



August 9, 2018

PM-602-1060.1

# Policy Memorandum

**SUBJECT:** Accrual of Unlawful Presence and F, J, and M Nonimmigrants

## Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. The PM also revises previous policy guidance in the USCIS Adjudicator’s Field Manual (AFM) relating to this issue.

## Authority

- INA 212(a)(9)(B)
- INA 212(a)(9)(C)

## Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service’s (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in AFM Chapter 40.9.2.<sup>1</sup>

According to that policy—to be superseded by this policy memorandum—foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the

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<sup>1</sup> See USCIS Interoffice Memorandum, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act” (May 6, 2009).

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applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.<sup>2</sup>

The former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS also has made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, and M nonimmigrants.<sup>3</sup>

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien’s immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.<sup>45</sup>

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<sup>2</sup> Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) (“Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes ‘illegally or unlawfully in the United States’ for purposes of § 922(g)(5)(A) upon commission of a status violation.”); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) (“A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations.”); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) (“After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.”).

<sup>3</sup> See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

<sup>4</sup> See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

<sup>5</sup> On August 7, 2018, DHS issued the Fiscal Year 2017 Entry/Exit Overstay Report as this memorandum was being finalized for publication. For FY2017, DHS calculated that a total of 1,662,369 aliens admitted in F, J, and M nonimmigrant status were expected either to change status or depart the United States, and estimated that the total overstay rate was 4.07 percent for F nonimmigrants, 4.17 percent for J nonimmigrants, and 9.54 percent for M nonimmigrants. These figures continue to be significantly higher than those for other nonimmigrant categories. See Fiscal Year 2017 Entry/Exit Overstay Report, Department of Homeland Security, page 11, available at

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To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).

### **Effective Date**

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic, including in its entirety the May 10, 2018 PM titled “Unlawful Presence and F, J, and M Nonimmigrants.”

### **Policy**

The new policy clarifies that F, J, and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as outlined below.<sup>6</sup>

*F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018.*

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status<sup>7</sup> before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,<sup>8</sup> unless the alien had already started accruing unlawful presence on the earliest of the following:

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<https://www.dhs.gov/publication/fiscal-year-2017-entryexit-overstay-report>. Accordingly, USCIS believes that the data presented in the FY2017 report continues to support this policy change.

<sup>6</sup> Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

<sup>7</sup> The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in an unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer’s inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

<sup>8</sup> An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

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- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;<sup>9</sup>
- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

*F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018*

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status<sup>10</sup> **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;<sup>11</sup> and

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<sup>9</sup> Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

<sup>10</sup> The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer, shall give the alien an opportunity to rebut that derogatory information.

<sup>11</sup> This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

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- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.<sup>12</sup>

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

### Implementation

Chapter 40.9.2 of the AFM is revised by:

- Adding "Other than F, J, or M Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(i);
- Adding "Other Than F or J Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(ii);
- Creating a new section 40.9.2(b)(1)(E)(iii);
- Redesignating current section 40.9.2(b)(1)(E)(iii) as section 40.9.2(b)(1)(E)(iv) and amending the text; and
- Revising the text of section 40.9.2(b)(3)(D).

These revised AFM Chapter 40.9.2 sections, as amended, read as follows:

\* \* \*

### **(b) Determining When an Alien Accrues Unlawful Presence**

\* \* \*

#### **(1) Aliens Present in Lawful Status or as Parolees**

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<sup>12</sup> The USCIS assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

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(E) Lawful Nonimmigrants

The period of stay authorized for a nonimmigrant may end on a specific date or may continue for “duration of status (D/S).” Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted Until a Specific Date (Date Certain) Other Than F, J, or M Nonimmigrants

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(ii) Nonimmigrants Admitted for Duration of Status (D/S) Other Than F or J Nonimmigrants

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(iii) F or J Nonimmigrants Admitted for Duration of Status (D/S) or F, J, or M Nonimmigrants Admitted Until a Specific Date (Date Certain)

*Background*

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service’s (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in this AFM chapter.<sup>13</sup>

According to that policy—now superseded by this guidance—foreign students and exchange visitors (F and J nonimmigrants, respectively) admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, or on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came

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<sup>13</sup> See USCIS Interoffice Memorandum, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act” (May 6, 2009).

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first.<sup>14</sup>

The former INS policy, as consolidated in the AFM, went into effect in 1997 prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants.<sup>15</sup>

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien’s immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.<sup>16</sup>

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS changed its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2) effective on August 9, 2018.

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<sup>14</sup> Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) (“Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes ‘illegally or unlawfully in the United States’ for purposes of § 922(g)(5)(A) upon commission of a status violation.”); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) (“A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations.”); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) (“After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.”).

<sup>15</sup> See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

<sup>16</sup> See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at <https://www.dhs.gov/publication/entryexit-overstay-report>.

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### *Policy*

Foreign students (F-1 nonimmigrants), exchange visitors (J-1 nonimmigrants), and vocational students (M-1 nonimmigrants), and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain) (in accordance with 8 CFR 214.2(f), 8 CFR 214.2(j), or 8 CFR 214.2(m)) start accruing unlawful presence as outlined below.<sup>17</sup>

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;<sup>18</sup> and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.<sup>19</sup>

### *F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018*

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status<sup>20</sup> before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,<sup>21</sup> unless the alien had already started accruing unlawful presence on the earliest of the following:

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<sup>17</sup> Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

<sup>18</sup> This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

<sup>19</sup> The assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

<sup>20</sup> The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

<sup>21</sup> An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration



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- The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;<sup>22</sup>
- The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

*F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018*

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status<sup>23</sup> **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but not limited to:

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laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

<sup>22</sup> Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

<sup>23</sup> The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer shall give the alien an opportunity to rebut that derogatory information.

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- During the period permitted under 8 CFR 214.2(f)(5)(i) (period of up to 30 days before the program start date listed on the F-1 nonimmigrant's Form I-20);
- While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);
- During a change in educational levels as outlined in 8 CFR 214.2(f)(5)(ii), provided the F-1 nonimmigrant transitions to the new educational level according to transfer procedures outlined in 8 CFR 214.2(f)(8);
- While the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant's D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1B petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year;
- While the F-1 nonimmigrant's application for post-completion Optional Practical Training (OPT) remains pending under 8 CFR 214.2(f)(10)(ii)(D);
- While the F-1 nonimmigrant is pursuing a school transfer provided that he or she has maintained status as provided in 8 CFR 214.2(f)(8);
- The period of time a timely-filed<sup>24</sup> reinstatement application under 8 CFR 214.2(f)(16) is pending with USCIS;
- The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;
- During annual vacation permitted under 8 CFR 214.2(f)(5)(iii) if the F-1 nonimmigrant is eligible and intends to register for the next term;
- During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure:
  - 60 days following completion of a course of study and any authorized practical training;

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<sup>24</sup> For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.

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- 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or
- No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status.
- Emergent circumstances as outlined in 8 CFR 214.2(f)(5)(v), in which any or all of the requirements for on-campus or off-campus employment are suspended by a *Federal Register* notice and the student reduces his or her full course of study as a result of accepting employment based on the *Federal Register* notice; and
- During a period of reduced course load, as authorized by the DSO under 8 CFR 214.2(f)(6)(H)(iii).

Foreign exchange visitors (J nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of time annotated on Form DS-2019 as the approved program time plus any grace period, either before the program start date or after the conclusion of the program as outlined in 8 CFR 214.2(j)(1)(ii);
- Any extension of program time annotated on Form DS-2019 as outlined in 8 CFR 214.2(j)(1)(iv);
- While the J-1 nonimmigrant is in a cap gap period as outlined in 8 CFR 214.2(j)(1)(vi);<sup>25</sup> and
- The period of time a J-1 nonimmigrant was out of status, if he or she is granted reinstatement under 22 CFR 62.45.

Foreign vocational students (M nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of admission as indicated on Form I-94, plus up to 30 days before the report or start date of the course of study listed on the Form I-20 as outlined in 8 CFR 214.2(m)(5);
- Any authorized grace period as outlined in 8 CFR 214.2(m)(5);

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<sup>25</sup> This is a discretionary provision in which the USCIS Director may, by notice in the *Federal Register*, bridge the gap for J-1 nonimmigrants.

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- During the time the M-1 nonimmigrant completes authorized practical training as outlined in 8 CFR 214.2(m)(14);
- The period of time a timely-filed<sup>26</sup> reinstatement application under 8 CFR 214.2(m)(16) is pending with USCIS; and,
- The period of time an M-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(m)(16), provided that the application is ultimately approved.

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

An alien under 18 years of age does not accrue unlawful presence.<sup>27</sup> Therefore, any F, J, or M nonimmigrant who is under 18 years of age does not accrue unlawful presence. Additionally, the F, J, or M nonimmigrant may be otherwise protected from accruing unlawful presence, as outlined in this chapter.

### (iv) Non-Controlled Nonimmigrants (for example, Canadian B-1/B-2)

Nonimmigrants who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S (as addressed in Chapter 40.9.2(b)(1)(E)(ii)) for purposes of determining unlawful presence.

### (F) Other Types of Lawful Status

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### **(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)**

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### **(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

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<sup>26</sup> For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.

<sup>27</sup> See INA 212(a)(9)(B)(iii)(I).

\* \* \*

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests

\* \* \*

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iii) Denials of Untimely Applications

If a request for EOS or COS is denied because it was not timely filed, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

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**Use**

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

**Contact Information**

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.