

F/J/M Visas: Update on Unlawful Presence and Litigation

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Understanding Unlawful Presence

- Technically speaking, what is "Unlawful Presence?"
 - Added to the INA by IIRAIRA in 1996
 - INA § 212(a)(9)(B)
- Previous Policy, since 1996:
 - Previously, UP not counted for D/S until a formal finding of a status violation
 - Must be "expiration of a period of stay authorized"
 - UP commences for all other visas on I-9 expiration date

Understanding Unlawful Presence

(Continued)

- August 9, 2018 USCIS Policy Memorandum
 - Now, UP begins to accrue for F, J or M D/S:
 - On August 9, 2018, if the status violation occurred prior to that date
 - The day after a status violation for violations occurring after August 9, 2018
 - No change for other visa categories
- Unlawful presence – greatest impact hits when/if the individual departs the U.S.

The 3-Year and 10-Year Bar

- 3-Year Bar
 - Applies to UP of more than 180 days, but less than 1 year
 - 180 days from August 9, 2018 was February 5, 2019
- 10-Year Bar
 - Applies to UP of one year or more



The 3-Year and 10-Year Bar

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- Those subject to bars to admission are "inadmissible"
 - In general, not eligible to apply for:
 - A new visa stamp
 - Admission to the United States
 - Adjustment of Status to Permanent Residence



Reinstatement F-1 and M-1

- UP counting is tolled for a timely filed application for reinstatement
 - "Timely filed" = filed within 5 months of the status violation
 - UP counting is not tolled for reinstatement applications filed more than 5 months after the status violation.

Reinstatement F-1 and M-1

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- Reinstatement decisions:
 - If approved: the entire count of UP is erased (whether/not reinstatement was timely filed.
 - If denied:
 - If the application was timely filed, counting starts at violation, stops while reinstatement is pending, resumes after reinstatement is denied
 - If untimely filed, UP is not tolled.
 - Denials could result in an NTA

Reinstatement

J-1

- August 9, 2018 Policy Memo does not include a tolling provision for J-1 reinstatement requests

Travel

- Departure from the U.S. stops the UP clock
- But departure triggers the bar, if UP had accumulated
- Return with a new I-20 or DS-2019
- Is the visa stamp canceled? DOS has not weighed in on this question - - INA §222(g)

Ramifications

- Fs, Js, and Ms may not know if 3 or 10 year bar applies until at U.S. consul or in an adjustment interview
- Potential university liability for advice, action, of inaction of DSO
- Derivatives also subject to bars even though no knowledge of principal's status violations
- Next step: UP applies to violation of status by H-1B?

Guilford College et al v. Nielsen et al

- Plaintiffs: Guilford College, Haverford College, The New School, Foothill-DeAnza Community College District. Later joined by AFT and two MAVNI recruits awaiting orders
- Complaint alleges:
 - UP policy conflicts with federal immigration law
 - Was not promulgated properly under APA rulemaking
 - Policy forces international students to drop out of school, irreparably harming students and schools
 - Severely affects well-intentioned students who inadvertently violate status

Procedural History of Guilford v. Nielsen

- 10/23/2018 Civil Action No. 1:18-cv-00891, filed in the United States District Court for the Middle District of North Carolina
- 12/21/2018 Amicus curiae brief filed by numerous colleges and universities
- 1/28/2018 District Court issued a TRO blocking the application of the new UP policy on the two individual plaintiffs
- 3/26/2019 Hearing date on the motion for preliminary injunction
- Current status

Questions?


