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F/ J Unlawful Presence Memo Enjoined

On May 3, 2019, a Federal Court issued an injunction in *Guilford College v. McAleenan* against the Department of Homeland Security's policy memoranda recalculating the accrual of unlawful presence for F, J and M nonimmigrants, including foreign students and exchange visitors. USCIS is now enjoined from implementing the new policy.

The original policy memoranda would have recalculated how unlawful presence is accrued by these visa holders. Instead of unlawful presence occurring when the Department of Homeland Security notifies the visa holder of the violation, it would occur retroactively, without formal notification, when the violation occurred. Immigrant advocates argue that this recalculation would unfairly threaten the status of foreign students, who may be unaware that a violation has occurred. In fact, the Court stated that the Plaintiffs in the case were "likely to suffer irreparable harm absent entry of a preliminary injunction." The consequences of unlawful presence are indeed serious: a foreign national who accrues more than 180 days but less than one year of unlawful presence is subject to a three-year ban from reentering the United States. A foreign national who accrues more than one year of unlawful presence is subject to a ten-year ban from reentering the United States.

The Plaintiffs in the case claimed that USCIS had released the new policy in violation of the Administrative Procedure Act ("APA"), having failed to adhere to the APA's public notice and comment process. Secondly, the Plaintiffs argued that the policy was in violation of the Immigration and Nationality Act and Due Process. As a result, in addition to protecting the integrity of F-1/J-1 student and exchange visitor programs, the injunction may also protect against future USCIS policy memos that fail to adhere to the APA notice and comment procedure.