PUBLICATION

Say Goodbye to the 30/60 Day Rule

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When applying for a nonimmigrant or temporary U.S. visa and when actually seeking to enter the U.S., most applicants – including those for B visitor, F student and J exchange visitor – are required to convince the consular or port officer that they (1) have a residence abroad; (2) have no immediate intention of abandoning that residence; and (3) intend to depart the U.S. at the end of the authorized stay. Some visa classifications require only that the person is coming "temporarily," and the H-1B and L classifications even specifically allow also pursuing permanent residence at the same time.

Previously, the Department of State applied what was known as the "30/60 day rule" to determine travelers had engaged in misrepresentation about their purposes at the time of their visa interview or admission into the U.S. Under this rule, a presumption of misrepresentation would arise if an individual engaged in an activity inconsistent with their immigration status, such as applying for permanent residence, within 30 days of entering the U.S. Generally, no basis for misrepresentation would exist if such an action were taken more than 60 days after entering the U.S.

Recently, however, the State Department updated the Foreign Affairs Manual (FAM), the official guide serving consular officers in their visa review process. New language was added to the FAM, which now states that consular officers may presume conduct is willful, and gives rise to a presumption of misrepresentation, if conduct inconsistent with the visa holder's status takes place within 90 days of entry into the U.S.

This new policy gives four non-exclusive examples of actions within 90 days of entering the U.S. that may give rise to a presumption of misrepresentation:

- Engaging in unauthorized employment
- Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g., B visitor status)
- A nonimmigrant in B visitor or F student status, or any other status prohibiting immigrant intent, marrying a United States citizen or lawful permanent resident and taking up residence in the United States
- Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment

Every visa application asks about all prior unauthorized employment and violations of status, so not revealing these things would be itself a misrepresentation.

Of course, travelers accused of a misrepresentation may seek to rebut the presumption by showing that they actually had the proper intent in seeking visa or admission but only changed their mind after admission. But, for example, an officer reviewing and denying an application for new visa or admission might make a systems notation containing the officer's conclusion that the traveler previously made a misrepresentation without even notifying the traveler of that conclusion or affording some opportunity to rebut. Travelers facing a past misrepresentation finding can always seek to show that prior findings of misrepresentation were erroneous, but officers are hesitant to overrule the conclusions of officers who previously encountered a traveler.

A finding of willful misrepresentation of a material fact in a U.S. immigration matter makes a traveler permanently inadmissible to the U.S. Travelers seeking only temporary admission can apply for a waiver of inadmissibility under a generally discretionary standard, but waivers can be a long and convoluted process with no guarantee of success. Persons seeking permanent residence can receive a waiver of misrepresentation only by showing "extreme hardship" to a spouse or parent who is a U.S. citizen or permanent resident.

The new guidance to consular officers does not mention any limit on its retroactivity, so travelers today could face findings of misrepresentation based on actions they took within 90 days of past admissions to the U.S.

This heightened scrutiny is a direct result of President Trump's March 2017 memorandum that instructed the Department of State to focus on "ensuring the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits." Individuals who are uncertain if their actions violate the new 90-day rule should be sure to consult with an immigration attorney to confirm any implications to their status or future immigration.