



**Pauline Schwartz**  
— Your Trusted Immigration Lawyer —

# **The Invisible Wall**

**How International Students Can Navigate  
Recent Immigration Policy Changes**



**Washington International Education Conference – February 22, 2019**

# International Education & Immigration Law

- How to reconcile goals of international education professionals with ongoing policy changes?



# International Education Professionals

## • Goals

- Encourage and facilitate international student admissions
- Provide a stable and safe educational environment
- Help international students achieve success in their academic and future career goals

# Current U.S. Immigration Policies

- Anti-immigrant, xenophobic
- Particularly punitive towards certain groups – for example, the “Muslim Travel Ban”
- Many ongoing immigration policy changes:
  - Volatile
  - Reactionary
  - Unpredictable

# What is the “Invisible Wall”?

- Changes in US Government policies that affect non-U.S. citizens since January 2017
- Obvious:
  - Muslim Travel Ban
  - Treatment of asylum-seekers at the U.S.-Mexican border
- More subtle:
  - Several recent USCIS policy memoranda which affect foreign students/scholars
  - New adversarial approach
  - Growing USCIS adjudications backlog

# The Invisible Wall: Effects

- DOS reported a FY 2017 17% decline in student visa issuance:
  - 28% decrease for Indian students
  - 24% decrease for Chinese students
- From FY 2013-FY 2017, total F-1 visas declined from over 534,000 to around 393,000
- In academic year 2017-18, new enrollments of international students fell by 6.6%
- Steep declines in Canadian and Mexican students
- Decline in international tourist visitors to the U.S,

# The Invisible Wall: Hurting International Students

- More difficult to obtain a visa
- Certain applicants subjected to lengthy administrative processing
- Easier for students to accrue Unlawful Presence (ULP)
- OPT issuance and compliance more challenging
- Lengthy USCIS processing delays hurt students' ability to apply for reinstatement/change status
- Upheaval in lives of students and families

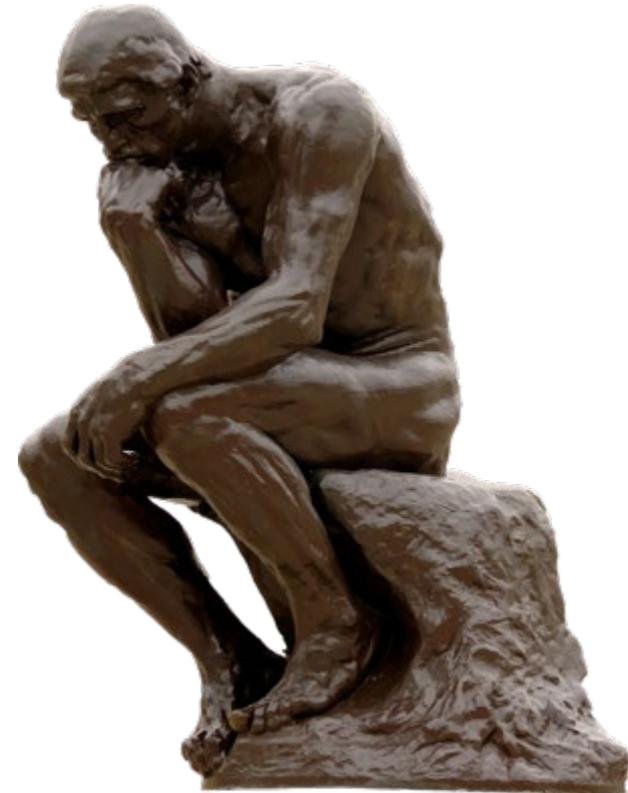
# Climbing the Invisible Wall



How can we help our current and future students?

# The Invisible Wall: Solution

- These current difficulties can be overcome with a combination of Knowledge and Action
- “Chance favors a prepared mind.”



# Knowledge: Three Major 2018 USCIS Policy Memoranda

1. June 28, 2018 Memorandum on Notice to Appear Issuance
2. July 13, 2018 Memorandum on USCIS Denials without Requests for Evidence
3. August 9, 2018 Memorandum on the Accrual of Unlawful Presence and F, J, and M Nonimmigrants

# USCIS New NTA Memorandum

- Effective as of October 1, 2018 for denials of Form I-539 Change/Extension of Status Applications
- Will place foreign students at greater risk for ICE detention and removal proceedings



# July 13, 2018 Memorandum on USCIS Denials without Requests for Evidence

- Will result in an increase in denials of F-1 Reinstatement Applications
  - Also, more denials of change of status and adjustment of status applications
- Will hurt applicants who file such applications without legal assistance
  - More likely to omit critical documents from application submissions
- Applications can be denied even for simple, easily-corrected errors or omissions
- More denials will result in more students at risk for ICE detention and removal proceedings

# August 9, 2018 Unlawful Presence (ULP) Memorandum : Major Change in Policy

- F, M, and J students will now be considered out of status (OOS) immediately, no longer in D/S
  - Students now begin to accrue ULP the day after a status violation occurs.
- Contrast to the prior USCIS and INS policy
  - Which did not consider students admitted in D/S to be OOS until there was a status violation found by an Immigration Judge or following the denial of a USCIS benefit application

# What's the Big Deal about Unlawful Presence and Status Violations?

- Being Out of Status can result in the following:
  - Risk of apprehension and questioning by DHS
  - Risk of detention by DHS and transfer to a detention center remote from school, friends, and counsel
  - Risk of removal proceedings and deportation
  - Difficulties when attempting to get OPT or COS to H-1B or other nonimmigrant status
  - Difficulties when attempting to adjust status to LPR
  - Serious problems with overseas travel – inadmissible due to 3/10 year bars; visa cancellation; inability to renew F-1 visa

# What can result in a status violation?

## Some Examples:

- Enrolling in less than a full-time course load, without prior DSO approval
- Registering for too many online courses
- Students who do not timely extend an expiring Form I-20
- Students who voluntarily withdraw or who are withdrawn by the school for misconduct
- Engaging in unauthorized employment (beware of Uber-driving students)
- Students who violate CPT or OPT employment rules, even unintentionally
- Students who graduate or complete OPT but do not timely depart, transfer, or file a timely change of status application
- Arrest and detention for criminal or immigration violation
- Failing to report/update a new residential mailing address

# More problems with the ULP Memo

- Any status violation can trigger ULP
- No formal notice will be given to the student or school of status violations
- Dependents are harmed as well
- The negative impact of this memo will not be felt until long into the future – when the student applies to change status or when the student travels overseas to apply for a new visa
- We are already seeing difficulties with OPT issuance

# Exceptions to ULP Calculation

- Period of up to 30 days prior to program start date, as listed on Form I-20
- F-1 students who are pursuing a full course of study or authorized OPT
- Students changing educational levels, provided the student follows the proper transfer procedures
- When a student's application for OPT remains pending
- When a student is pursuing a school transfer, provided he has remained in status
- Periods of authorized annual vacation and grace periods following the completion of a course of study or OPT

# More Exceptions to ULP Calculation: Reinstatement

- During the time that a reinstatement application is pending, IF the reinstatement application was timely filed within 5 months of the student falling out of status
- The period of time that the student was out of status, if she applies for reinstatement, provided that the reinstatement application was ultimately approved
- BUT note, untimely reinstatement applications do NOT toll the accrual of ULP if application is ultimately denied

# October 2018 lawsuit against DHS: A glimmer of hope

- Several colleges filed a lawsuit against the U.S. Government , seeking a preliminary injunction and a declaration that the August 9, 2018 memo is unlawful and cannot be enforced. The case is Guilford College et al. v. Nielsen et al. in the U.S. District Court for the Middle District of North Carolina.
- Currently, DHS is still permitted to enforce the policy memo. However, at a hearing on March 26, 2019, the court will hear arguments on the motion for preliminary injunction filed by the plaintiffs and a motion to dismiss filed by the defendants.
- Stay Tuned!

# Reinstatement or Consular Processing: Challenges

- A difficult decision: Whether to pursue Reinstatement or Consular Processing for a new Visa when student is OOS
  - If a timely-filed Form I-539 is denied, the student will accrue ULP
- If a Form I-539 is UNTIMELY filed (more than 5 months after status violation), then ULP will continue to accrue while the I-539 is pending. If the I-539 is ultimately approved, then the ULP is forgiven
- But if an untimely I-539 is denied, then most likely the student will have accrued more than a year of ULP, and once he departs will be subject to the 10 year bar
- This is due to backlog in I-539 processing times – up to 7.5 months at the California Service Center, and up to 15.5 months at the Vermont Service Center

# Reinstatement or Consular Processing: Challenges

- While reinstatement applications are backlogged and uncertain, Consular Processing is also risky
- Risk that DOS will follow USCIS ULP memo and calculate time OOS, to find that student is subject to 3/10 year bars
- No right to appeal a Consulate's visa denial
- Students must interrupt studies to Consular Process
- Overseas travel is an added expense
- Student may be subject to lengthy administrative processing at Consulate



# How Schools Can Take Action

- Be proactive with students' immigration status – over-communicate
- Learn about new trends/changes to law/policy:
  - Washington International Education Conference
  - NAFSA
  - American Immigration Lawyers Association
  - Other reputable organizations and lawyers
- Do not rely on “fake news” and rumors
- Do not rely on past cases to predict future

# More Ways to Take Action

- Website/recruitment brochures can address the immigration issues and reassure potential students
- International Student Office can send a monthly immigration/visa update with reminders to students via email
- Schools can hold international student visa information sessions to share information, address best practices, and answer questions

# Even More Ways to Take Action

- Increased Office Hours offered by DSO to international students
- Mandatory visa advising and planning sessions (can be in person or video chat)
- Provide a climate of openness to international students, where they feel comfortable to discuss legal issues and ask questions
- Audit of DSO reporting procedures to SEVIS
- Create and publicize a standard school policy on managing students who have immigration crisis, criminal arrest, termination, OOS, etc.

# CAUTION – Beware of Giving Legal Advice

- Unless the DSO or other Student Advisor is a licensed U.S. attorney, they cannot give legal advice
- Even “simple” decisions and completing DHS forms can be considered legal advice
- Immigration issues are very specialized, so a university’s general counsel may not be qualified to address these issues



# When to refer a student to an immigration lawyer?

- Student is terminated and has questions about reinstatement eligibility
- Student is OOS and has questions about consular processing to get new visa
- To determine whether student's activity *renders them OOS* under the new memo
- Arrested by DHS or law enforcement
- OPT/CPT eligibility questions
- Post-degree visa planning

# Questions? Want more information?

- Contact the Pauline Schwartz Law Firm regarding:
- Immigration advising services tailored to the needs of your campus
- Confidential individual student immigration consultations
- On-campus and video conference workshops for students, college administrators, and advisors



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