



December 1, 2017

## **Special Immigration Alert:**

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

---

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

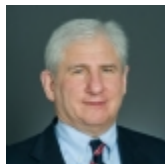
status that requires approval to engage in the sponsored activities. Under the broad language of the September 2017 guidance, such change of status requests now could be viewed by the government as willful misrepresentations by the F-1 OPT worker.

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.

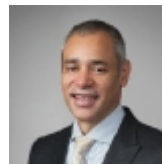
Therefore, it is important that you notify your F-1 OPT employees who plan to travel during the holidays about these potential issues.

\* \* \* \*

If you have any questions regarding this Alert or any other U.S. immigration issues, please contact Epstein Becker Green's Immigration Law Group:



[Robert S. Groban, Jr.](#)  
New York  
212/351-4689  
[rgroban@ebglaw.com](mailto:rgroban@ebglaw.com)



[Pierre Georges Bonnefil](#)  
New York  
212/351-4687  
[pgbonnefil@ebglaw.com](mailto:pgbonnefil@ebglaw.com)



[Patrick G. Brady](#)  
Newark  
973/639-8261  
[pbrady@ebglaw.com](mailto:pbrady@ebglaw.com)



[Jungmin Choi](#)  
Newark  
973/639-5226  
[jchoi@ebglaw.com](mailto:jchoi@ebglaw.com)



[Jang Hyuk Im](#)  
San Francisco  
415/399-6067  
[jim@ebglaw.com](mailto:jim@ebglaw.com)

*This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.*

**About Epstein Becker Green**

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit [www.ebglaw.com](http://www.ebglaw.com).

© 2017 Epstein Becker & Green, P.C.

Attorney Advertising