NEW USCIS POLICIES

•OVERVIEW OF UNLAWFUL PRESENCE

•INTRODUCTION TO REMOVAL

PRESENTATION #2 IN THE SERIES

Steve Springer, Director of Regulatory Practice Liaison

NAFSA: Association of International Educators

August 20, 2018

NAFSA
Connecting People. Changing the World.™

THE LAW

IIRIRA 1996

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) created two new sections of the Immigration and Nationality Act (INA) to establish penalties for visa overstays and unlawful presence

INA 212(a)(9)(B) states that any alien not a permanent resident, who

- was unlawfully present in the U.S. for a period of more than 180 days but less than one year and voluntarily departs the U.S. and again seeks readmission within 3 years of that departure, or
- was unlawfully present in the U.S. for more than one year and departs or is removed from the U.S. and again seeks admission within 10 years of that departure or removal

is inadmissible

And an alien is deemed unlawfully present after expiration of the period of stay authorized by the Attorney General or if in the U.S. without being paroled or admitted

NAFSA
Connecting People. Changing the World.™

PRIOR KEY GUIDANCE

1997 INS Memos and

2009 USCIS Memo

Prior INS and USCIS policy:

- 3/29/97 INS memo stated that UP was triggered by expiration of authorized stay, ***status violation***, or commission of criminal offense that rendered an alien removable or inadmissible

- 9/19/97 INS "Virtue memo" corrected and clarified that UP was triggered only by:
  - Expiration of authorized stay (I-94)
  - Immigration judge determining a status violation in removal proceedings, or
  - INS determining a status violation in adjudicating an application/petition

- 5/6/2009 USCIS "consolidated memo" basically affirmed Virtue memo (no UP due to status violation)

- DOS FAM has similar language to 2009 memo

NAFSA
Connecting People. Changing the World.™

NEW UNLAWFUL PRESENCE POLICY

USCIS Memo May 10, 2018

Effective August 9, 2018

USCIS Policy Memorandum: "Accrual of Unlawful Presence and F, J, and M Nonimmigrants"

-Issued: May 10, 2018

-"Final Version" issued August 9, 2018

-Effective date: August 9, 2018

-www.nafsa.org/ULP

Summary: with some narrow exceptions, Fs, Js, and Ms, will begin to accrue unlawful presence the day after a violation of status, and this may subject them to a 3-year or 10-year bar on returning to the U.S. when they depart the U.S.

Issued by USCIS

SEVP, CBP, and DOS have not issued related guidance

AM360 Newsfeed and Trending Issues web page

NEW UNLAWFUL PRESENCE POLICY

Key New Provisions

New USCIS policy:

F, J, and M nonimmigrants (including dependents) who failed to maintain status ***before August 9, 2018*** begin to accrue unlawful presence on August 9 or the earlier of:

- Expiration of date-specific I-94
- USCIS denial of an application/petition due to a violation of status, or
- Removal order by an immigration judge

F, J, and M nonimmigrants (including dependents) who fail to maintain status ***on or after August 9, 2018*** begin to accrue unlawful presence on the earliest of the day after:

- Expiration of date-specific I-94
- Failing to pursue the course of study or authorized activity
- Engaging in unauthorized activity
- Completing course of study, program, or practical training and any grace period, or
- Removal order by immigration judge

NAFSA
Connecting People. Changing the World.™

EXCEPTIONS

Time That Does Not Count, Generally Toward UP

In general, unlawful presence does not accrue:

Prior to an individual's 18th birthday

While unlawful presence is "tolling for good cause" for up to 120 days while a change of status or extension of status application/petition is pending with USCIS

- Must be timely filed, non frivolous, and no unauthorized employment
- Approval of COS or EOS results in a new "period of stay," retroactive to previous expiration, so no unlawful presence accrues

While a bona fide asylum application is pending (unless applicant works unauthorized)

When an individual is the beneficiary of family unity protection (which is a special legal provision in very narrow circumstances)

If an individual is a battered spouse under a specific legal provision with very narrow conditions

NAFSA
Connecting People. Changing the World.™

THE "BARS"

3-Year and 10-Year Bars

The simplest way of stating INA 212(a)(9)(B) is that someone found to be unlawfully present is barred from returning to the U. S.:

- for 3 years if unlawfully present for 180 days but less than one year
- for 10 years if unlawfully present for one consecutive year or more

after departing the U. S.

For purposes of these bars, days of unlawful presence are not counted in the aggregate over multiple visits to the U.S.; rather, unlawful presence is counted only during any single stay (*USCIS AFM 40.9.2(b)(4)(A)*)

The 3-year bar applies only if you voluntarily depart the U.S., but the 10-year bar applies if you depart voluntarily or are removed

An alien must leave the U. S. to trigger a bar (they are specifically bars on ***returning*** to the U. S.)

NAFSA
Connecting People. Changing the World.™

IMPLICATIONS

What are the Implications for Students & Scholars

What are the implications of a status violation and accrual of UP?

- Because OOS, not eligible for an extension of status ("late EOS" in USCIS discretion but unlikely)
- Because OOS, not eligible for a change of status ("late COS" in USCIS discretion but unlikely)
- Student reinstatement applications more treacherous
  - In general, due to adjudication patterns and possible NTA
  - Especially if not "timely filed" because UP continues accruing
  - If reinstatement approved, no UP
- "Travel and re-entry to reestablish status" will trigger any applicable bar
  - If subject to a bar, inadmissible to the U.S. so generally ineligible for a new nonimmigrant visa
  - If subject to a bar, inadmissible to the U.S. so generally ineligible to enter U.S. at POE
- Generally ineligible for adjustment of status ("green card")

NAFSA
Connecting People. Changing the World.™

WAIVERS

Waivers of Inadmissibility

Waivers of inadmissibility are possible for nonimmigrants, but they are very difficult and require legal counsel

- DHS, through the CBP Admissibility Review Office, has broad discretion to waive most grounds of inadmissibility
- Application filed at consulate if a new visa is necessary, no specific form required, and applicant must be otherwise eligible for visa (if favorable, consul forwards to CBP)
- Filed with CBP if applicant already has visa or is visa-exempt (in advance, in person, using USCIS Form I-192)
- Adjudicated per Matter of Hranka, weighing 3 factors:
  - Risk of harm to society if applicant is admitted
  - Seriousness of prior immigration/criminal violations
  - Nature of applicant's reasons for seeking to enter
- Detailed and persuasive legal brief, affidavits, and other supporting documents should be included
- Often 6+ months processing time
- Green card-related waivers very limited: Consult a lawyer!

NAFSA
Connecting People. Changing the World.™

REMOVAL

An Introduction

The parties in a removal proceeding include:

- Respondent (the foreign national in removal proceeding)
- Respondent's attorney or accredited representative
- Immigration judge (Department of Justice)
- ICE trial attorney (representing DHS)
  - Employed by ICE Office of Principal Legal Advisor (OPLA)
  - 26 Offices of Chief Counsel with 60 locations

Notice to Appear (NTA), also known as Form I-862, is a charging document issued by an DHS agent to initiate removal/deportation proceedings

NTA must be served on respondent **and** filed with Executive Office for Immigration Review (EOIR), which is "immigration court." EOIR is within the Department of Justice, not DHS. Once NTA served and filed, court has jurisdiction.

The NTA must:

- State prima facie case, charges, allegations, against respondent
- State time and place of the proceedings (which immigration court)
- Allow 10 days before the start of proceedings for respondent to secure legal counsel (right to counsel, but at respondent's expense: list of pro bono representatives provided)
- Be served on the respondent (service by mail is sufficient)

NAFSA
Connecting People. Changing the World.™

REMOVAL

NTA: An Example

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: A055-555-555

In the Matter of:

Respondent: RAMOS, Jorge currently residing at:

Port Isabel, SPC, 27991 Buena Vista Blvd., Los Fresnos, TX 78566
(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.
[X] 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1) You are not a citizen of the United States.
2) You are a native of Mexico and a citizen of Mexico.
3) You entered the United States at or near Hidalgo, TX on or about 6/11/2010.
4) You did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document.
5) You were not then admitted or paroled after inspection by an immigration officer.
6) You were, on August 18, 2009,, convicted in the Superior Court of Los Angeles for the offense of Receive Etc Known Stolen Property.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(7)(A)(i)(I)- of the Immigration and Nationality Act, as amended, as immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationaqlity as required under the regulations issued by the AG.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

Harlingen EOIR, 2009 West Jefferson, Ste. 300, Harlingen, TX 7855
(Complete Address of Immigration Court, including Room Number, if any)

on to be set (Date) at to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

[signature] SDDO
(Signature and Title of Issuing Officer)

Date: 9/21/10 Harlingen, TX
(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

REMOVAL

Overview of the Process

Initial short "master calendar hearing" to set out how the case will proceed and take pleadings

- Dire backlogs, so can be long delayed
- If respondent is detained, usually the hearing is scheduled sooner, expedited
- If respondent does not appear, court usually issues an order of removal "in absentia"

Subsequent "individual hearing" or "merits hearing" to provide evidence, testimony, legal arguments, and judge usually issues ruling immediately in open court

Judge's decision can be challenged through motion to reconsider, motion to reopen, or appeal to Board of Immigration Appeals (BIA), and BIA decisions can be appealed to federal court

NAFSA
Connecting People. Changing the World.™

REMOVAL

Some Potential Defenses and Legal Strategies

Attorney may consult with client about taking voluntary departure to avoid harsh consequences of removal (however, voluntary departure may trigger 3 or 10 year bar depending on length of time respondent has been unlawfully present)

Many potential defenses or legal strategies may be available, depending on the specific circumstances

- Seek prosecutorial discretion
- Seek administrative closure
- Motion to dismiss or terminate
- Eligibility for USCIS benefit (e.g., reinstatement, U, VAWA, DACA, etc.)
- Negotiate the charges with ICE
- Challenge the NTA (e.g., facts, law, service)
- Prevail against ICE at the individual/merits hearing on the facts or application of the law

Either party may file MTR/R court's order, appeal to BIA, and perhaps eventually litigate "petition for review' in federal appeals court

Removal order usually results in 10-year bar on returning to US, in some cases "permanent bar"

NAFSA
Connecting People. Changing the World.™

SUMMARY

Key Take-Aways for Advisors

Be very clear with yourself and your advisees about your role and the scope of your duties/advising

USCIS new UP policy makes advising about status violations much more complicated

Consider encouraging Fs, Js, Ms to seek legal advice concerning reinstatement or departing the U.S., especially if discovery of a prior violation that would result in a bar or require an "un-timely" reinstatement application

Understand the impact of I-539 reinstatement application processing times on the accrual of UP for "un-timely" apps.

Consider referring any student or scholar to immigration attorney immediately upon denial of application/petition leaving the student or scholar without status (NTA may follow – be prepared)

Document well your discussions about these matters and memorialize them in writing (email, for example)

Consider institutional policy on providing information about immigration attorneys and legal services providers

NAFSA
Connecting People. Changing the World.™

NEW USCIS POLICIES

Resources

NAFSA Connecting People. Changing the World.™

NAFSA Adviser's Manual 360

- chapter 11 on "Nonimmigrants" covers unlawful presence and the new policies

New USCIS Unlawful Presence Policy

NAFSA comment letter

New USCIS NTA Policy

Resource: Identifying an Immigration Attorney

AILA's Immigration Lawyer Referral Service

Dept. of Justice List of Pro Bono (Free) Legal Services Providers

About the DHS Executive Office of Immigration Review

American Immigration Council: Attorney Practice Advisories

CBP: App. for Advance Permission to Enter as a Nonimmigrant

USCIS: Form I-192 Application for Advance Permission to Enter as a Nonimmigrant

Department of State, Consular Affairs: Waivers of Inadmissibility

THANKS!

Stay tuned for other presentations in this series

For a copy of the slides, go to the NAFSA AM360 page:
www.nafsa.org/am

NAFSA
Connecting People. Changing the World.™