UNLAWFUL PRESENCE
FOR F AND J
NONIMMIGRANTS

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What is “Unlawful Presence?”

- Concept introduced into immigration law in 1996 with new, strict legislation
- Includes any time in the U.S. after period of stay authorized by the Attorney General
- Includes any time in the U.S. after entry without inspection
Penalties for Unlawful Presence

- More than 180 days of unlawful presence during a single stay but less than a year? Subject to 3-year bar on admission
- More than a year of unlawful presence during a single stay? Subject to 10-year bar on admission
- A total of more than one year (whether in a single stay or multiple stays) followed by reentry or attempted reentry without authorization? Permanently inadmissible
- Bars are only triggered on departure from the United States
Most non-immigrant visa holders are admitted until a certain date, which is listed on their I-94 arrival/departure form.

F-1 students and J-1 exchange visitors are typically admitted for “duration of status” or D/S.

Duration of status = the time during which a student is pursuing a full course of study at an educational institution authorized by DHS.
A person admitted for duration of status will start accumulating unlawful presence upon the earlier of:

- An official finding of violation of status by the DHS, or
- An order of removal by an Immigration Judge
New USCIS Policy

- Effective August 9, 2018
- Failure to maintain non-immigrant status before August 9, 2018? Unlawful presence starts on August 9, 2018 (unless there has already been a finding of a status violation by DHS or an IJ order of removal)
Failure to maintain non-immigrant status after August 9, 2018? Unlawful presence will begin upon:

- The day after a student fails to pursue a full-time course of study
- The day after a student engages in unauthorized activity
- The day after completing studies (including OPT and any grace period)
New USCIS Policy

- Failure to maintain non-immigrant status after August 9, 2018, continued...
  - The day after I-94 expires if there is a date certain
  - The day after an Immigration Judge orders removal
New USCIS Policy

- Generally, there is no unlawful presence during:
  - A student’s 30 day-admission period prior to starting studies
  - A change in educational levels
  - Pending “cap=gap” H-1B petition
  - Pending OPT application
  - Pursuing transfer
  - Reduced course load **authorized** by DSO
  - “Emergent circumstances”
An application for reinstatement of student status will only protect you from unlawful presence if it was **timely filed** (within 5 months of termination).

**Untimely** application for reinstatement will only protect you from unlawful presence if it is **approved**.
What About Change of Status?

- If an application for a change of status (F-1 to H-1B) is denied as “frivolous” or due to unauthorized employment, there is no unlawful presence protection even if the application was timely filed.
Determining Unlawful Presence

- USCIS will determine the start date for unlawful presence by:
  - Review of systems available to the agency (SEVIS)
  - Information in the individual’s record
  - Response to Request for Evidence or Notice of Intent to Deny
How Does This Impact Me?

- Full course of study = 12 units
- There are limits on the number of online courses allowed
- OPT employment out of the major area of study?
- Periods of unemployment during OPT validity?
- Spouse or child is contingent on principal (F-1, J-1)
  - F-1 unlawful presence = F-2 unlawful presence
Overcoming the 3 or 10 Year Bar

- **Nonimmigrant visa waiver**
  - Requires recommendation of Consular officer + final approval by DHS

- **Immigrant visa waiver**
  - Requires a “qualifying relative” = spouse or child who is a US citizen or lawful permanent resident of the United States
  - Must show extreme hardship to qualifying relative
Questions?
Thank You!

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