Understanding “Unlawful Presence”

The United States Citizenship and Immigration Services (USCIS) recently issued a policy directed at F, J and M visa holders. According to this policy, USCIS will begin counting and tracking “unlawful presence” for any individual on one of these visas who does something, intentionally or unintentionally, to violate the terms of or “lose” their legal status. 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]. The new rule has the potential to cause individuals to be barred from returning to the U.S. for three years, ten years, or even permanently.

International students are important and valued members of the Yale community. The staff of OISS works diligently to audit student data, send alerts to students and monitor changing regulations. However, maintaining legal status under immigration law is a team effort, and students are responsible to understand and follow the regulations. With this new policy, innocent actions such as working on campus 21 hours per week instead of the maximum 20 hours per week could have serious repercussions if not identified immediately. As always, please contact your OISS adviser [2] at any time should you have questions about this new policy.

What is the New Policy?

The new USCIS policy aims to penalize J-1 Exchange Visitor students who are currently in violation of their status or who violated their status anytime in the past. The language of the policy memo is sometimes difficult to understand. Below is text from the August 9, 2018 USCIS Revised Policy Memo. To better understand the memo, it may be helpful to read the sections that follow.

An individual who failed to maintain legal status before August 9, 2018 started accruing unlawful presence based on that failure on August 9 unless the individual 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 student/scholar violated their non-immigrant status while adjudicating a request for another immigration benefit;
- 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).

If status is lost on or after August 9, 2018, a J-1 Exchange Visitor begins accruing unlawful presence, as follows:

- The day after the J visa holder no longer pursues the course of study
- The day after they engage in an unauthorized activity;
The day after completing the course of study or program (including any authorized practical training plus an authorized grace period, as outlined in 8 CFR 214.2). Visa holders who have successfully completed their course of study have a 60 day grace period after the completion of their program.

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).

What are Examples of Ways J-1 Students Might Lose Legal Status?

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

- Students who fail to correctly report a new residential address to OISS [3] within ten days of moving to a new address
- Students who enroll below full-time without obtaining OISS permission in advance
- Students who work on campus without first receiving permission from OISS
- Students who fail to maintain their health insurance (according to the Exchange Visitor regulations) [4]
- Students with permission who work on campus more than 20 hours per week [5] during term time
- Students who are withdrawn by the school for misconduct or other violations and do not leave the U.S.
- Students who work off-campus without obtaining employment authorization (with one exception, contact your adviser [2] to discuss)
- Students who graduate or complete their Academic Training [6] and do not depart from the U.S., transfer to another J program or change visa status with in the 30-day grace period

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 student is applying by mail to USCIS for a change of visa status, and USCIS responds with a notice.

From the date listed on the notice, the J-1 student 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/or your attorney right away if you receive any correspondence from USCIS (also note there are scams going on now [7] - USCIS would never call a student 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 other university offices are here to help international students understand often complex immigration regulations and provide resources to keep up to date with immigration regulations. However, we cannot monitor all student 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 OISS, including the weekly newsletter [8]. 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 student 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 are enrolled full-time or have authorization from OISS to drop below full-time.

- 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 of study or after post-graduation Academic Training. [6] In other words, a student who graduates on May 21st will have a J-1 Form DS-2019 that expires on May 21st. Upon graduation the student would have the option of remaining in the U.S. an additional 30 days during the grace period (the student is not permitted to work for anyone or travel internationally during this time.)

Some J-1 students 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 [9] 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 schools [10]. [6] 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! [2]

Do These Policies Apply to J-2 Dependents?

If an J-1 student 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. [11]