

NEW USCIS UNLAWFUL PRESENCE MEMO: IMPACT ON STUDENTS

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ACCRUAL OF UNLAWFUL PRESENCE AND F, J AND M NONIMMIGRANTS

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- ▶ Memo is effective as of August 9, 2018.
- ▶ Understanding the implications of the new memo and how it affects students is critical.
- ▶ This new memo is a complete 180-degree change from more than 20 years of USCIS policy for students who violate their F1 status.

THIS WEBINAR WILL COVER:

- ▶ Key provisions of the Memo
- ▶ Review of prior USCIS policy
- ▶ Unlawful Presence and penalties
- ▶ When F1 Students do not accrue Unlawful Presence
- ▶ Maintenance of F1 and status violations
- ▶ OPT and STEM pitfalls and filing EAD with USCIS
- ▶ Filing for reinstatement with USCIS
- ▶ Severe consequences and why more reinstatement petitions will be prepared and filed by Attorneys

KEY NEW PROVISIONS OF THE MEMO

- ▶ With some narrow exceptions, F1 students 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. after they travel abroad

EFFECTIVE DATES

- Students who failed to maintain status before 8/9/2018 begin to accrue unlawful presence on 8/9/2018
- Students who failed to maintain status on or after 8/9/2018 begin to accrue unlawful presence the day after the violation occurs

REVIEW OF PRIOR USCIS POLICY

- ▶ F-1 Students are admitted “**Duration of Status**” - unlike other nonimmigrant visas that have a date certain on their I-94 (see below)

Admission (I-94) Number Retrieval

Admission (I-94) Record Number: 04677803230

Admit Until Date: D/S

Details provided on Admission (I-94) form:

Family Name:	█
First (Given) Name:	█
Birth Date:	1988 July 02
Passport Number:	M79277572
Passport Country of Issuance:	Korea, South
Most Recent Date of Entry:	2013 August 21
Class of Admission:	F1

REVIEW OF PRIOR USCIS POLICY (CON'T)

- ▶ Prior to Memo, a status violation did not initiate unlawful presence
- ▶ Prior to Memo, F1 students admitted D/S began to accrue unlawful presence ONLY when:
 - Immigration Judge determined a status violation occurred
 - USCIS made a finding that a status violation occurred when adjudicating a petition

UNLAWFUL PRESENCE PENALTIES

INA 212(A)(9)(B)

Any person found to be unlawfully present will be barred from returning to the U.S. for:

- 3 years if unlawfully present for 180 days but less than one year
 - 10 years if unlawfully present for one year or more
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- ▶ The bar to reentry is triggered when a person leaves the U.S.
 - ▶ A person must obtain a Waiver of Inadmissibility to return to the US.

NEW POLICY IS STUDENTS WILL BEGIN TO ACCRUE UNLAWFUL
PRESENCE AFTER AUGUST 9, 2018 ON THE DAY AFTER THEY:

- Fail to pursue a full course of study or authorized activity
- Engage in unauthorized activity
- When they complete their course of study, program or practical training and after any grace periods allowed

STUDENTS WILL NOT ACCRUE UNLAWFUL PRESENCE DURING THE FOLLOWING:

- ▶ Annual Vacation
- ▶ 30-day grace period of admission before a program start date
- ▶ During any authorized grace period
- ▶ While pursuing authorized full course of study or authorized reduced course load
- ▶ During periods of practical training, including periods of unemployment
- ▶ During a change of level transition process
- ▶ During authorized H1B “Cap Gap” period
- ▶ When an application for post-completion OPT is pending
- ▶ During a school transfer transition process

MAINTENANCE OF F1 STATUS AND VIOLATIONS

- ▶ USCIS Memo makes no distinction between technical vs. obvious violations
- ▶ There are many elements to maintaining status found throughout SEVIS
- ▶ Examples of non-obvious status violations:
 - Off campus volunteer position
 - Honorarium fees
 - Book publishing
 - AIR BNB rental
 - Dog-sitting
 - Selling on eBay
 - Working a little over 21 hours on CPT

OPT AND STEM PITFALLS

- ▶ CPT, OPT and STEM OPT are ripe for USCIS to find violations due to the reporting obligations

- ▶ Before filing the I-765 for OPT with USCIS, these documents should be carefully reviewed for any violations:
 - SEVIS Record, correct any typos
 - CPT History
 - On-campus employment history and compliance
 - Ensure no more than 20 hours of employment
 - Reduced course load history and authorization
 - Weekly hours of instruction met
 - Transcripts for any missing data
 - Use of any public benefits (CHIP or Medicaid) by the student during F1 status

FILING FOR REINSTATEMENT WITH USCIS

Timing is a critical factor when filing a reinstatement petition in light of new memo:

- Filing a timely reinstatement petition within the 5 months of the violation stops the tolling of unlawful presence:
 - If approved, no unlawful presence
 - If denied, unlawful presence starts to accrue as of the date of the denial and students have 30 days to leave

- Filing a reinstatement petition after 5 months of the violation does not stop the tolling of unlawful presence:
 - If approved, no unlawful presence
 - If denied, unlawful presence accrues from the date of the violation

CONSIDER TRAVEL ABROAD IN LIEU OF REINSTATEMENT

- ▶ Must obtain new initial I-20 and travel signature.
- ▶ Student cannot use current I-20.
- ▶ Must pay SEVIS fee again.
- ▶ Student can use current student visa in passport if still valid (does not go back to Embassy to obtain new visa stamp).
- ▶ However, the Student will lose the OPT benefits for that SEVIS number.

SUMMARY

- ▶ Filing for reinstatement with USCIS should be done within 5 months of violation or risk 10-year bar to re-entry
- ▶ USCIS Officer will look back at all SEVIS records when they adjudicate the reinstatement or new petitions such as the H1B or work permit (I-765)
- ▶ USCIS Service Centers can take 12-18 months to adjudicate the Reinstatement Petition
- ▶ Consider travel in lieu of filing for reinstatement (issue new I-20)
- ▶ USCIS has NO LIMITATION of when it can look back in a student's history and find that an Unlawful Presence violation has occurred

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