USCIS Ends Unlawful Presence Exemptions for F, J and M Nonimmigrant Visa Categories-by Eugene Goldstein, Esq.

On May 10, 2018 USCIS issued a “Policy Memorandum” overturning policy in effect since 1997 which exempted F, J and M nonimmigrants admitted for Duration of Status (D/S) from the three-year bar of INA §212 (a)(9)(B)(i)(I), and the ten-year bar of INA §212(a)(9)(B)(i)(II).

The Immigration Act of 1996 had enacted these bars to penalize individuals who entered illegally or who overstayed the time period permitted by their status. Should an individual overstay their status by 180 days but less than one year and then subsequently depart, they cannot reenter for 3 years. If the overstay is beyond one year they cannot reenter for 10 years.

As “Legacy INS” originally believed that it would be difficult in the F/J/M context to determine just what date the individual became out of status, these categories were exempted from the bars. Confusion in dates arose from various controlling time periods including the dates during which entry was permitted on a visa; time periods for full course of study programs on the F-1’s or-M-1’s I-20 or on the J-1’s DS-2019; or actual program completion dates; as well as determining the exact date on which a status violation occurred, such as the beginning of unauthorized employment. USCIS has now changed its’ policy using the rationale that current technologies used by the Service to monitor F, J, and M nonimmigrants have permitted it to better monitor these categories “… in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status…” The Memorandum notes that the student monitoring system (SEVIS) now records if a student has completed or dropped out of their program. (Something SEVIS has done for many years.) USCIS mentions that in FY2016 1,457,556 F, J, or M aliens were expected to change status or depart, an estimate for overstays was provided of 6.19% for Fs, 3.80% for Js and 11.60 % for Ms. No breakdown for overstays was given for specific J programs (such as scholars, students, interns etc.). Nor was the F-1 student category broken down by nature of school (ESL, Test Prep, Community College, University, etc.).

Further, it appears that violation of status beginning dates will still need to be determined in the discretion of a DHS officer, as would determination of specific program completion dates, although these should be reported by the institutions. Drop out dates might be problematical.

The new guidance takes effect on August 9, 2018. The unlawful presence date for those presently in D/S but out of status will begin on August 9th unless they had a date certain from a change of status or other benefit denial, or an order from an Immigration Judge.

Although the vast majority of individuals in F, J or M status comply with their requirements, those who don’t may fit into a couple of common scenarios:

An F-1/J-1/M-1 who has overstayed for more than 180 days marries a U.S. Citizen while remaining in the U.S. This overstay is permitted to adjust their status in the U.S. as an exception to INA §245(c). However, if the overstay departs the U.S. prior to adjusting to permanent residence (even with USCIS permission) they could be barred and would require a waiver on Form I-601 and/or a transfer of their case to a U.S. Consulate.

If the F-1/J-1/M-1 has unlawful presence of 180 days or more, and they seek to obtain a green card through employment, they are barred from doing so (unless excused by INS §245(k)) and would have to consul process their application. Therefore, their departure to attend the consular appointment would activate the 3 or 10-year bars-unless they departed prior to 180 days from their date of status termination (whatever that date may be determined to be).

The 3 and 10-year bars were designed to punish status overstays. They have been criticized for actually expanding the undocumented population, as the failure to timely depart raises a severe penalty which is avoided simply by remaining in the U.S.-a Congressionally unintended consequence which will now be expanded by USCIS policy.

It is also interesting that in 20 years, neither “Legacy INS”, nor USCIS has promulgated regulations under the Administrative Procedure Act. Whether changes in policy are the legally acceptable manner to administer these sections of the 1996 Act is a separate, but basic issue.

A public comment period on this policy change ends on June 11, 2018, although nothing requires USCIS to act upon any comments. In fact, some schools have reported that this policy is already being implemented.

Mr. Goldstein is the Managing Partner of Goldstein and Cheung, a law firm in NYC concentrating in business, academic and family immigration issues. He is a graduate of CCNY and the law school of Washington University in Saint Louis. He is a long-time practitioner of immigration law and has participated in many organizations and is the recipient of many professional awards.