



STONE GRZEGOREK & GONZALEZ LLP



**UNLAWFUL PRESENCE
FOR F AND J
NONIMMIGRANTS**

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What is “Unlawful Presence?”

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- 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

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- 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

“Duration of Status”

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- 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

Prior USCIS Policy Regarding D/S

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- 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

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- 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)

New USCIS Policy

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- 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

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- 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

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- 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”

What About Reinstatement?

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- 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?

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- 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

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- 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?

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- 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

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- 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?

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Thank You!

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