

Overstay and Unlawful Presence provisions

In September 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which imposed penalties on those who stay in the United States beyond the period authorized by the Attorney General. Two new sections of the Immigration and Nationality Act were created to define these penalties:

- INA § 222(g) "Visa Overstays" and
- INA § 212(a)(9)(B) "Aliens Unlawfully Present"

Interpreting when and how these two provisions apply to a specific individual is complicated, but critically important. Regulations have not yet been written to fully define the applicability of the statutory provisions; however, the penalties that could apply are significant. DHS has not yet issued any guidance that supersedes prior INS guidance. Individuals needing legal advice should be referred to an immigration attorney.

The challenge of interpreting the law

Advising individuals on the applicability of INA § 222(g) and § 212(a)(9)(B) is particularly challenging because regulations have not yet published to comprehensively define when those two statutory provisions should apply. In the meantime, INS and DOS issued internal memoranda and cables to their field offices, to provide central office guidance on how field offices should interpret and apply the law. The explanations and interpretations of INA § 222(g) and § 212(a)(9)(B) found here are based principally on these internal agency communications. One should note, however, that although an agency's interpretation of a law that it is charged with enforcing or administering does carry great weight, these memoranda and cables are not considered law.

Nonimmigrant status violations and I.N.A. § 222(g) and I.N.A. § 212(a)(9)(B)

Not all violations of nonimmigrant status will subject an individual to the penalties of INA § 222(g) and § 212(a)(9)(B) (even though any violation of a term or condition of nonimmigrant status will make an alien "out of status" and subject to deportation under INA § 237(a)).

INA § 222(g) and § 212(a)(9)(B) are triggered only in the specific circumstances.

	222(g)	212(a)(9)(B)
Keywords	<ul style="list-style-type: none">• Visa overstay; overstay• Cancellation of visa• Visa shopping	<ul style="list-style-type: none">• Unlawful presence• 3- and 10-year bars
Penalties	<ul style="list-style-type: none">• Cancellation of the nonimmigrant visa used by alien to enter the United States• Alien permanently restricted to applying for future nonimmigrant visas at a consular office in country of nationality, unless extraordinary circumstances exist	<ul style="list-style-type: none">• 3-year bar to readmission to the United States if alien voluntarily departs the United States after being unlawfully present for more than 180 consecutive days, but less than 1 year• 10-year bar to readmission to the United States if the alien departs (voluntarily or involuntarily) after being unlawfully present for 1 consecutive year or more
Triggering events	<ul style="list-style-type: none">• Entered on a nonimmigrant visa; and• Remained in the United States "beyond the period of stay authorized by the Attorney General"	<ul style="list-style-type: none">• Present in the United States "after the expiration of the period of stay authorized by the Attorney General"; or• Entered the United States without being admitted or paroled; and• Remained unlawfully present for more than 180 consecutive days; and• Departed the United States

INS and DOS developed a unified interpretation of a key triggering event for purposes of both INA § 222(g) and § 212(a)(9)(B): an alien is considered to have stayed in the United States "beyond the period of stay authorized by the Attorney General" [INA § 222(g)(1)] or "after the expiration of the period of stay authorized by the Attorney General" [I.N.A. § 212(a)(9)(B)(ii)] only under the following circumstances:

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| Unified definition of a key triggering event | <ol style="list-style-type: none">1. The alien has remained in the United States after the expiration date recorded on Form I-94, without having applied for an extension or change of status; or2. An immigration judge finds that a status violation has occurred; or3. INS (DHS) determines in the course of adjudicating an application for an immigration benefit that there has been status violation, and the request for the benefit is denied<ul style="list-style-type: none">○ For those with a "D/S" I-94, only items 2 and 3 trigger the provision, since there is no expiration date on the I-94. |
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I.N.A. § 222(g) visa overstays

(g)(1) In the case of an alien who has been admitted on the basis of a nonimmigrant visa and remained in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay.

(2) An alien described in paragraph (1) shall be ineligible to be readmitted to the United States as a nonimmigrant, except--

(A) on the basis of a visa (other than the visa described in paragraph (1) issued in a consular office located in the country of the alien's nationality (or, if there is no office in such country, in such other consular office as the Secretary of State shall specify); or

(B) where extraordinary circumstances are found by the Secretary of State to exist.

Effective dates of 222(g)

INA § 222(g) applies to anyone who entered the United States on a nonimmigrant visa and "stayed beyond the period authorized," no matter when the overstay occurred. Thus, someone whose I-94 expired before September 30, 1996, when the law went into effect, is still considered an overstay and thus is subject to the penalties of the law. Also, a ruling by an immigration judge or a USCIS (or a DHS) officer that the individual violated status, even if such a violation occurred prior to September 30, 1996, would result in application of the overstay penalties.

Penalties under 222(g)

If an alien is determined to be a "visa overstay" under this section, he/she is subject to the following penalties:

Cancellation of visa

The law provides that the visa of individuals who overstay is automatically voided and all future nonimmigrant visas must be obtained in the country of nationality, except for those who are eligible for an exemption due to "extraordinary circumstances." If the individual has more than one visa in the passport, only the visa that was used to enter the country is considered to be void, but when the other visa expires, a new visa application must be made in the home country (DOS cable, June 1999). It is important to remember that I.N.A. § 222(g) can only be used to deny a visa if the applicant is a third-country national applying in a country other than the home country. If an individual who is subject to I.N.A. § 222(g) applies for a visa at a U.S. consular office in his or her home country, § 222(g) is not a basis for denial of the visa.

Restriction on place of future visa applications

If subject to INA § 222(g), the alien is permanently limited to applying for future nonimmigrant visas only at a U.S. consular office located in the country of his or her nationality, unless the Department of State finds that "extraordinary circumstances" exist.

Extraordinary circumstance exceptions

A DOS final rule implementing the overstay provisions defines the general parameters of when extraordinary circumstances might be found in individual cases:

Extraordinary circumstances may be found where compelling humanitarian or national interests exist or where necessary for the effective administration of the immigration laws. [This regulation further states that] extraordinary circumstances shall not be found upon the basis of convenience or financial burden to the alien, the alien's relative, or the alien's employer.

The Department of State has created several "blanket" extraordinary circumstances categories, which cover any § 222(g)-subject alien who falls into one of them. For situations not covered by one of the "blanket" exemptions listed below, consular officers do not have the authority to grant an individual extraordinary circumstances exemption without first obtaining an advisory opinion from the Department of State Visa Office. In making the request for an advisory opinion a consular officer may recommend that an exemption be granted, but must in all cases request an advisory opinion from the Visa Office and await the Visa Office's response before granting the exception and issuing the visa.

Blanket extraordinary circumstances exemptions

Department of State regulations and guidance provide several important "blanket" exceptions to the place-of-visa-application restriction. If an alien subject to I.N.A. § 222(g) falls under one of the following categories, he or she is not required to return to his or her country of nationality to apply for a visa (although individual categories may restrict application to another single country if so noted):

1. Alien physicians serving in underserved areas in the United States under I.N.A. § 214(l), and who filed a timely application for a waiver of the J-1 two-year home country physical presence requirement and/or an H-1B petition, may claim the exception. This provision applies to individuals whose period of stay expired while applications that had been filed before the authorized period of stay expired--and that were subsequently approved--were pending. [22 C.F.R. § 41.101(c)(1)]
2. Individuals who are a resident of a country other than the country of citizenship can also apply for visas in their country of residence. [22 C.F.R. § 41.101(c)(3)]
3. Nationals and residents of a country in which there is no United States consulate must apply for a visa at the consulate designated by the Department of State to accept such applications for individuals from that country. [22 C.F.R. § 41.101(c)(4)]
4. Dual nationals must apply in their country of residence. [22 C.F.R. § 41.101(c)(5)]
5. H-1B applicants denied change of status because the H-1B cap was reached, provided they did not work without authorization either before the application was filed or while it was pending, may claim the exception. [Cable 99 State 105097, June 7, 1999]

A stateless person is considered to be a national of the country that issued the alien's travel document, and must apply in that country.

Who is subject to 222(g)?

222(g) overstay provisions apply only to the following aliens:

- Aliens who entered the United States on the basis of a nonimmigrant visa stamp in their passport; and who
- Have "stayed beyond the period of time authorized by the Attorney General."

Alien must have entered the United States on the basis of a nonimmigrant visa

I.N.A. § 222(g) clearly states that the provision applies only to "an alien who has been admitted on the basis of a nonimmigrant visa..."

Aliens who enter the United States in ways other than with a particular nonimmigrant visa in their passport are not affected by § 222(g). USCIS and DOS clarified that the following individuals are not subject to overstay penalties, since they did not enter the United States on a nonimmigrant visa:

- Individuals who come on immigrant visas;
- Those who enter the United States under a visa waiver program (WB or WT status on the Visa Waiver Pilot Program or Guam Visa Waiver Program);
- Individuals who are not required to obtain visas under 8 C.F.R. § 212.1(c) (e.g., Canadians);
- Those who enter without inspection; and
- Those who are admitted to the United States in parole status.

It is important to understand that individuals in these categories who stay longer than the authorized period of stay are still in violation of their status, but they are not subject to I.N.A. § 222(g).

Alien must have "overstayed" his or her period of admission

If an alien entered the United States on a nonimmigrant visa, then he or she must also be considered to have "remained in the United States beyond the period of stay authorized by the Attorney General" in order for the I.N.A. § 222(g) penalties to apply.

It is very important to understand that the phrase "remained in the United States beyond the period of stay authorized by the Attorney General" has a specific definition for purposes of § 222(g). INS and DOS jointly interpreted this phrase to mean only the following:

1. The alien has remained in the United States after the expiration date recorded on Form I-94; or
2. An Immigration Judge finds in the course of removal proceedings that there has been a status violation, resulting in the termination of the alien's period of authorized stay; or
3. INS (and now presumably DHS) determines in the course of adjudicating an application for an immigration benefit that there has been a status violation, resulting in the termination of the alien's period of authorized stay.

Status violations other than staying beyond the date on Form I-94 (e.g., unauthorized employment) will make a person fall out of status, but will not subject an alien to I.N.A. § 222(g) unless either an immigration judge or USCIS (DHS) makes a formal determination that a status violation has occurred, as per items 2 and 3 above.

Duration of Status (D/S) cases

F, G, J, A, and I nonimmigrants are usually admitted to the United States for a period known as "duration of status," indicated by the notation "D/S" on their Form I-94, rather than a specific expiration date. For those with a "D/S" I-94, there is no I-94 date to stay beyond. A stay beyond the date listed on Form I-20 ID or Form DS-2019 (and any applicable grace period), although considered a violation of status, is not considered to be an overstay for purposes of § 222(g) if the alien was admitted for D/S on his or her I-94. A nonimmigrant admitted for D/S will be considered an overstay under § 222(g) only if:

1. An immigration judge finds in the course of removal proceedings that the individual has violated status, resulting in the termination of the alien's period of authorized stay; or
2. USCIS (and now presumably DHS) determines in the course of adjudicating an application for an immigration benefit that there has been a status violation, which results in the termination of the alien's period of authorized stay.

In addition to D/S cases, other categories are treated in particular ways for § 222(g) purposes. USCIS considered the following individuals not to be subject to § 222(g) penalties:

- Those who apply for visas in the following categories: A-1, A-2, C-2, C-3, G-1, G-2, G-3, G-4, and NATO 1 through NATO-6;
- Those who have been granted Temporary Protected Status (TPS) before the expiration of their authorized stay; and
- Those who violate status in any other way other than staying beyond the period authorized, unless the status violation was determined in proceedings before an Immigration Judge or by INS (DHS) in the course of an application for an immigration benefit.

I.N.A. § 222(g) and applications for extension or change of status

If a nonimmigrant with a date-certain I-94 applies for an extension of stay or a change of status, he or she is generally permitted to remain in the United States while the application is pending, even if his or her I-94 expires during the pending period. Since, strictly speaking, the I-94 expires, however, government guidance was necessary concerning the applicability of § 222(g) in that circumstance.

The most recent government guidance is from DHS; it defines the entire time during which an application for an extension or change of status is pending "as a period of stay authorized by the Attorney General," provided the following conditions are met:

1. The application was filed in a timely manner (i.e., before the expiration of the current period of authorized stay);
2. The application is nonfrivolous (i.e., has an arguable basis in law or fact and was not filed for an improper purpose); and
3. The applicant has not engaged in any unauthorized employment before the application was filed or while it was pending.

Effect of departure from the United States while application for extension or change of status is pending

Nonimmigrants who apply for extension or change of nonimmigrant status but who leave the United States before a decision on the application is made by USCIS are not subject to § 222(g) if they were in a period of stay authorized by the Attorney General prior to their departure from the United States.

Nonimmigrants who apply for an extension or change of nonimmigrant status but who leave the United States after their I-94 expires but before a decision on the application has been issued are not subject to § 222(g) if they can establish that:

1. The application was filed in a timely manner (i.e., before the expiration of the current period of authorized stay);
2. The application was nonfrivolous; and
3. The applicant did not engage in any unauthorized employment before the application was filed or while it was pending.

Effect of I.N.A. § 222(g) on late filing of applications

If an application for an extension or change of status is filed after the date of expiration of the I-94, USCIS has the discretion to approve the late filing, provided that certain conditions are met. (see 8 C.F.R. § 214.1(c)(4) for criteria for late extensions; see 8 C.F.R. § 248.1(b) for criteria for late change of status applications). Applications that are accepted late are eventually approved nunc pro tunc ; that is, approval is retroactive to the date of the previously authorized stay. Aliens whose applications are approved in this circumstance are not subject to I.N.A § 222(g).

Nevertheless, an alien whose late application is accepted for filing by USCIS and who departs while the application is pending may not be able to take advantage of the travel-during-pendency interpretation, since the application was not filed in a timely fashion.

Advisers should instruct those who intend to depart from the United States after the expiration of the I-94, but before an adjudication is made on a timely filed application for extension or change of status, to keep copies of the application, the receipt notice, checks, and I-94s. Also, such individuals should have evidence of their ability to support themselves while the application was pending to prove that they did not need to work. This documentation may have to be presented to a DHS or consular officer to prove that the alien was in a period of authorized stay prior to his or her departure from the United States.

I.N.A. § 212(a)(9)(B) unlawful presence

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

-is inadmissible.

(ii) Construction of unlawful presence. -For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

Who is considered to be "unlawfully present"?

For purposes of I.N.A. § 212(a)(9)(B), aliens present in the United States are divided into two categories:

- Aliens present in the United States who were not officially admitted or paroled into the United States by an immigration inspector (entered without inspection); and
- Aliens who were admitted to the United States after being inspected by an immigration officer, but who remain in the United States "after the expiration of the period of stay authorized by the Attorney General."

Someone who enters the United States without being inspected and admitted or paroled by an immigration officer (for example, someone who enters without inspection), is considered to be "unlawfully present" for purposes of 212(a)(9)(B) as soon as he or she enters the United States.

For those who are admitted to the United States by an immigration officer, applicability of 212(a)(9)(B) depends on whether the alien is present in the United States "after the expiration of the period of stay authorized by the Attorney General." Neither DHS nor DOS have published regulations defining this key term, but they have released written guidance outlining their interpretations of this section of law:

Aliens admitted until a specific date begin accruing unlawful presence if:

1. The alien remains in the United States after the expiration date recorded on Form I-94; or
2. An immigration judge finds in the course of exclusion, deportation or removal proceedings that a status violation has occurred, resulting in a termination of the alien's period of authorized stay; or
3. INS (DHS) determines in the course of adjudicating an application for an immigration benefit that there has been a status violation, resulting in a denial of the benefit.

Nonimmigrants admitted to the United States for "duration of status" (D/S)

F and J nonimmigrants, as well as I nonimmigrants (information media representatives) and certain A nonimmigrants, are usually admitted to the United States for a period known as "duration of status," as indicated by the notation "D/S" on their Form I-94. When a nonimmigrant is admitted for duration of status, no expiration date appears on Form I-94. For those with a "D/S" I-94, only conditions 2 and 3 (above) trigger § 212(a)(9)(B) since there is no expiration date on the I-94. A nonimmigrant admitted for D/S will therefore be considered unlawfully present for purposes of § 212(a)(9)(B) only if:

- An immigration judge finds in the course of exclusion, deportation or removal proceedings that a status violation has occurred, resulting in a termination of the alien's period of authorized stay; or
- INS (DHS) determines in the course of adjudicating an application for an immigration benefit that there has been a status violation, resulting in a denial of the benefit.

Penalties for unlawful presence

If an alien is determined to be "unlawfully present" under I.N.A. § 212(a)(9)(B), he or she is subject to the following penalties:

- 3-year bar to readmission to the United States if he or she voluntarily departs the United States after being unlawfully present for more than 180 consecutive days but less than 1 year
- 10-year bar to readmission to the United States if he or she departs (voluntarily or involuntarily) the United States after being unlawfully present for 1 consecutive year or more

I.N.A. § 212(a)(9)(B)(i)

Requirement for departure from the U.S. for penalty to apply

An alien's departure from the United States is required for the § 212(a)(9)(B) penalty provisions to apply. In the case of the 3-year bar, the departure must be voluntary in order for the 3-year bar to apply. If a person is removed from the United States involuntarily (e.g., through deportation), the 3-year bar will not apply despite the fact that the person has accumulated between 180 and 364 days of unlawful presence (although separate bars to admission apply to those who are deported). Any departure, voluntary or otherwise, will cause the 10-year bar to apply if an individual has accumulated 365 consecutive days or more of unlawful presence.

Counting days of unlawful presence

For purposes of the 3- and 10-year bars, days of unlawful presence are not counted in the aggregate; rather, unlawful presence must be accrued in consecutive days for the penalties of § 212(a)(9)(B) to apply.

Time that does not count towards unlawful presence

There are certain situations in which the days of presence in the United States do not count towards unlawful presence. Those circumstances are outlined below:

- Days prior to the individual's 18th birthday
- Periods during which an individual had a bona fide application for asylum pending (unless the individual engaged in unauthorized employment during the period when the application was pending);
- Time when the individual was a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990;
- Those who qualify as a battered spouse or child under I.N.A. § 212(a)(6)(A)(ii), if there was a substantial connection between the battery or cruelty and the alien's violation of nonimmigrant visa terms;
- The time during which counting of unlawful presence is "tolled" for good cause. This is commonly called the "tolling provision".

Tolling and the effect of 212(a)(9)(B) on pending applications for extension or change of status

If an applicant's Form I-94 expires while a timely filed application for extension or change of status is pending with USCIS, I.N.A. § 212(a)(9)(B)(iv) allows "tolling for good cause," which provides up to 120 days when unlawful presence does not accrue during the pendency of the application. To qualify for the tolling provision, the individual must

- be lawfully admitted or paroled into the United States;
- have timely filed a nonfrivolous application for a change of status or extension of status with USCIS;
- not have engaged in unauthorized employment before or while the application was pending with USCIS.

USCIS considers an application "nonfrivolous" if it "has an arguable basis in law and fact, and was not filed for an improper purpose."

For applications that take longer than 120 days to be adjudicated

INS opined that Congress selected the 120-day period assuming that all extension or change of status applications could be decided within that time. Recognizing that applications for extension or stay or change of status in reality may take longer than 120 days to adjudicate, INS decided to interpret the entire period of pendency of such applications as a period "authorized by the Attorney General." This interpretation effectively covers not only the 120-day statutory tolling period, but continues until a decision is made on the application.

Effect of decision on extension and change of status on unlawful presence

An approval of an application for an extension of stay or a change of status results in a new period of stay, which is made retroactive to the expiration of the previous period of stay. In the case of an approval, no unlawful presence accrues.

If a timely-filed application for a change or extension of status is denied because it was frivolous or because the alien engaged in unauthorized employment, then unlawful presence begins to accrue as follows:

- For those with a date-certain I-94, unlawful presence begins on the date of expiration of the I-94.
- For those with duration of status, unlawful presence begins to accrue on the date the application is denied.

If an application is not filed in a timely manner, and is denied for any reason, unlawful presence begins to accrue as of the date of the expiration of the I-94 for those with a date-certain I-94. For those admitted for duration of status, unlawful presence begins to accrue on the date the application is denied.

Applications filed late, but accepted for processing

If an application for change or extension of status is filed late, but accepted for processing (see 8 C.F.R. § 214.1(c)(4) for criteria for late extensions; see 8 C.F.R. § 248.1(b) for criteria for late change of status applications), no days of unlawful presence accrue if the application is approved. If the application is denied, unlawful presence will accrue starting on the date the Form I-94 expired (for date-certain I-94 cases) or the date of the denial (for D/S I-94 cases).

Effect of departure from the United States while application for extension or change of status is pending

Nonimmigrants who apply for extension or change of nonimmigrant status but who leave the United States before a decision on the application is made by USCIS are not subject to the counting of days of unlawful presence if they were in a period of stay authorized by the Attorney General prior to their departure from the United States.

Nonimmigrants who apply for an extension or change of nonimmigrant status but who leave the United States after their I-94 expires but before a decision on the application has been issued are not subject to the counting of days of unlawful presence if they can establish that:

1. The application was filed in a timely manner (i.e., before the expiration of the current period of authorized stay);
2. The application was nonfrivolous; and
3. The applicant did not engage in any unauthorized employment before the application was filed or while it was pending.

Other periods during which unlawful presence time is not counted

INS had also designated the following "periods authorized by the Attorney General." Time spent in these categories, then, is not counted as unlawful presence:

- Voluntary departure
- Refugee status
- Asylee status
- Grants of withholding or deferral of removal under the United Nations Convention Against Torture
- Legalization and special agricultural worker applications for lawful temporary residence which are pending an administrative appeal
- Grants of withholding or suspension of deportation, or cancellation of removal
- Applications for temporary and permanent residence by Cuban-Haitian entrants under § 202(b) of Public Law 99-603, through administrative appeal
- Grants of Temporary Protected States (TPS) and Deferral of Enforced Departure
- Properly filed applications for adjustment of status

Adjustment of status applicants

INS's designation of the period that an adjustment of status application is pending as a "period of stay authorized by the Attorney General" gives protection to adjustment applicants that is similar to that given nonimmigrants who have applied to extend or change their nonimmigrant status. Therefore, if a nonimmigrant applies for adjustment of status under I.N.A. § 245, and his or her nonimmigrant status expires while the adjustment application is pending, no days of unlawful presence are accumulated until the application is adjudicated, provided the individual does not work without authorization.

Waiver of bars to admission

There is a waiver allowed for a permanent resident who is the spouse, son, or daughter of a U.S. citizen or permanent resident. To be eligible, the permanent resident must show that being barred from admission to the United States would result in extreme hardship to the citizen or permanent resident spouse or parent [I.N.A. § 212(a)(9)(B)(v)] It appears that no waivers are available to nonimmigrants.

Avoiding unlawful presence and overstays

There are certain situations that are more likely to result in exposure to overstay or unlawful-presence penalties. Because many in the population of students and scholars are admitted for duration of status, it is easy to miss situations where individuals are admitted for a specific date.

Such situations create a greater risk of staying beyond the period authorized. A common date-certain situation is that of the H-1B, but temporary workers cannot continue working beyond the date on the I-94 if they have not submitted an application for an extension. Thus, most institutions have systems in place to identify the expiration dates of H-1Bs in advance.

F-1s or J-1s who receive an I-515 after a visit outside the United States are at great risk of becoming overstays and unlawfully present. These individuals have only 30 days to submit an application for an extension to USCIS, and the expiration date of the I-94 is usually near the beginning of the semester, at a time when students and scholars are likely to be occupied with other concerns. Advisers should warn F-1s and J-1s about the possibility of the I-515 in advance of travel to prevent the expiration of the I-94.

Not all denials of applications by a USCIS officer will subject someone to the overstay and unlawful-presence penalties. The USCIS must make a ruling that the application was denied because of a violation of status. Thus, someone who applies for permission to work due to economic hardship may be denied because the application did not show a change in the applicant's financial circumstances since he or she became an F-1. That student would not be subject to the overstay and unlawful-presence provisions. However, if the student is denied because he or she was found to have violated status because of previous unauthorized employment, that student would be considered an overstay and would begin to accrue days of unlawful presence from the date of the denial.

Because the penalties are so severe, it is important to advise students and scholars about unlawful presence and overstay penalties. When a student or scholar has violated his or her status, the adviser's discussion of options should include an exploration of whether the student or scholar may become subject to overstay or unlawful-presence penalties if the proposed application is not approved.

For example, someone with "D/S" who has failed to extend his or her I-20 in an appropriate time frame is not automatically considered to be an overstay or unlawfully present. However, if an application for reinstatement is made to USCIS and that application is denied, it is likely that the student will be considered an overstay and will begin to accrue days of unlawful presence. If that same student did not make the application to USCIS, but simply left the United States and made a new entry, he or she would not be subject to any of the overstay or unlawful-presence penalties. But, there may be certain risks associated with leaving the United States to make a new entry, particularly when a new visa is required. Thus, the adviser must be able to outline the risks associated with the various options available to students and scholars. In many cases, the student or scholar should be advised to seek the assistance of qualified immigration counsel for advice.