
**December 1, 2017**

## Special Immigration Alert:

## The New "90-Day Rule" Could Impact Holiday Travel by F-1 OPT Employees

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The U.S. Department of State ("DOS") recently updated its Foreign Affairs Manual ("FAM") guidance regarding what the agency perceives as "willful misrepresentations." The guidance revises what was previously known as the "30/60-day rule."

### Background

Before the DOS updated the FAM in September 2017, foreign nationals ("FNs") who entered the United States in a visa classification that requires a temporary intent to stay in the United States (i.e., an F-1 student, B-1/B-2 visitors, TN, E-3, etc.) but filed an adjustment of status application for U.S. permanent residency (i.e., a green card) within 30 days were presumed to have made a willful misrepresentation at entry because they acted contrary to the temporary intent inherent in their visa status. If the adjustment of status application was filed within 30 to 60 days of an FN's U.S. entry, then the U.S. government could still claim a willful misrepresentation if it could demonstrate that the FN acted contrary to this temporary intent. After 60 days passed, the inference of willful misrepresentation regarding the FN's intent to stay temporarily in the United States would no longer be an issue.

### The 90-Day Rule and Its Impact on F-1 Optional Practical Training ("OPT") Workers

In September 2017, the DOS guidance changed the 30/60-day rule to a flat "90-day rule." Now, 90 days must pass after admission before anyone in a nonimmigrant status that requires a temporary intent to stay in the United States can safely file an adjustment of status application for U.S. permanent residency without the government claiming that he or she committed a willful misrepresentation at entry.

The September 2017 guidance also added a new wrinkle by including language that affects changes of status to another nonimmigrant status. While we do not think it likely, this arguably includes any changes of status from F-1 OPT status to H-1B or any other

status that requires approval to engage in the sponsored activities. Under the broad language of the September 2017 guidance, such change of status requests now could be viewed by the government as willful misrepresentations by the F-1 OPT worker.

Under this new and more robust 90-day rule, anyone in F-1 OPT, TN, E-3, H-1B1, O-1, or any other temporary visa status who files a change of status application to H-1B or another status within 90 days of entry into the United States runs the risk that the government may claim that he or she made a willful misrepresentation, and then deny the change of status application on that basis. Even if the application is approved now, the circumstances create an undefined future danger that the employee may (i) be denied an H-1B visa at a U.S. consulate, (ii) be denied H-1B extensions, (iii) be refused U.S. reentry, or (iv) have his or her green card application denied. This is all based on the employee's imputed willful misrepresentation of his or her nonimmigrant intent resulting from filing an H-1B change of status application within 90 days of entering the United States.

Therefore, it is important that you notify your F-1 OPT employees who plan to travel during the holidays about these potential issues.

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