



## **USCIS Policy Memorandum:**

### ***Accrual of Unlawful Presence and F, J, and M Nonimmigrants***

On August 9, 2018, US Citizenship and Immigration Services (USCIS) published a final Policy Memorandum on the subject of [Accrual of Unlawful Presence and F, J, and M Nonimmigrants \(PM-602-1060.1\)](#). The revised policy also took effect on August 9<sup>th</sup> and addresses the calculation of unlawful presence for international students, exchange visitors, and their dependents. The policy poses potentially severe consequences to individuals who do not maintain their immigration status and fail to satisfy various reporting obligations and deadlines. A summary of the new policy follows.

#### **Background Information & Legal Concepts**

- USCIS is a branch of the US Department of Homeland Security (DHS) and oversees the nation's immigration system, often for individuals who have already entered the country. Among other responsibilities, this includes requests for new permissions or immigration benefits, such as a Change of Status or work authorization.
- Unlawful Presence is a legal determination that a person is present in the US without authorization. Once a person is deemed to be 'unlawfully present', they are required to apply for any future US visa only in their home country. If they accrue more than 6 months unlawful presence before departing the country, that person may be subject to a 3-year bar from entry to the US. If they accrue more than 12 months, they may be subject to a 10-year bar. These consequences have been intended to deter willful violations of status or disregard for status expiration.
- Determinations for unlawful presence are applicable when someone remains beyond the expiration date of their immigration status (an 'overstay') or an immigration judge makes an official order for removal, deportation, or exclusion. Additionally, when USCIS denies an application or immigration benefit, the officer reviews other factors to determine if the individual is otherwise maintaining a valid immigration status in the US. If not, unlawful presence has traditionally begun to accrue on the date after the denial from USCIS is issued.
- Justification for this policy indicates an aim to reduce the number of overstays among F, J, and M participants.

#### **Provisions of the new policy for F, J, and M nonimmigrants**

- Upon review of an application for immigration benefit or status, USCIS may determine that a status violation or failure to maintain status has occurred at some point previously. Officers will consider information made available through government systems available to USCIS (such as SEVIS, I-94 records, etc.), the applicant's record (materials submitted with the application), and any requests for additional information issued for that application.
- For individuals who failed to maintain their nonimmigrant status *before* 8/9/2018, accrual of unlawful presence will be calculated from August 9, 2018 (unless they had previously been accruing unlawful presence already).
- For individuals who fail to maintain their nonimmigrant status *on or after* 8/9/2018, accrual of unlawful presence will be calculated from the earliest date of the following conditions:
  - The day after they no longer pursue their authorized activities or they pursue an unauthorized activity;
  - The day after completing their authorized activities, including any authorized training and/or grace period;
  - The day after the Form I-94 expires, if they were admitted in F, J, or M status with a date certain;
  - The day after an immigration judge orders that they be removed, deported, or excluded from the US.
- Under the new policy, regardless of when USCIS makes the determination based on an application filed to their agency, the calculation will be tied to the date of the event rather than the date of the determination.
- The valid nonimmigrant status for dependent family members (F-2, J-2, M-2) is contingent on the principal (the primary F-1, J-1, or M-1) maintaining valid immigration status and remaining in an authorized period of stay. The dependent's status will end when the principal's status ends, or based on their own conduct or circumstances. Dependents under the age of 18 do not accrue unlawful presence under current policies.

PLEASE NOTE: This new policy represents a significant deviation from many years of US policy and legal precedent, and applies a different standard to international students and exchange visitors than to other nonimmigrant categories. The ISO will continue to monitor any legal developments or practical guidance regarding how this policy is implemented.