Understanding “Unlawful Presence”

In August 2018 the United States Citizenship and Immigration Services (USCIS) issued a policy directed at F, J and M visa holders. The policy change is being challenged in the courts - but is currently in effect. Under the policy USCIS will count and track “unlawful presence” for any individual who does something, intentionally or unintentionally, to violate the terms of their legal status. Innocent actions such as accepting an honorarium for giving a talk at another university or being paid to be part of a trial or study could now have serious repercussions. While we don’t know exactly how this will play out, it is now more important than ever to understand how to maintain legal status in the U.S [1]. For example in many cases it is possible for OISS to give work permission for an occasional lecture if it is requested prior to the event. Unfortunately this new policy could penalize individuals who do not obtain proper work permission and bar them from returning to the U.S. for three years, ten years, or even permanently.

What is the New Policy?

The following is taken from the August 9, 2018 USCIS Revised Policy Memo. It states that J-1 Exchange Visitors begin to accrue unlawful presence time:

- The day after the J Exchange Visitor no longer pursues the original program objective
- The day after they engage in an unauthorized activity;
- The day after completing the program objective, plus a 30 day grace period
- The day after the I-94 record expires (if date certain, this does not pertain to Duration of Status)
- The day after an immigration judge ordered the student/scholar excluded, deported, or removed (whether or not the decision is appealed).

Examples of How J-1 Scholars on Yale’s DS-2019 Might Jeopardize Their Legal Status

These are the most common situations where J-1 scholars could jeopardize their legal status, but this is not an exhaustive list:

- Scholars who accept money or compensation that are not named on the DS-2019 and not from Yale sources
- Scholars who work for their former employer outside the U.S. while on a J-1 visa at Yale
- Scholars who fail to maintain their health insurance (according to the Exchange Visitor regulations) [2]
- Scholars who perform patient care or clinical work without express permission from OISS
- Scholars who fail to seek proper authorization for additional work called Occasional Lecture or Short-Term Consultation authorization [3].
- Scholars who do not depart from the U.S., transfer to another J program or change visa status within the 30-day grace period.
Unlawful Presence Policy for J-1 Scholars
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What Happens if I Accrue Unlawful Presence?

The very first step would be for USCIS to identify that an individual has violated the terms of their visa status. They would presumably issue a notice and name a date when the violation began. While it is still too early to know how frequently the government will investigate J-1 Exchange Visitor violations, the most common ways of receiving a notice are when the scholar is applying by mail to USCIS for a change of visa status, and USCIS responds with a notice. From the date listed on a notice the J-1 scholar would begin to accrue unlawful presence time. This is an important concept - the longer you wait to resolve the issue, the more severe the penalty may be. Please notify OISS and your attorney right away if you receive any correspondence from USCIS (also note there are scams going on now[4] - USCIS would never call a scholar or demand money to fix the problem.)

USCIS states the following in their policy memo: “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.”

What Can I Do to Avoid Losing My Legal Status?

It is your responsibility to maintain your J status. OISS and your host department are here to help international scholars understand U.S. immigration regulations and provide resources to keep up to date with immigration regulations. However, we cannot monitor all scholar activity. It is your responsibility to maintain your J Exchange Visitor status. Your best defense against losing your legal 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.
- **Ask first.** If you have an opportunity to begin a new activity (doing new research outside of Yale) or to be paid by an outside source - ask an OISS adviser before taking action. OISS will try to help you to find a solution.
- **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 DS-2019 expires, keep your U.S. address updated, and make sure you request occasional lecture or short-term consultation authorization[5] before the activity starts.
- **Please read** Maintaining Legal Status. [1]

Some Expired Documents Do Not Count Towards Unlawful Presence

As mentioned previously J-1 Exchange Visitors students have a 30-day grace period after the successful completion of their program. In other words, a scholar's appointment that ends on October 1st will have a J-1 Form DS-2019 that expires on October 1st. In this example the J-1 has the option to remain in the U.S. until October 31st using the 30-day grace period (but is not permitted to work for anyone or travel internationally during this time.)

Some J-1 scholars may have an expired U.S. embassy visa stamp in their passport. While inside the U.S., if otherwise maintaining legal J-1 status, the expired visa stamp does not trigger accrual of unlawful status. There is a difference between legal status, and the visa [6], which is an entry permit. Visas do not control activities inside the U.S.

There are other provisions, such as having legal status while transferring between two J sponsors[7], [8] These exceptions to the unlawful presence rule can be complicated, so after reading our information if you still have doubts please contact your OISS adviser! [9]

Do These Policies Apply to J-2 Dependents?

If an J-1 scholar violates their status, then the J-2 dependent will also accrue unlawful presence (except for children who are under the age of 18.) If the J-2 violates their own status, this does not affect the J-1 (with accrual of unlawful status.) Please read the regulations about how an J-2 maintains legal status. [10]