USCIS PROPOSAL ON ACCRUING UNLAWFUL PRESENCE AND POTENTIAL RESTRICTIONS TO RETURNING TO THE U.S.

For international students, scholars, and dependents holding F or J status at the University of Virginia

Updated August 8, 2018

On August 9, 2018, a new rule is expected to be put in place by the Department of Homeland Security (DHS), regarding what is called “unlawful presence” on the part of those holding F/J visas/status as well as their dependents. Very basically, it means that DHS will begin counting and tracking “unlawful presence” if anyone with F/J status does anything, intentionally or unintentionally, to violate the terms of their status or to “lose” their legal status. This has the potential to lead to “bars,” or prohibitions, on returning to the U.S. in any manner for three years, ten years, or even permanently. As this can carry serious issues for international students, scholars, and their dependents, ISO will attempt to answer what we know about the proposal, and give examples of the common situations that may occur to cause a student/scholar to lose status. Please refer to our website for further details.

The original Policy Memorandum, posted May 11, 2018, may be read here: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf Guidance from NAFSA: Association of International Educators is also available online.

Technically this rule is not new – the possibility of being barred from the U.S. for 3 or 10 years has existed since the 1990’s, but we have not seen this commonly applied to those here on international student or scholar visas. A major difference is that under the “old” rule, you did not begin to accrue unlawful presence until officially found to be in violation, such as by an immigration judge or USCIS. The new proposal would have the unlawful presence “clock” begin immediately.

A note about language used: Some of the specific rule text below is copied directly from the Department of Homeland Security memo linked above.

WHAT IS THE NEW RULE?

It makes a difference when the F/J individual first failed to maintain legal status:

If status was lost before August 9, 2018, individuals start accruing unlawful presence based on that failure on August 9, 2018, unless the alien had already started accruing unlawful presence on the earliest of the following:

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;
- The day after the Form I-94, Arrival/Departure Record, expired, if the F/J nonimmigrant was admitted for a date certain; or
- The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA) ordered the alien excluded, deported, or removed (whether or not the decision is appealed).
If status is lost on or after August 9, 2018 an F/J nonimmigrant begins accruing unlawful presence, on the earliest of any of the following:

- The day after the F/J nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F/J nonimmigrant was admitted for a date certain; or
- The day after an immigration judge or, in certain cases, the BIA orders the alien excluded, deported, or removed (whether or not the decision is appealed).

**WHAT CAN HAPPEN IF AN INDIVIDUAL DOES ACCRUE UNLAWFUL PRESENCE?**

It is possible that an individual will be restricted from entering the U.S. for three years, ten years, or even permanently:

"Individuals who have accrued more than 180 days of unlawful presence during a single stay, and then depart, may be subject to three-year or 10-year bars to admission, depending on how much unlawful presence they accrued before they departed the United States. Individuals who have accrued a total period of more than one year of unlawful presence, whether in a single stay or during multiple stays in the United States, and who then reenter or attempt to reenter the United States without being admitted or paroled are permanently inadmissible. Those subject to the three-year, 10-year, or permanent unlawful presence bars to admission are generally not eligible to apply for a visa, admission, or adjustment of status to permanent residence unless they are eligible for a waiver of inadmissibility or another form of relief."

**WHAT ARE EXAMPLES OF WAYS A STUDENT MIGHT LOSE LEGAL STATUS?**

These are the most common situations where we see students lose their legal status, but is by no means an exhaustive list:

- Students academically dismissed after a semester ends, who do not either transfer to a new US school in a timely way or who do not leave the US by the deadline provided by ISO
- Students who enroll below full-time without the legally required ISO approval and do not fix the issue by the deadline provided by ISO
- Students who do not extend an expiring I-20 or DS-2019 before the end date
- Students who voluntarily withdraw while a semester is in session but who do not leave the US by the established deadline (15 days)
- Students who are withdrawn by the school for misconduct or other violations and do not leave the US
- Students who work without required authorization
- Students who graduate, or who complete a period of post-graduation OPT or Academic Training, and then do not leave the US by the established deadline, transfer to a new school/program, or change to another immigration status in a timely way (F-1 students get a grace period of 60 days following graduation or the end of OPT; J-1 students get a grace period of 30 days following graduation or the end of Academic Training)
WHAT CAN I DO TO AVOID LOSING MY LEGAL STATUS? (STUDENTS)
You as the student or scholar MUST take responsibility for ensuring you follow the rules of your immigration status. As the prior list of examples shows, do not let yourself end up in those situations in the first place. THAT is your best defense against losing your legal status. You should also:

- **Read your emails** from the ISO! Many students receive email alerts from ISO and do not read them or disregard them.

- **Be aware of your own immigration situation.** While ISO strives to send reminders for a number of circumstances, it is not possible to create reminders for all situations. These reminders are a courtesy we provide, but the law holds you responsible for your own status. This is why you must remain on top of your own immigration situation – be aware of when your I-20 or DS-2019 expires, keep your US address updated, make sure you are enrolled full-time or have authorization from ISO to drop below – i.e. makes sure you are following the next section:

- Remember the very basic immigration requirements you must follow:
  - Register full-time (12 hours for undergrads, 12 hours for grad/professional students, or be authorized by ISO for part-time)
  - Keep your US address (Mailing Address Type) up to date in SIS within 10 days of any change.
  - Do not work illegally
  - Get an updated travel signature every year (or every 6 months while on OPT) if you need to travel outside the U.S.
  - Follow deadlines - If ISO gives you a deadline by which you need to do something, follow it! It could very well mean losing your legal status if you do not meet certain deadlines.
  - Attend class and strive to do well academically! This does not mean you have to get all A grades, but too many students do not attend class at all, or do so sporadically, and then eventually receive grades of D or F.
    - If you are here on a student visa, the law expects you to attend your classes – skipping or missing too many classes is a reason by itself that you could potentially lose your status.
    - Too many low grades will affect your grade point average, which can cause you to drop below the required minimum GPA of your program. You could then be suspended or dismissed from your program.
  - Do not under any circumstances violate the University’s Honor Code. This may lead you to be suspended or expelled. Make sure you understand the rules of behavior under Honor. Ask your professors and/or the Honor Committee when unsure.
- If you lose your legal F/J status for any reason, speak to an ISO advisor IMMEDIATELY so that we can help you assess your situation!
WHAT CAN I DO TO AVOID LOSING MY LEGAL STATUS? (SCHOLARS)

- Do not change the research, teaching, or observation objectives as it appears on the DS-2019 – for example, if you are here to do research in biochemistry, you cannot shift to doing work that is different from what is listed on the DS-2019.
- Be sure you report changes in your U.S. residential address within 10 days any time you move.
- Maintain health insurance for you and any J-2 dependents for the entire duration of your DS-2019 that meets the J insurance minimums.
- Do not leave the U.S. for a period of more than 30 days without advance approval from ISO. J-2 dependents should not be left in the U.S. for more than 30 days if the J-1 is not present.
- Do not engage in any employment, paid or unpaid, that is not with the department listed on your DS-2019, without prior approval from ISO first.
- Notify ISO if your University of Virginia work ends earlier than the date listed on your DS-2019.

WHAT ABOUT F-2 AND J-2 DEPENDENTS?

- F-2 and J-2 dependents (the spouse and children under 21 of an F-1 or J-1) rely upon the F-1/J-1 maintaining their legal status. If the F-1 or J-1 loses legal status, so do the dependents.
- Note that dependents under 18 do not typically accrue unlawful presence.