Unlawful Presence Policy for H-1B Employees

Understanding “Unlawful Presence”

The United States Citizenship and Immigration Services (USCIS) defines “unlawful presence” for H-1B visa holders to mean remaining in the U.S. beyond “…the expiration of the period of stay authorized by the Secretary of Homeland Security…” H-1B visa holders can accrue unlawful presence by:

- Remaining in the U.S. beyond the expiration date of the I-94 record
- Remaining in the U.S. after receiving formal notice of accruing unlawful presence from USCIS or an immigration judge

How Does the Accrual or Unlawful Presence Time Work?

As stated above, unlawful presence for an H-1B employee has to do with remaining in the U.S. beyond the period of authorized stay. The longer the individual remains in the U.S. the more serious the penalties are. There are four periods of time and related penalties to be aware of:

- If the H-1B visa holder remains in the U.S. between one day and 180 days after the expiration of the I-94 record, they will be considered an “over stay”. The H-1B visa in the passport will be considered invalidated, and in the future if the individual requires a new visa, they will be required to apply in their home country.
- If the H-1B visa holder remains for a period of more than 180 days but less than one year they would be subject to a three-year bar from re-entering the U.S. in any visa status.
- If the H-1B visa holder has been unlawfully present for one year or more, they can be barred from re-entering the U.S. for ten years.
- There are also unlawful presence penalties that would permanently bar an individual from ever returning to the U.S.

What Happens if I Accrue Unlawful Presence?

The first step is to identify whether or not you are actually accruing unlawful presence. For example, if OISS has already submitted an H-1B extension application to USCIS, or if your new employer has submitted a new H-1B application, then an expired I-94 may not mean that you are accruing unlawful presence. First, look up your I-94 record and confirm the expiration date. Next, check with your department or your OISS adviser to see if an extension application has already been filed. If you believe that you have an expired I-94 record and you are accruing unlawful presence, contact OISS immediately. The day after your I-94 record expires, you could begin to accrue days of unlawful presence. This is an important concept - the longer you wait to resolve the issue, the more severe the penalty may be. In many cases, departing from the U.S. before you have accrued 180 days of unlawful presence may prevent being subject to penalties. Please speak to your OISS adviser before taking any action.
What Can I do to Avoid Losing My Legal Status?

In addition to knowing about the unlawful presence policy, it is important to know how to maintain your legal status. OISS and other university offices are here to help international employees understand often complex immigration regulations and provide resources to keep them up to date. However, we cannot monitor all scholars’ activities. It is your responsibility to maintain the terms of your H-1B legal status. Your best defense against falling out of status is to:

- **Read your emails** from the OISS, including the weekly Newsletter. OISS sends very few announcements - so when you see email from us, please read it.
- **Be aware of your own immigration situation.** While OISS utilizes technology available to us to monitor scholar records and send out alert messages, sometimes technology fails. These reminders are a courtesy we provide, but, ultimately the law holds you responsible for maintaining your immigration status. Be aware of when your I-94 record expires [1] - it may have a shorter expiration than your H-1B (I-797) Approval Notice. Keep your U.S. address updated and make sure you report any changes in your job, including but not limited to the job title, work sites, department/school and salary.
- **Please read** Maintaining Legal Status [4]

Some Expired Documents Do Not Count Towards Unlawful Presence

Some individuals with H-1B status have an expired H-1B U.S. embassy visa stamp in their passport. While inside the U.S., if otherwise maintaining legal H-1B status, the expired visa stamp does not trigger accrual of unlawful status. There is a **difference between legal status, and the visa** [5] which is an entry permit. Visas do not control activities inside the U.S.

There are other provisions that may allow an H-1B visa holder to remain in the U.S. when changing departments or employers. These exceptions to the unlawful presence rule can be complicated, so after reading our information [6] if you still have doubts, please contact your OISS adviser! [7]

Do These Policies Apply to H-4 Dependents?

If an H-1B employee violates their status, then the **H-4 dependent** [8] will also accrue unlawful presence (except for children who are under the age of 18.) If the H-4 violates their own status, this does not affect the H-1B (with respect to accrual of unlawful status.) Please read the regulations about how an **H-4 maintains legal status.** [8]