

Avoiding Problems Under the 90 Day “Rule”

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Visitors beware: engaging in certain activities within 90 days of entering the U.S. as a visitor can trigger big problems for you later on. A recently enacted but lesser-known policy of the U.S. Department of State (DOS), commonly called the 90-Day “Rule,” can result in charges of misrepresentation or fraud for foreign national visitors applying for a longer-term visa or change of status from within the U.S., or to adjust status to a permanent resident. The chart below highlights a few of the major things to watch out for, and how to avoid problems.

Action: Marrying a U.S. citizen or Lawful Permanent Resident

How it can hurt you: Marrying a U.S. citizen or Lawful Permanent Resident within 90 days of entry as a nonimmigrant in B or F status (or any other nonimmigrant status prohibiting nonimmigrant intent) causes a default presumption that you *actually* intended to immigrate to the U.S. when you entered. U.S. government agents may presume that you misrepresented your intent at the time of entry, making you inadmissible to the U.S. and ineligible to adjust your status and obtain a Green Card based on your marriage (unless you obtain an extreme hardship waiver).

Possible solutions:

- **Explore a K-1 (fiancée) visa** if you wish to marry a U.S. citizen. This would allow you to enter the U.S. legally, to marry your intended spouse within 90 days of entering the U.S. on the visa.
- **Obtain a nonimmigrant visa** before coming to the U.S., which would allow you to live and work in the U.S. Some nonimmigrant options (e.g., H-1B and O) allow for dual intent, meaning that you can seek permanent residence while holding and traveling on the visa with a pending immigrant visa petition and/or adjustment of status application, without potential repercussions to your nonimmigrant status.
- If your visa allows you to stay in the U.S. longer than 3 months and you decide to get married after 90 days of original entry (e.g., while still in visitor status), be prepared to be questioned heavily during your adjustment of status interview as to your original intent when entering as a nonimmigrant. If you **provide evidence that your intent to marry the U.S. citizen or legal permanent resident arose after you entered the U.S.**, it will be less likely that you will be charged with material misrepresentation or fraud based on your intent at the time of entry.
- Instead of applying to adjust your status while in the U.S., apply for your immigrant visa based on your marriage, but **apply to obtain lawful permanent resident status (a Green Card) through Immigrant Visa Processing (IVP)** at a U.S. Consulate or Embassy abroad, rather than through adjustment of status from within the U.S. Most individuals can travel to the United States while the immigration visa petition is pending, although there is always a risk that an immigration officer could decide they think you have immigrant intent, and deny your entry. Importantly, you would still need to maintain lawful status when entering and staying in the U.S. during the pendency of your immigrant visa petition and IVP at a U.S. Consulate/Embassy abroad.

Action: Enrolling in an academic study or exchange visitor program

How it can hurt you: Enrolling in a program of academic study or an exchange visitor program within 90 days of

entry as a visitor raises a presumption that you intended to stay longer than your permissible entry when you entered on your visitor visa. U.S. government agents may presume that you misrepresented your intent at the time of entry, making you inadmissible to the U.S. and ineligible to adjust your status to another nonimmigrant status such as F-1 or J-1.

Possible solutions:

- **Plan ahead.** Wanting to expand your mind and your opportunities is an admirable quality, but proper planning is key to being able to take advantage of the many programs available in the U.S. To prevent problems, you could apply to a program ahead of time and get an F-1 student visa, or apply to participate in a J-1 exchange visitor program, which will allow you to engage in the program without raising questions regarding your character or trustworthiness that could impact your short- or long-term U.S. immigration options.

ACTION: Engaging in U.S. employment

HOW IT CAN HURT YOU: Employment authorization of foreign nationals in the U.S. is highly restricted. Engaging in unauthorized employment in the U.S.—within or outside of the initial 90 days of entry in nonimmigrant status—can be an enormous problem, resulting in:

- Removal (deportation)
- Ineligibility for an extension and/or change of nonimmigrant status
- Ineligibility for a nonimmigrant visa, now or in the future
- Inability to adjust your status to permanent resident at any time, now or in the future
- Ineligibility for future entries under ESTA or visa waiver

POSSIBLE SOLUTIONS:

There is a clear right and wrong way to do this. If you want to work in the U.S., there are several ways to achieve this goal legally, whether your employment is only temporary or on a more permanent basis. A few of the options available to foreign nationals include:

- **Find a U.S. business to sponsor you** for a visa, such as an E-1, E-2, H-1B, TN, L-1, O-1, etc.
- **Work for a company abroad that has a U.S. affiliate, subsidiary, parent or branch** to which you could possibly transfer
- **Invest in a U.S. business or create a business in the U.S.**, which can create immigrant visa opportunities, as well as nonimmigrant visa opportunities for foreign nationals from certain countries
- **Engage in substantial trade with the U.S.** (e.g., trade goods, services, international banking, insurance, transportation, tourism, technology and its transfer or engage in some news-gathering activities), which can create nonimmigrant visa opportunities for foreign nationals from certain countries
- Apply to obtain a degree through a full-time program with a U.S. institution of higher education and enter the U.S. on a related F-1 visa, which can lead to the opportunity to work in a related field during or upon completion of the course of study.

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