

## Unlawful presence and F, J, and M nonimmigrants

On May 10, 2018, the U.S. Citizenship and Immigration Service issued a policy memorandum which establishes new penalties for foreign students and scholars who fall out of status<sup>1</sup>. These new penalties take effect August 9, 2018.

In 1996, Congress passed and President Clinton signed into law the Illegal Immigration and Immigrant Responsibility Act (IIRIRA)<sup>2</sup>. One of the provisions of this law was the creation of a new concept in our immigration laws, that of "unlawful presence". The law stipulated that noncitizens who were admitted in a temporary nonimmigrant status, such as tourists would begin to accrue "unlawful presence" on the day after their period of stay expired. Accruing unlawful presence carried severe penalties. A single day of unlawful presence resulted in the automatic cancellation of that person's visa and barred them from changing or acquiring legal status in the United States. Accruing 180 days of unlawful presence resulted in the person being barred from re-entering the United States for three years. Accruing 365 days or more of unlawful presence resulted in the person being barred from the United States for ten years.

However, after the enactment of the law, the INS (forerunner to the USCIS) effectively exempted persons in F, J or M nonimmigrant status from these provisions. For individuals in those visa categories, unlawful presence could only accrue on or after a USCIS officer, while adjudicating a request for an immigration benefit, had formally found such an individual to be violating their status or if an Immigration Judge ordered such an individual to be deported.

The new policy changes that and exposes individuals in F, J, and M status to much greater danger. Pursuant to the new policy memorandum, such individuals will now begin to accrue unlawful presence on or after August 9, 2018 or on the earliest of either of the following:

- The day after an F, J or M nonimmigrant no longer pursues their course of study or 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).

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<sup>1</sup> Policy Memo, USCIS, PM-602-1060, *Accrual of Unlawful Presence and F, J, and M Nonimmigrants* (May 10, 2018)

<sup>2</sup> PL. 104-208, div. C; 110 Stat. 3009, 3009-46 to 724 (Sept. 30, 1996)

This change poses significant risks to foreign students and scholars. Under the prior policy, individuals received a written notice that the period of unlawful presence had begun. However, under the new policy, unlawful presence can begin for an individual even without their being aware of it. For example, a professor might ask a graduate student to join him on a consulting project for which the student receives part of the fee. The student may believe this is legal employment since the professor proposed it-but it isn't. Or another student may reduce a course load, but doesn't get the required authorization (from the DSO). In both of these common scenarios, unlawful presence would begin the day after the violation. Yet, the student or scholar would not be aware of the consequences and find themselves subject to severe penalties without prior notice of the danger. It is important that foreign student and scholar advisors warn their community as to the potential dangers of activities that might contravene immigration regulations.