The ‘90 day rule’: U.S. complicates stance on determining preconceived intent

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Last year, the U.S. Department of State (DOS) revised its guidance to U.S. consular officers regarding a long-held policy on how it determines inadmissibility under the U.S. Immigration and Nationality Act s. 212(a)(6)(C), which holds any alien inadmissible where he or she:

“… 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.”

Previously, a long-held 30-60 day “rule” meant that if — within 60 days of entering the country — a client engaged in any activity inconsistent with his or her initial visa classification or status, he or she could be (1) found to be inadmissible to the U.S., if the activity took place within 30 days of entry, or (2) found to be inadmissible if the activity took place after 30 but within 60 days of entry and a U.S. consular officer had a “reasonable belief” of misrepresentation that the foreign national could not disprove.

But in this era of increasingly black-and-white policy, new guidance has replaced the 30/60 day rule with a 90 day “rule.” Under this new analytical tool, anyone who engages in activity inconsistent with their status at any point in the 90 days following their entry to the U.S. can be found to have willfully misrepresented their intentions when applying for their visa and/or entering the U.S. This can result in a lengthy bar to admission to the U.S., among other consequences.

Although the 90 day rule is a DOS policy used in determining foreign nationals’ eligibility for visas, the agencies of the Department of Homeland Security (DHS) and its branches may consider this when making their own determinations and adjudicating cases. As such, best practice would be to consider the policy in helping clients plan their short- and long-term strategies for travel and immigration to the U.S. — even where they will be dealing with a different government agency than the DOS.

This issue can be a particularly difficult one for people who come to visit, but whose intent to stay longer or for alternate purposes changes during their time in the U.S. For example, a Canadian — “Alec” — receives a visitor visa to come to the U.S. to visit his (U.S. citizen) girlfriend, “Emily.” At the time of entry, the relationship was informal; however, over the course of time, Alec and Emily fall in love and decide to get married.

Under the prior 30/60 day rule, if they were married and established a home in the U.S. within 30 days of Alec’s entry to the U.S., the U.S. government would presume that Alec lied about his lack of intent to stay in the U.S. when he entered (i.e., he would be guilty until proven innocent). If he could not rebut this presumption through evidence

to the contrary, it would likely result in his being denied a green card. He could also have been found to have willfully misrepresented his intentions —possibly resulting in a bar to re-entry to the U.S. for the rest of his life (unless he was granted a waiver).

If Alec and Emily were married between 30-60 days after Alec's entry, there would not be an automatic presumption that Alec misrepresented his intent on entry. However, at the time of his interview, the U.S. immigration officer is likely to subject the application to a higher degree of scrutiny — i.e., the officer will likely specifically ask questions about Alec's intent at the time of entry. When did he intend to return? Did he have a job and residence to return to abroad? When did the couple make the decision to be married?

Under the current rule, there is no period of rebuttable presumption of misrepresented intent. Instead, the bar has moved from 30 days to 90 days; within the full 90 days of entry to the U.S., any activity that brings into question the intent of a nonimmigrant visa holder may result in a presumption of misrepresentation or fraud. Activities that could trigger findings of fraud or misrepresentation may include:

- Engaging in unauthorized employment;
- Enrolling in a program of academic study while in a status that does not permit this;
- Marrying a U.S. citizen or lawful permanent resident and taking up residence in the U.S., while in a nonimmigrant status; and
- Engaging in any other activity requiring a change of status or adjustment of status from "visitor," without first obtaining the change or adjustment of status.

There is no presumption of willful misrepresentation if one engages in any of the above activities after 90 days. However, a September 2017 DOS field cable to consular offices summarizing the 90 day rule does state that "if facts in the case give [the consular officer] a reason to believe that the alien misrepresented his or her purpose of travel at the time of the visa application or application for admission, [the consular officer] must request an [Advisory Opinion] from [the Visa Office of Advisory Opinions] CA/VO/L/A."

In light of this new administrative tool being used by the DOS (and potentially other immigrationrelated agencies, moving forward) to root out fraud and misrepresentation among nonimmigrants in the U.S., lawyers must be vigilant in helping foreign nationals to protect themselves from even inadvertent violations of their nonimmigrant status.

Informing clients who are considering a move to the U.S. of the heightened risks associated with entering as a visitor and changing or adjusting their status within 90 days of entry is key. Help them to determine other, legal ways to achieve their goals, such as applying for a fiancée visa or exploring creative means to allow them to apply for advance permission to work in the U.S. in one of the available employment-related visa categories.

While it might take clients longer to get to the United States, advance planning and following the letter of the law may give them a better long-term way to stay in the U.S. to work, to study, or to reside with their spouse.

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