Practice Alert: 30/60 Day Rule Eliminated from FAM Provisions on "Misrepresentation"

On September 1, 2017, the Department of State (DOS) updated the Foreign Affairs Manual (FAM) with new guidance on the term "misrepresentation" for purposes of determining inadmissibility under INA §212(a)(6), which provides:

> *Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act, is inadmissible.*

Specifically, 9 FAM 302.9-4(B)(3)(g) and (h) have been substantially revised, the "30/60 Day Rule" has been eliminated, and new sections regarding status violations or "inconsistent conduct" within 90 days of entry, and after 90 days of entry have been added. The changes articulated in the FAM can have potentially significant consequences for individuals who apply for adjustment of status or change of status after entering the United States on a nonimmigrant visa or temporary basis.

What Activities Will Trigger the Application of the 90-Day Rule and How Has This Changed from the 30/60-Day Rule?

Though the wording is slightly different, both the former FAM guidance and the new FAM guidance describe the following actions that are sufficient to trigger the application of the rule:

- Engaging in unauthorized employment;
- Enrolling in a full course of academic study without authorization and/or the appropriate change of status;
- A nonimmigrant in a status prohibiting immigrant intent marrying a USC or LPR 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 changing or adjusting status.

At What Point Does the 90-Day Rule Create a Presumption of Misrepresentation and How Has This Changed from the 30/60 Day Rule?

Under the new 90-Day Rule, a presumption of willful misrepresentation will be applied to a person who violates his or her nonimmigrant status or engages in conduct inconsistent with that status, as described above, within 90 days of entry. This is significantly different from the prior rule, which allowed for such a presumption only if the status violation or conduct occurred within 30 days of entry. Under the prior rule, if the status violation or conduct occurred more

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than 30 days but less than 60 days after entry, no presumption of misrepresentation would apply but if the facts gave rise to a "reasonable belief" that the individual misrepresented his or her intent, he or she would be provided the opportunity to present evidence to the contrary.

What if the Conduct Occurs More Than 90 Days After Entry into the U.S.?

Under the new 90-Day Rule, no presumption of willful misrepresentation arises if the individual violates status or engages in conduct inconsistent with his or her nonimmigrant status more than 90 days after entry into the United States. However, if the facts of the case give rise to a "reasonable belief" that the individual misrepresented the purpose of his or her travel at the time of the visa application or application for admission, rather than providing the opportunity to present evidence to the contrary, the Consular Officer must request an Advisory Opinion.[1]

The FAM is Guidance for DOS Consular Officers. Does This Apply to USCIS Officers Who are Reviewing Adjustment of Status Applications?

As of the date of publication of this Practice Pointer, the USCIS Policy Manual has not been updated to reflect the FAM changes. However, the USCIS Policy Manual states that adjudicators "should keep in mind that the 30/60 day rule is not a 'rule' in the sense of a binding principle of decision. The rule is simply an analytical tool that may be helpful in resolving in a particular case whether a person's actions support of finding of fraud or misrepresentation." The Policy Manual also emphasizes, "[o]fficers must not use Foreign Affairs Manual (FAM) guidance in a denial."

How Might This Impact the Adjudication of Adjustment of Status Applications Filed within 90 Days of Entry?

Although the FAM is not directly applicable to USCIS, and the USCIS Policy Manual has not yet been updated to reflect the new guidance, it is possible USCIS will release parallel guidance in the coming days. AILA members should be careful to counsel clients on the risks of entering into a marriage and taking up residence with a U.S. citizen within 90 days of entry via the Visa Waiver Program or on a nonimmigrant visa that does not allow dual intent. Note, however, that 9 FAM 402.2-4(B)(1) states that "The fiancé(e) of a U.S. citizen or lawful permanent resident (LPR) may … be classified as a B-2 visitor if you are satisfied that the fiancé(e) *intends to return to a residence abroad* soon after the marriage." (Emphasis Added).

How Might This Impact the Adjudication of Change of Status Applications Filed within 90 Days of Entry?

Although the FAM is not directly applicable to USCIS, and the USCIS Policy Manual has not yet been updated to reflect the new guidance, AILA members should be careful to counsel clients on the risks of changing nonimmigrant status within 90 days of entry. Moreover, even if a change of status application that is filed within 90 days of entry is granted by USCIS, clients should be prepared to address questions about whether or not they misrepresented their intentions at the time of their last nonimmigrant visa interview and/or entry into the United States.

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[1] A "reasonable belief" requires the consular officer to have more than a "mere suspicion," but requires less than a "preponderance of the evidence" ("more likely than not").

TABLE OF SIGNIFICANT CHANGES TO 9 FAM 302.9-4(B)(3)

Topic	12-20-2016 Version	NEW 09-01-2017 Version
Reporting Derogatory Information	**(g)(1)(c) …** If you become aware of derogatory information indicating that an alien who has applied to USCIS to adjust to immigrant status or change nonimmigrant status in the United States may have misrepresented his or her intentions to you at the time of visa application or to the immigration officer at the port of entry, you should bring the derogatory information to the attention of the appropriate USCIS office that has jurisdiction over the adjustment or change of status application.	**(g)(1)(b)** If you become aware of derogatory information indicating that an alien in the United States who has a valid visa, may have misrepresented his or her intentions to you at the time of visa application, or to DHS at the port of entry or in a filing for an immigration benefit, you may bring the derogatory information to the attention of the Department for potential revocation. See 9 FAM 403.11-5. If you become aware of derogatory information indicating that an alien in the United States without a valid visa but who is not a Lawful Permanent Resident may have misrepresented his or her intentions to you at the time of visa application, or to DHS at the port of entry or in a filing for an immigration benefit, then you may enter a P6C1 lookout in CLASS with the appropriate information. See 9 FAM 403.10-3(C)(1).
Standard of Proof for Misrepresentation for Failure to Maintain NIV Status	**(g)(1)(d) …** The existence of a misrepresentation must therefore be clearly and factually established by direct or circumstantial evidence sufficient to meet the "reason to believe" standard. Although indeed more flexible than the judicial "beyond reasonable doubt" standard demanded for a conviction in court, a "reason to believe" standard requires that a probability exists, supported by evidence which goes beyond mere suspicion.	**(g)(1)(c)** To conclude there was a misrepresentation, you must have direct or circumstantial evidence sufficient to meet the "reason to believe" standard, which requires more than mere suspicion but less than a preponderance of the evidence.

Elimination of 30/60 Day Rule and Creation of New "Inconsistent Conduct Within 90 Days" Rule	**(g)(2) Applying 30/60 Day Rule When Alien Violates Status:** You should apply the ***30/60***-day rule if an alien states on his or her application for a nonimmigrant visa, or informs an immigration officer at the port of entry (POE), that the purpose of his or her visit is consistent with that nonimmigrant status and then violates such status by: (a) Actively seeking unauthorized employment and, subsequently, becomes engaged in such employment; (b) Enrolling in a full course of academic study without the benefit of the appropriate change of status; (c) Marrying and taking up permanent residence; or (d) 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. **(g)(3) Inconsistent Conduct Within 30 Days of Entry:** If an alien violates his or her nonimmigrant status in a manner described in 9 FAM 302.9-4(B)(3) paragraph g(2) within 30 days of entry, you may presume that the applicant's representations about engaging in status-compliant activity were misrepresentations of his or her intention in seeking a visa or entry. For a finding of an inadmissibility for inconsistent	**(g)(2) Inconsistent Conduct Within 90 Days of Entry:** (a) However, if an alien violates or engages in conduct inconsistent with his or her nonimmigrant status within 90 days of entry, as described in subparagraph (2)(b) below, you may presume that the applicant's representations about engaging in only status-compliant activity were willful misrepresentations of his or her intention in seeking a visa or entry. To make a finding of inadmissibility for misrepresentation based on conduct inconsistent with status within 90 days of entry, you must request an AO from CA/VO/L/A. As with other grounds that do not require a formal AO, the AO may be informal. See 9 FAM 304.3-2. (b) For purposes of applying the 90-day rule, conduct that violates or is otherwise inconsistent with an alien's nonimmigrant status includes, but is not limited to: (i) Engaging in unauthorized employment; (ii) Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status); (iii) A nonimmigrant in B or F 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; or (iv) Undertaking any other

	conduct within 30 days of entry, you must request an AO from CA/VO/L/A. **(g)(4) After 30 Days But Within 60 Days:** If an alien violates his or her nonimmigrant status more than 30 days but less than 60 days after entry into the United States, no presumption of misrepresentation arises. However, if the facts in the case give you reasonable belief that the alien misrepresented his or her intent, then you must give the alien the opportunity to present countervailing evidence. If you do not find such evidence to be persuasive, you must request an AO from CA/VO/L/A. (See 9 FAM 302.9-4(C)(2)).	activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.
Elimination of Post-60 Day Rule and Creation of "Inconsistent Conduct After 90 Days" Rule	**(g)(5) After 60 Days:** If an alien violates his or her nonimmigrant status more than 60 days after admission into the United States, the Department does not consider such conduct alone to constitute a basis for an INA 212(a)(6)(C)(i) inadmissibility.	**(g)(3) After 90 Days:** If an alien violates or engages in conduct inconsistent with his or her nonimmigrant status more than 90 days after entry into the United States, no presumption of willful misrepresentation arises. However, if the facts in the case give you reasonable belief that the alien misrepresented his or her purpose of travel at the time of the visa application or application for admission, you must request an AO from CA/VO/L/A. (See 9 FAM 302.9-4(C)(2)).