

One Minute Memo®



USCIS Policy Memo Significantly Changes Unlawful Presence Issues for F, J, and M Nonimmigrants

By John Quill, Michelle Gergerian and Jason Burritt

To stay up-to-date on Immigration developments, [sign up](#) for Seyfarth's new BIG Immigration Law Blog.

Seyfarth Synopsis: Nonimmigrants in F, J, and M visa status should ensure that they take no actions to violate their status, as they could inadvertently trigger unlawful presence and jeopardize future status in the United States.

On May 10, 2018, USCIS issued a [policy memorandum](#) that reverses prior guidance on the interpretation of unlawful presence for F, J, and M nonimmigrants. This policy takes effect on August 9, 2018. The result is that F, J, and M nonimmigrants who violate their status can trigger the start of "unlawful presence" in the United States, and over a period of time can become subject to a three-year or ten-year bar to reentering the United States.

Background

A [1996 law](#) introduced the concept of unlawful presence. If a nonimmigrant remains unlawfully present in the United States for more than 180 days, s/he is subject to a three-year bar from returning to the United States; a nonimmigrant who remains unlawfully present for more than one year is subject to a ten-year bar. In addition, most nonimmigrants who remain unlawfully present are ineligible for an extension of their current visa status, or a change of status to another visa classification, from within the United States.

Unlawful presence begins either when a person remains in the United States beyond his/her period of admission OR when found by USCIS to have violated his/her nonimmigrant status. A 2009 USCIS memorandum clarified when unlawful presence is triggered for F, J, and M nonimmigrants. Because individuals in these visa classifications are admitted for "Duration of Status" (D/S), and not until a date certain, in most cases unlawful presence is only triggered following a formal finding of a status violation by USCIS for F, J, and M nonimmigrants.

Impact of May 10, 2018 Policy Memorandum

The policy memorandum significantly changes USCIS' position on when F, J, and M nonimmigrants trigger unlawful presence. Under the new policy, F, J, and M nonimmigrants still become unlawfully present following a formal finding of a status violation by the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR). In addition, an F, J, or M nonimmigrant can also trigger unlawful presence in any of the following scenarios:

- Failure to continue the course of study or authorized activity which was the basis for their F, J, or M nonimmigrant status;
- Engaging in an unauthorized activity that is not permitted by their status (such as unauthorized employment that is not approved pursuant to their status); and
- Completion of the course of study or authorized activity which was the basis for their F, J, or M nonimmigrant status. In this case, unlawful presence begins the day following the completion of the course of study or authorized activity, or following any authorized grace period that is provided by law or regulation (whichever is later).

Effective Date of Policy Change

This new policy takes effect on August 9, 2018. Any F, J, or M nonimmigrant who does not currently maintain status based on this new policy will begin to accrue unlawful presence starting on August 9. After August 9, any activity by an F, J, or M nonimmigrant that results in a status violation will trigger the start of unlawful presence.

Recommendations

Any nonimmigrant in F, J, or M nonimmigrant status should communicate with his/her program sponsor to ensure that s/he maintains valid nonimmigrant status and to confirm when s/he would no longer hold valid status following the completion of his/her course of study or authorized activity pursuant to this new policy.

If you should have any questions about how the policy change might impact your workforce, please reach out to your contact person at Seyfarth Shaw LLP. We will be happy to address your questions.

If you would like further information, please contact [John Quill](mailto:jquill@seyfarth.com) at jquill@seyfarth.com, [Michelle Gergerian](mailto:mgergerian@seyfarth.com) at mgergerian@seyfarth.com, or [Jason Burritt](mailto:jburritt@seyfarth.com) at jburritt@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This One Minute Memo is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP One Minute Memo® | May 29, 2018

©2018 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.