

Date: October 17, 2018
To: International Students and Exchange Visitors
From: CUNY Office of International Student & Scholar Services
Re: CUNY Guidance Memo the Unlawful Presence Policy for Nonimmigrants in F and J Status:

This memo, which supersedes the one that was sent out in July, is an update on the revisions made by USCIS based on the feedback received from the stakeholders and the public during the 30 – day public comment period that ended on July 11, 2018. However, the immigration changes that could affect your ability to continue your studies as an international student or exchange visitor in the United States still went into effect after August 9, 2018.

On August 9, 2018, the United States Citizenship and Immigration Services (**USCIS**) issued a policy memo on the changes they have made to account the accrual of unlawful presence in the country by certain nonimmigrants. This policy, which went into effect after Thursday, August 9, 2018 redefined how students in F-1 status and exchange visitors in J-1 status may become unlawfully present in the United States, and, accrue unlawful presence. The final redefinition could still potentially subject some of you to either a 3 or 10 year bar to reenter the country, and, result in the revocation of your existing nonimmigrant visas. It may also make you ineligible for changes and extensions of international student immigration status, adjustment of status to lawful permanent residency (green card), and, terminate your employment eligibility.

Under the new policy, USCIS redefined the calculation of the accrual of unlawful presence for international students in F-1 and exchange visitors in J-1 status; with an exception of a reinstatement filed in a timely manner.

According to USCIS, “a timely reinstatement application for F status is the one where the student has not been out of status for more than five months at the time of filling”. This means that “accrual of unlawful presence is suspended when the F nonimmigrant student files a reinstatement application within the five month window and while the application is pending with USCIS” However, if USCIS denies the reinstatement application, “the accrual of the unlawful presence resumes on the day after the denial”.

This is called “tolling”. For example, an F-1 student falls out of status on November 1, 2018. The student starts accumulating unlawful presence immediately. If the student is eligible for reinstatement, and, files a good faith reinstatement application with the USCIS in a timely manner (i.e. within less than five (5) months of the violation), the unlawful presence clock will stop until the USCIS makes a decision on the reinstatement. So, if a student who fell out of status on November 1, 2018 is eligible for a reinstatement, and, files for the reinstatement on December 1, 2018, the student will have accumulated only 30 days of unlawful presence by the date of the reinstatement application, and, the unlawful presence clock will stop on December 1, 2018. This, as stated above is called tolling. Let’s say, hypothetically, the USCIS approves the reinstatement application on May 1, 2019. At the moment of the reinstatement approval, the student will be put back into valid and lawful F-1 status, and, all unlawful presence (the 30 days from 2018) will be erased. However, if on May 1, 2019 the USCIS denies the reinstatement application, then, the unlawful presence clock will start ticking again, from the previous 30 days, and, the day after the denial, on May 2, 2019, the student will be on her 31st day of unlawful presence.

The J-1 exchange visitors also received a form of relief with the final policy memoranda. They will also enjoy the same protection as their F counterparts, if they apply for reinstatement. However, it should be noted that the J reinstatement rules are much different than the F reinstatement rules. There are three distinct types of J program violations that may render an exchange visitor out-of-status. However, the US Department of State, who administers the Exchange Visitor Program, takes a more liberal approach to reinstatements, either letting the Responsible Officers (the University Administrators who oversee and manage the J program on their campuses), or, process the reinstatements in-house, at the US Department of State, rather than the USCIS.

Regulatory violations requiring reinstatement of the visitor's status are classified as: minor or technical infractions, which are considered to be a "correction of the record," and which the Responsible Officer may adjust without prior authorization of the Department of State; substantive, which require the authorization of the Department of State prior to adjustment; and non-reinstatable.

The US Department of State Exchange Visitor Program defines Minor or Technical Infractions as those that include, but are not limited to: failure to 1) extend a participant's program before the end date on the Form DS-2019; 2) process a program transfer prior to the end date on the Form DS-2019; or 3) receive approval and an amended Form DS-2019 prior to accepting an honorarium or other type of payment for an allowable activity.

The responsible officer may correct the participant's record within 120 days of the stated end date of the participant's program by issuing a new Form DS-2019 that 1) shows continued authorized stay without interruption; 2) indicates the appropriate purpose code and the additional notation "correct the record"; and 3) is dated as of the date the adjusted Form DS-2019 is executed.

Substantive Infractions on the other hand are those that include; 1) failure to maintain valid program status for more than 120 calendar days after the program end date indicated on the Form DS-2019; and, if the participant is a student, 2) failure to maintain a full course of study without prior consultation with (and approval of) the Responsible Officer or the Alternate Responsible Officer of the sponsor and with the student's academic advisor.

In this case, the Responsible Officer must apply to the Department of State for reinstatement on behalf of the participant. These types of reinstatement applications are always risky and have a high chance of denial.

Non-Reinstatable Infractions:

The following infractions preclude reinstatement. Applications for reinstatement submitted to the Department of State showing any of these infractions will be denied: 1) willful and knowing failure to comply with program insurance requirements; 2) unauthorized employment; 3) involuntary suspension or termination from the most recent exchange visitor program; 4) failure to maintain valid program status for more than 270 calendar days; 5) receipt of a favorable recommendation from the Department of State on an application for waiver of section 212(e) 2-year home country residency requirement; and 6) failure to pay the SEVIS fee.

Therefore, if a J exchange visitor violates the terms of his/her status on November 1, 2018, by not extending the J program validity dates by obtaining a new Form DS-2019 from the college Responsible Officer, the exchange visitor will be unlawfully present in the United States immediately. However, because this is a minor or technical infraction, as defined by the US Department of State, the exchange visitor may

simply ask his/her Responsible Officer to correct the record, i.e. reinstate the status, within 120 days of November 1, 2018. If the Responsible Officer deems it proper to correct the record, he or she will issue a new Form DS-2019, and, the exchange visitor will automatically be reinstated to the J status immediately, and, all unlawful presence days are erased.

However, if the same exchange visitor fails to consult with the Responsible Officer within 120 days of the violation, or, if the violation is a substantive violation as described above, then, the Exchange Visitor, in consultation with her Responsible Officer, must file a reinstatement application with the US Department of State. If the US Department of State approves or denies the reinstatement, the same tolling rules for reinstatements for F students described above will apply.

So, in our example, the J exchange visitor falls out of status on November 1, 2018 and starts accumulating unlawful presence immediately. If the J exchange visitor is eligible for reinstatement, files a good faith reinstatement application with the US Department of State in a timely manner, the unlawful presence clock will stop until the US Department of State makes a decision on the reinstatement. So, if the exchange visitor who fell out of status on November 1, 2018 is eligible for a reinstatement, and, files for the reinstatement on December 1, 2018, the Exchange Visitor will have accumulated only 30 days of unlawful presence by the date of the reinstatement application, and, the unlawful presence clock will stop on December 1, 2018. This is called tolling. Let's say, hypothetically, the US Department of State approves the reinstatement application on May 1, 2019. At the moment of the reinstatement approval, the Exchange Visitor will be put back into valid and lawful J-1 status, and, all unlawful presence (the 30 days from 2018) will be erased. However, if on May 1, 2019 the US Department of State denies the reinstatement application, then, the unlawful presence clock will start ticking again, from the previous 30 days, and, the day after the denial, on May 2, 2019, the Exchange Visitor will be on her 31st day of unlawful presence.

Finally, if the Exchange Visitor has violated the terms of his/her status by one of the "non-reinstatable infractions", as listed above, she will not be able to file for a reinstatement, and, the unlawful presence clock will not stop.

Though the revised policy clarified the calculation of the accrual of unlawful presence in the country, and provided some exceptions, the consequences if a nonimmigrant in F or J status is in violation remains the same.

What does this mean?

In a nutshell, the law stipulates that anyone who accumulates more than 180 days of unlawful presence in the country and then decides to leave the country voluntarily is barred from coming back to the U.S. for three years. Similarly, anyone who is unlawfully present in the U.S. for more than 365 days (one year) and then leaves the country, is barred from returning to the United States for 10 years. Moreover, when someone becomes unlawfully present in the United States, even for one day, the following consequences are triggered:

- The person's existing visas are automatically revoked;
- The person is no longer eligible for an extension or a change of status to any other immigration classification;
- The person becomes ineligible for an adjustment of status to lawful permanent residency (green card) with the exception of lawful permanent residency through marriage to a US citizen; and
- The person becomes removable (deportable) from the United States.

How does this affect international students and exchange visitors?

F-1 international students and J-1 exchange visitors, who have violated their status for different reasons, such as failing to maintain the full time course load requirement (12 credits for undergraduates and 9 credits at the graduate level), unauthorized employment, etc., are negatively affected by the new policy; and, all, or some of the serious consequences and penalties listed above are triggered.

For example, if a student drops below a full-course of study in the fall 2018 semester, and, leaves the U.S. for a family visit in the summer of 2019, the Department of Homeland Security (**DHS**) will count the student's unlawful presence from the first day the student fell out of status. Furthermore, not only will the student be denied entry into to the U.S., but DHS will be able to penalize the student with a re-entry bar of 3 or 10 years.

Similarly, as a further example, if a student leaves the U.S. in the summer of 2019 for a family visit, and, at the student's return, DHS agents, in inspection, find out that the student has been working in the U.S. without authorization, the DHS will backdate the student's unlawful presence to the first day of the student's unauthorized employment or August 9, 2018, whichever happens latter, and, impose penalties based on the duration of unlawful presence.

Therefore, given the serious consequences and penalties, please speak to your international student advisors immediately for all the details.

Is this a new policy?

Yes and No: The policy for unlawful presence and re-entry bars have been in existence. "The statutory provisions that created the penalties for "unlawful presence" are not new; they were added to the Immigration and Nationality Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ([IIRIRA](#))." However, under the old regulations, F and J visa/ status holders and their dependents were significantly protected from the unlawful presence penalties. Before the new policy, an F or a J visa/ status holders and their dependents became unlawfully present in the U.S. only if (1) an immigration officer found them to be unlawfully present while adjudicating a benefit they sought from the USCIS, such as an OPT, reinstatement, or a change of status request; or (2) if they were brought in front of an immigration judge, and, the judge determined that they were unlawfully present in the U.S. And, in these situations, the unlawful presence started only from the date of the immigration officer or judge's determination. It was not backdated or retroactive. An F and J visa/ status holder or their dependents were not deemed to be unlawfully present in the United States if they violated their statuses—such as dropping below a full-course of study without prior authorization from the school, stop attending their educational programs, accepting unauthorized employment, etc. In those situations, the students were deemed to be "out-of-status", but, without a formal determination of an immigration officer or a judge, students in F or J status were not subject to the penalties that come with unlawful presence.

USCIS has redefined the way it triggers and counts days of unlawful presence for nonimmigrants in F-1, F-2, J-1, and J-2 visa categories from August 9, 2018 onwards.

What are the differences between the old policy and the new one that went into effect after August 9, 2018?

- Under old policy, which has been in place for 20 years, the unlawful presence started only after a formal finding of a status violation by a DHS officer or an immigration judge.
- Under the new policy, the unlawful presence count begins the day after the status violation, and, a formal finding of a status violation by a DHS officer or an immigration judge is not necessary.

- Under both the old and new policies:
 - Remaining in the United States beyond the expiration of a date-specific Form I-94 also starts the unlawful presence clock; and
 - There are a number of important exceptions (such as unlawful present not being counted if USCIS approves a student's application for reinstatement).
 - However, if the reinstatement is denied, unlawful presence continues counting from where it stopped the day after USCIS denies a student's application.
- If you failed to maintain your F or J status before August 9, 2018 and you did not file for reinstatement, then you started accruing unlawful presence on the day the new policy went into effect.

How will USCIS know that there has been a violation of immigration status?

Status violation is a reportable event in SEVIS. International Student Advisors, who are the Designated School Officials (DSOs) by the Department of Homeland Security and Responsible Officers by the Department of State are required by the federal mandate to report such activities on SEVIS records within the first 30 days of program start date. The following federal agencies, including USCIS have access to view SEVIS records and are all able to see all updates on students' and exchange visitor's records.

- **ICE:** Immigration and Custom Enforcement with its prescribed enforcement responsibilities
- **SEVP:** Student Exchange and Visitor Program that oversees the Student Exchange and Visitor Information System (SEVIS), which electronically keeps track of the records of students in F-1 status and Exchange Visitors in J-1 status.
- **CBP:** Customs and Boarder Protection regarding your admission into the United States at the port of entry e.g. airports.
- **DOS:** Department of State - Consular Affairs (Embassies/Consulates abroad), regarding your eligibility for a nonimmigrant visa. Student are sometimes advised to reinstate their status by exiting the country and apply for a new visa and reenter the country. However, this will not be feasible anymore since a student could be subjected to the reentry bars (3 years or 10 years).

Additionally, the following agencies can verify your immigration status through a Systematic Alien Verification for benefits Entitlement Program (**SAVE**). This system administered by USCIS is used by federal, state, and local agencies to verify the beneficiary's immigration status.

- **SSA:** Social Security Administration
- **DMV:** Motor Vehicle Department

Is there anything that the International Student Advisors can do?

Though there's nothing much that can be done if you have any status violations, you should still contact your international student advisor. The advisor may help you mitigate your damages even though your options are much more limited now than before. With the new policy in place, USCIS has to operate and enforce the changes accordingly.

What can International Students and Exchange Visitors do?

Unfortunately, the restriction went into effect after August 9, 2018. As a result, you have no choice but to follow the rule and avoid being unlawfully present and be subjected to either the 3 or 10 years bar penalties.

Remember:

- Maintain your immigration status.
- Speak to your international student advisors about any challenges you might be facing that can affect your status maintenance.
- Visit your international student advisors' office for any immigration questions or concerns you might have.
- Always update your contact information with your college international student office, and make sure that you are receiving all communications coming from your international advisors.
- If you have failed to maintain your nonimmigrant status, go and speak to your international student advisor **immediately**. Time is of the essence; don't subject yourself to the penalties of the new policy.