TO ADJUST OR NOT TO ADJUST, THIS IS THE QUESTION WE ASK OF THEE
OVERVIEW OF PROCEDURES AND TIMELINES

by Gerald E. Burns*

SCOPE

Many times, understanding the forms, fees, filing procedures, and filing locations for applying for an immigration benefit can be just as complicated as the highly complex eligibility requirements involved. Filing errors can lead to costly delays and, in some cases, more severe penalties including possible attorney liability. Filing procedures are in constant transition so it is incumbent for immigration practitioners to be mindful of current trends and changes. This is particularly true with Adjustment of Status.

Adjustment of Status is a mechanism to obtain Lawful Permanent Residence from inside of the United States. Adjustment of Status is sought by filing an I-485 Application for Adjustment of Status before U.S. Citizenship and Immigration Service (USCIS) or by filing a “defensive” application in deportation or removal proceedings before the Immigration Judge at the Executive Office for Immigration Review (EOIR).

However, persons who seek to enter the United States from their home country must appear before a U.S. Consulate abroad and apply for an immigrant or nonimmigrant visa. This procedure is often referred to as “Consular Processing.” Because of the vast differences between Adjustment of Status and Consular Processing, we strongly urge practitioners to familiarize themselves with the protocols and timelines presented by both mechanisms. For purposes of this Practice Advisory, this discussion is limited to the forms, fees, procedures and timelines associated with Adjustment of Status filings before USCIS.

Form(s)

The I-485 application has undergone many substantive changes over the years. Although earlier versions may be accepted by USCIS, practitioners should use the most recent version of the I-485 application when assisting clients with Adjustment of Status. The most recent version of the I-485 application has a revision date of December 16, 2008, which is found at the bottom right of the first page of the form. The form contains questions that seek out primary biographical and entry, passport, and immigration documentation data, yet other questions are specifically designed to “flesh out” issues of inadmissibility or removability under current immigration law at INA §212 or INA §237, respectively. This area demands the most attention by immigration attorneys when helping clients complete the I-485 application with the utmost accuracy.

Fees

It is important to note that many forms and their instructions may be outdated and contain incorrect information about filing fees. Current forms of payment accepted by USCIS include: attorney trust checks drawn on a U.S. bank or financial institution, money orders, and cashiers checks. USCIS does not accept cash.

The current fee for the I-485 application is $1,010 and $600 for minors 14 and under. Providing the correct payment with the I-485 application or any benefit, is essential because applications filed with an incorrect fee, including underpayment, will result in rejection by USCIS, sometimes many weeks or months after the original submission date. This undue delay may cause great harm to the applicant.

Upon receipt of the application filing, fees will not be returned, regardless of any action(s) taken by USCIS. There may also be a fee for biometrics that will be captured at an Application Support Center (ASC) prior to the applicant’s adjustment interview with USCIS.

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Where to File

Filing locations vary greatly depending on the eligibility category indicated on the I-485 application. For example, all “family-based” I-485 applications, either accompanied by an I-130 Immigrant Petition or with an approved I-130 Immigrant Petition, must be filed with the USCIS Chicago lockbox. Employment-based I-485 applications will be filed at one of the four regional USCIS Service Centers depending on the residence of the applicant. Defensive I-485 applications must be filed with the USCIS Texas Service Center in Mesquite, Texas, with a copy of the I-485 application, the proper fee(s), to a special address with special cover letter. The original I-485 application is filed directly with the Immigration Judge with proof of the filing fee payment.

Supporting Documentation

USCIS regulations at 8 CFR §204 establish specific items that constitute “initial evidence” that must be included with the I-485 application at the time of filing; otherwise, the filing may be rejected or may incur significant processing delays in obtaining benefits such as Employment Authorization or Travel Documents. Perceived deficiencies in the Adjustment of Status filing may trigger a “Request for Evidence” from USCIS that will most certainly result in processing delays. USCIS will not continue to process the Employment Authorization or Travel Document applications until deficiencies with the Adjustment of Status application are resolved.

In addition, any document in a foreign language must be accompanied by an English translation completed by a translator competent to translate who certifies that the translated document contains true and accurate information.

Adjudication—Interview

All I-485 applications undergo intense review and scrutiny by the adjudicator, whether it is a USCIS District Adjudicating Officer (DAO) or an Immigration Judge. The applicant must be “admissible” as an intending immigrant to the United States. The applicant’s entire immigration story will be examined including any arrest and conviction history to determine if he or she is admissible into the United States for Lawful Permanent Residence.

DAOs have nearly unfettered discretion when adjudicating I-485 applications. Therefore, it is the responsibility of the Applicant and their attorney to be thoroughly prepared for the Adjustment of Status interview and any possible situation that may arise.

TIMELINES

It is the responsibility of the local District Offices, with limited exceptions, to adjudicate marriage-based I-485 applications. Processing times for these Adjustment of Status filings have improved a great deal over recent years. It once took several years from the date of filing an I-485 application until attending an interview at a local USCIS District Office. As a result of a more efficient and streamlined process, it currently takes consistently three to five months, depending on the District Office for the applicant to receive an interview on the I-485 application.

As noted above, the difference between Adjustment of Status and Consular Processing may be most evident in the timelines involved. Adjustment of Status is somewhat predictable resulting in an adjustment interview in three to five months nationwide. On the other hand, Consular Processing of immigrant or nonimmigrant visas is wildly unpredictable, involving no less than three separate entities: USCIS, the National Visa Center (NVC) and the U.S. Department of State. Compounding the problem is the use of different forms, different fee structures, and local consular operating procedures that can be difficult to track, resulting in a process that takes several months to well over a year to complete in the best case scenario. In summary, Adjustment of Status is the preferred mechanism where obtaining Lawful Permanent Residence in the most efficient and timely manner is the primary consideration of your client.
Interoffice Memorandum

To: Field Leadership

From: Donald Neufeld /s/
Acting Associate Director
Domestic Operations Directorate

From: Lori Scialabba /s/
Associate Director
Refugee, Asylum and International Operations Directorate

From: Pearl Chang /s/
Acting Chief
Office of Policy and Strategy

Date: May 6, 2009

Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act

Revision to and Re-designation of Adjudicator’s Field Manual (AFM) Chapter 30.1(d) as Chapter 40.9 (AFM Update AD 08-03)

1. Purpose

Chapter 30.1(d) of the Adjudicator's Field Manual consolidates USCIS guidance to adjudicators for determining when an alien accrues unlawful presence, for purposes of inadmissibility under section 212(a)(9)(B) or (C) of the Immigration and Nationality Act. This memorandum redesignates Chapter 30.1(d) of the AFM as chapter 40.9 of the AFM. This memorandum also revises newly re-designated Chapter 40.9 to clarify the available guidance, and to incorporate into Chapter 40.9 prior guidance that was issued after adoption of former Chapter 30.1(d) but not incorporated into former Chapter 30.1(d).

USCIS intends AFM Chapter 40.9 to provide comprehensive guidance to adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility. Since Chapter 40.9 provides comprehensive guidance, the following prior memoranda are rescinded in their entirety:
Unlawful Presence, sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (AFM Update AD 08-03)
HQDOMO 70/21.1
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**Date** | **Subject**
---|---
September 19, 1997 | Section 212(a)(9)(B) Relating to Unlawful Presence
March 3, 2000 | Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act) (AD 00-07)
June 12, 2002 | Unlawful Presence

Also, the following memoranda are rescinded, insofar as they dealt with inadmissibility under section 212(a)(9)(B) or (C) of the Act.

**Date** | **Subject**
---|---
March 31, 1997 | Implementation of section 212(a)(6)(A) and 212(9) grounds of Inadmissibility
June 17, 1997 | Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)

Also rescinded is any other USCIS memorandum (or legacy INS memorandum) that addresses inadmissibility under section 212(a)(9)(B) or (C) of the Act, to the extent that any other such memorandum is inconsistent with AFM Chapter 40.9.

2. **Background**

The three- and ten-year bars to admissibility of section 212(a)(9)(B)(i) of the Act and the permanent bar to admissibility of section 212(a)(9)(C)(i)(I) of the Act were added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208 (September 30, 1996)) (IIRIRA). The amendments enacting sections 212(a)(9)(B) and (C) became effective on April 1, 1997.

Section 212(a)(9)(B)(i)(I) of the Act renders inadmissible those aliens who were unlawfully present for more than 180 days but less than one (1) year, who voluntarily departed the United States prior to the initiation of removal proceedings and who seek admission within three (3) years of the date of such departure or removal from the United States. Section 212(a)(9)(B)(i)(II) of the Act renders inadmissible those aliens unlawfully present for one (1) year or more, and who seek admission within ten (10) years of the date of the alien’s departure or removal from the United States. Finally, section 212(a)(9)(C)(i)(I) of the Act renders inadmissible any alien who
Unlawful Presence, sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (AFM Update AD 08-03)
HQDOMO 70/21.1
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has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted.

Section 212(a)(9)(B)(ii) of the Act specifies that "unlawful presence" can accrue during any period in which an alien, other than a Legal Permanent Resident, is present in the United States without having been admitted or paroled, or after the expiration of the period of stay authorized by the Secretary of Homeland Security. As discussed in AFM Chapter 40.9.2, there are other situations in which an alien who is actually in an unlawful immigration status is, nevertheless, protected from the accrual of unlawful presence.

Over the last ten (10) years, the determination of what constitutes “unlawful presence” has been the subject of various interpretations, in part because of legislation amending the rights of aliens seeking immigration benefits. Legacy Immigration and Naturalization Service (INS) and the United States Citizenship and Immigration Services (USCIS) have issued several memoranda on this issue; however, sometimes, the AFM was not updated. Therefore, this revised and re-designated section 40.9.2 in the AFM consolidates the information contained in these memoranda and updates the AFM.

In general, the consequences of accruing unlawful presence depend on the immigration status of an individual, the particular type of benefit or relief sought, and whether the denial of the benefit is subject to administrative and judicial review. The details are set forth in the field guidance below.

3. Field Guidance and AFM Update

The adjudicator is directed to comply with the guidance provided in the AFM as amended by this memorandum. Additionally, overseas adjudication officers can also find guidance on this issue, tailored to the overseas context, in the International Operations “Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers” dated July 30, 2008 or subsequent revisions.

The AFM is updated as follows:

1. Chapter 30.1(d) of the AFM entitled “Unlawful Presence Under Section 212(a)(9) of the Act” is re-designated as Chapter 40.9 and
2. Chapter 40.9 and is amended as follows:

40.9 Aliens Previously Removed and Unlawfully Present (Section 212(a)(9) of the Act)

Section 212(a)(9) of the Act renders certain aliens inadmissible based on prior violations of U.S. immigration law. Section 212(a)(9) of the Act has three major subsections.

Under Section 212(a)(9)(A) of the Act, an alien, who was deported, excluded or removed under any provision of law, is inadmissible if the alien seeks admission to the
United States during the period specified in section 212(a)(9)(A) of the Act, unless the alien obtains consent to reapply for admission during this period.

Under section 212(a)(9)(B) of the Act, an alien is inadmissible if the alien has accrued a specified period of unlawful presence, leaves the United States after accruing the unlawful presence, and then seeks admission during the period specified in section 212(a)(9)(B)(i) (either 3 years or 10 years after the departure, depending on the duration of the accrued unlawful presence).

Under Section 212(a)(9)(C)(i) of the Act, an alien is inadmissible if the alien enters or attempts to enter the United States without admission after having been removed or after having accrued more than one year (in the aggregate) of unlawful presence.

*AFM* Chapter 40.9.2 provides an overview of USCIS' policy concerning the accrual of unlawful presence and the resulting inadmissibility under section 212(a)(9)(B) or section 212(a)(9)(C)(i)(I) of the Act.

**40.9.1 Inadmissibility Based on Prior Removal (Section 212(a)(9)(A) of the Act) or Based on Unlawful Return after Prior Removal (Section 212(a)(9)(C)(i)(II) of the Act) [Reserved]**

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(a) **General Overview**

If an alien, other than an alien lawfully admitted for permanent residence, accrues unlawful presence in the United States, he or she may be inadmissible pursuant to section 212(a)(9)(B)(i)(Three-year and Ten-year bars) or 212(a)(9)(C)(i)(l) of the Act (Permanent bar).

(1) **Outline of Section 212(a)(9)(B)(i) and Section 212(a)(9)(C)(i)(l) of the Act**

(A) **Section 212(a)(9)(B)(i) of the Act - The 3-Year and the 10-Year Bars.** Section 212(a)(9)(B)(i) is broken into two (2) sub-groups:

- **Section 212(a)(9)(B)(i)(l) of the Act (3-year bar).** This provision renders inadmissible for three (3) years those aliens, who were unlawfully present for more than 180 days but less than one (1) year, and who departed from the United States voluntarily prior to the initiation of removal proceedings.

- **Section 212(a)(9)(B)(i)(l) of the Act (10-year bar).** This provision renders inadmissible an alien, who was unlawfully present for one (1) year or more, and who seeks again admission within ten (10) years of the date of the alien’s departure or removal from the United States.

Both bars can be waived pursuant to section 212(a)(9)(B)(v) of the Act.

(B) **Section 212(a)(9)(C)(i)(l) of the Act - The Permanent Bar.** This provision renders an individual inadmissible, if he or she has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted. An alien, who is inadmissible under section 212(a)(9)(C)(i)(l) of the Act is permanently inadmissible; however, after having been outside the United States for at least ten (10) years, he or she may seek consent to reapply for admission pursuant to section 212(a)(9)(C)(ii) of the Act and 8 CFR 212.2. A waiver is also available for certain Violence Against Women Act (VAWA) self-petitioners under section 212(a)(9)(C)(iii) of the Act. The 10-year absence requirement does not apply to a VAWA self-petitioner who is seeking a waiver under section 212(a)(9)(C)(iii) of the Act, rather than seeking consent to reapply under section 212(a)(9)(C)(ii) of the Act.

A DHS regulation at 8 CFR 212.2 addresses the filing and adjudication of an application for consent to reapply (filed on Form I-212). As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), however, the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the filing procedures in 8 CFR 212.2 are still in effect, the substantive requirements of section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal. A USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212.
that is filed by an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act. That is, because of the 10-year absence requirement for consent to reapply, section 212(a)(9)(C)(i)(I) of the Act is a permanent bar for which neither the retroactive nor the prospective grant of consent to reapply is possible. The regulatory language at 8 CFR 212.2(l) and (j) is not applicable, see Torres-Garcia, at 875, and the alien has to be physically outside the United States for a period of at least ten years since his or her last departure before being eligible to be granted consent to reapply. See id., at 876. Finally, the regulatory language referring to the 5-year and the 20-year limitation on consent to reapply does not apply to section 212(a)(9)(C) of the Act; these limitations refer to former sections 212(a)(6)(A) and (B), the predecessors of current section 212(a)(9)(A) of the Act. See id. at 874 (for a historical analysis).

Also, an adjudicator should pay special attention to the possibility that an alien who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act (because the alien entered or attempted to enter without admission after having been removed) may be subject to the reinstatement provision of section 241(a)(5) of the Act (reinstatement of removal orders).

(2) Distinction Between "Unlawful Status" and "Unlawful Presence"
To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same.

As discussed in chapters 40.9.2(b)(2) and (3), there are situations in which an alien who is present in an unlawful status nevertheless does not accrue unlawful presence. As a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien’s remaining can be said to be “authorized.” However, the fact that the alien does not accrue unlawful presence does not mean that the alien’s presence in the United States is actually lawful.

**Example 1:** An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. The alien remains in the United States after the Form I-94 expires. The alien’s status becomes unlawful, and she begins to accrue unlawful presence, on January 2, 2009. On May 10, 2009, the alien properly files an application for adjustment of status. The filing of the adjustment application stops the accrual of unlawful presence. But it does not "restore" the alien to a substantively lawful immigration status. She is still amenable to removal as a deportable alien under section 237(a)(1)(C) of the Act because she has remained after the expiration of her nonimmigrant admission.
Example 2: An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. On October 5, 2008, he properly files an application for adjustment of status. He does not, however, file any application to extend his nonimmigrant stay, which expires on January 1, 2009. The adjustment of status application is still pending on January 2, 2009. On January 2, 2009, he becomes subject to removal as a deportable alien under section 237(a)(1)(C) of the Act because he has remained after the expiration of his nonimmigrant admission. For purposes of future inadmissibility, however, the pending adjustment application protects him from the accrual of unlawful presence.

The application of section 245(k) of the Act is a good example of the importance of clearly distinguishing unlawful status from the accrual of unlawful presence. Guidance concerning section 245(k) may be found in chapter 23.5(d) of the AFM. If the requirements of section 245(k) are met, this provision relieves certain employment-based immigrants of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act for adjustment of status. For example, an alien who failed to maintain a lawful status after any entry is, ordinarily, ineligible for adjustment of status under section 245(c)(2) of the Act. Departure from the United States and return does, ordinarily, not relieve the alien of this provision. 8 CFR 245.1(d)(3). For an alien who is eligible for the benefit of section 245(k) of the Act, however, only a failure to maintain status since the last lawful admission is considered in determining whether the alien is subject to section 245(c)(2), (c)(7) or (c)(8) of the Act. AFM Chapter 23.5(d)(4). Unless the alien, since the last lawful admission failed to maintain lawful status for at least 181 days, section 245(k) of the Act relieves the alien of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act.

As stated in chapters 40.9.2(b)(2) and (3), some aliens who are actually present in an unlawful status, are, nevertheless, protected from accruing unlawful presence. But if their unlawful status continues for more than 180 days, in the aggregate, they would be ineligible for the benefit of section 245(k) of the Act, even if they have accrued no unlawful presence for purposes of section 212(a)(9)(B) of the Act.

Example 3: An alien is admitted for “duration of status” as an F-1 nonimmigrant student. One year later, the alien drops out of school, and remains in the United States for one year after dropping out. The alien’s status became unlawful when she dropped out of school. Neither USCIS nor an IJ ever makes a finding that the alien was out of status; therefore, she never accrues any unlawful presence for purposes of section 212(a)(9)(B) of the Act. Chapter 40.9.2(b)(1)(E)(ii). The alien eventually leaves the United States and returns lawfully as a nonimmigrant. While in nonimmigrant status, a Form I-140 is approved and the alien applies for adjustment of status. Because the alien failed to maintain a lawful status for more than 180 days during her prior sojourn, she is ineligible for adjustment under section 245(c)(2) of the Act, and section 245(k) of the Act does not relieve her of this ineligibility. Under section 245(k) of the Act, the alien is still eligible for adjustment, since the prior failure to maintain status does not apply to make the alien ineligible under section 245(c) of the Act. Also, the alien did not accrue
unlawful presence despite the prior unlawful status, and so the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Example 4: The alien is admitted as a lawful nonimmigrant, and, while still in status, applies for adjustment of status on the basis of an approved I-140. While the Form I-485 is pending, the alien’s EAD expires, and the alien fails to apply for a new EAD. Nevertheless, the alien continues to work after the EAD expires. The period of unauthorized employment exceeds 180 days. The alien would not be inadmissible under section 212(a)(9)(B) of the Act, since the pendency of the I-485 stopped the accrual of unlawful presence. Also, there has been no "departure" to trigger section 212(a)(9)(B) of the Act. Section 245(k) of the Act does not relieve the alien of ineligibility under section 245(c)(2) of the Act since the alien engaged in unauthorized employment for more than 180 days.

An alien who is present in a lawful status will not accrue unlawful presence as long as that lawful status is maintained.

(3) Definition of Unlawful Presence and Explanation of Related Terms

(A) Unlawful Presence. Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is:

- present after the expiration of the period of stay authorized by the Secretary of Homeland Security; or
- present without being admitted or paroled.

(B) Period of Stay Authorized (Authorized Stay). When nonimmigrants are admitted into the United States, the period of stay authorized is generally noted on Form I-94, Admission/Departure Record. Additionally, by policy, USCIS has designated other statuses - including some that are not actually lawful - as "periods of stay authorized." Please see the more detailed analysis in sections (b) and (c), below.

(C) Admission. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996)) amended section 101(a)(13) of the Act by removing the definition of the term “entry,” and by replacing it with a definition of the terms “admission” and “admitted.” Section 101(a)(13)(A) of the Act now defines “admission” and “admitted” as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” See section 101(a)(13)(A) of the Act. Section 101(a)(13)(B) of the Act furthermore clarifies that parole is not admission, and that an alien crewman, who is permitted to land temporarily in the United States, shall not be considered to have been admitted. See section 101(a)(13)(B) of the Act.
(D) Parole. Parole is the discretionary decision, under section 212(d)(5)(A) of the Act, to permit an inadmissible alien to leave the inspection facility free of official custody, so that, although the alien is not admitted, the alien is permitted to be physically present in the United States. By statutory definition, parole is not admission. See section 101(a)(13)(B) of the Act. An alien, who has been paroled under section 212(d)(5)(A) of the Act “is still in theory of law at the boundary line and [has] gained no foothold in the United States.” Leng May Ma v. Barber, 357 U.S. 185, 188-189 (1958), quoting Kaplan v. Tod, 267 U.S. 228 (1925).

Parole may be granted on a case-by-case basis for urgent humanitarian reasons (humanitarian parole) or for significant public benefit. See section 212(d)(5)(A) of the Act and 8 CFR 212.5. Deferred inspection and advance parole are parole, as are individual port of entry paroles and paroles authorized while a person is overseas. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of unlawful presence, the reason for the grant of parole is irrelevant. For more information on parole pursuant to section 212(d)(5) of the Act, see chapter 54 of the AFM.

Only parole under section 212(d)(5)(A) of the Act qualifies as parole for purposes of section 212(a)(9) of the Act. In an April 1999 memorandum and an August 1998 legal opinion (Legal Opinion No. 98-10, August 21, 1998), former INS suggested that a release under section 236 of the Act (conditional parole) could also be considered "parole" for purposes of adjustment of status under the Cuban Adjustment Act. The Board of Immigration Appeals (BIA) has rejected this interpretation in at least one unpublished decision. See Matter of Ortega-Cervantes, 2005 WL 649116 (BIA, January 6, 2005). The Ninth Circuit confirmed the BIA's decision and held that release under section 236 of the Act was not "parole" for purposes of adjustment of status. See Ortega-Cervantes v. Gonzales, 501 F.3d 1111 (9th Cir. 2007). DHS/Office of the General Counsel reconsidered that aspect of the 1999 memorandum, and the related 1998 legal opinion. On September 28, 2007, it issued a memorandum stating that release under section 236 of the Act is not deemed to be a form of parole under section 212(d)(5) of the Act. See September 28, 2007 Memorandum, Office of the General Counsel of the Department of Homeland Security, Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act. As of the release of this AFM chapter, the Ninth Circuit is the only circuit that has decided this issue, although several circuits have cases outstanding. If the adjudicator encounters the issue, he or she is advised to inquire with the USCIS Office of the Chief Counsel (Adjudications Law Division) about the status of any pending litigation or further developments.
(4) General Considerations when Counting Unlawful Presence Time Under Sections 212(a)(9)(B) and 212(a)(9)(C)(i)(l) of the Act

(A) Unlawful Presence for Purposes of the 3-Year and 10-Year Bars Is Not Counted in the Aggregate. Section 212(a)(9)(B)(i) of the Act only applies to an alien, who has accrued the required amount of unlawful presence during any single stay in the United States; the length of the alien’s accrued unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays in the United States. If, during any single stay, an alien has more than one (1) period during which the alien accrues unlawful presence, the length of each period of unlawful presence is added together to determine the total period of unlawful presence time accrued during that single stay.

Reminder: The statutory provisions of the 3-year and the 10-year bars became effective on or after April 1, 1997. An alien, who was unlawfully present in the United States prior to April 1, 1997, started to accrue unlawful presence on April 1, 1997, if he or she remained present in the United States at that time. An alien, who was unlawfully present in the United States prior to April 1, 1997, but departed prior to April 1, 1997, did not accrue any unlawful presence for purposes of section 212(a)(9)(B) of the Act.

Example 1: An alien’s status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004 (150 days after April 1, 2004), the alien files an adjustment of status application. The alien does not accrue unlawful presence while the adjustment application is pending. See section (b)(3)(A) of this AFM chapter. The adjustment application is denied on October 15, 2006 (administratively final decision). After the denial, the alien continues to remain in the United States unlawfully; the accrual of unlawful presence resumes on October 16, 2006, a day after the application is denied. The alien leaves the United States on January 1, 2007. At that time, the individual had accrued unlawful presence from April 1, 2004 to September 1, 2004, and again from October 16, 2006 to January 1, 2007. The total period of unlawful presence time accrued during this single unlawful stay exceeds 180 days. By departing the United States on January 1, 2007, the alien triggered the three-year bar and is inadmissible under section 212(a)(9)(B)(i)(l) of the Act.

Example 2: An alien’s status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004, the alien leaves the United States. The alien returns unlawfully on October 15, 2006. He departs the United States again on January 1, 2007. Although the alien has been unlawfully present in the United States for more than 180 days in the aggregate, the unlawful presence was accrued during two (2) separate stays in the United States; during each of these stays, the alien accrued less than 180 days of unlawful presence. Thus, the alien is not inadmissible under section 212(a)(9)(B)(i)(l) of the Act.
(B) **Unlawful Presence for Purposes of the Permanent Bar Is Counted in the Aggregate.** Under section 212(a)(9)(C)(i)(I) of the Act, the alien’s unlawful presence is counted in the aggregate, i.e. the total amount of unlawful presence time is determined by adding together all periods of time during which an alien was unlawfully present in the United States on or after April 1, 1997. Therefore, if an alien accrues a total of more than one (1) year of unlawful presence time, whether accrued during a single stay or during multiple stays, departs the United States, and subsequently reenters or attempts to reenter without admission, he or she is subject to the permanent bar of section 212(a)(9)(C)(i)(I) of the Act.

**Example:** An alien enters the United States unlawfully on April 1, 2004, and leaves on September 1, 2004. The alien has accrued about 150 days of unlawful presence at this time. She reenters the United States unlawfully on January 1, 2005 and stays until November 1, 2005. This time, the alien has accrued 300 days of unlawful presence. Although neither period of unlawful presence exceeds one (1) year, the aggregate period of unlawful presence does exceed one (1) year by totaling 450 days of unlawful presence, which the alien accrued during both stays. If the alien ever returns or attempts to return to the United States without being admitted, he or she will be inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

(C) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(I) of the Act (The 3-Year Bar).** For the three-year bar to apply, the individual must have accrued at least 180 days but less than one (1) year of unlawful presence, and thereafter, must have departed voluntarily prior to the commencement of removal proceedings. Any period of unlawful presence accrued prior to April 1, 1997, does not count for purposes of section 212(a)(9)(B)(i)(I) of the Act.

The alien does not need a formal grant of voluntary departure by DHS for his or her departure to be considered voluntary. However, if DHS grants voluntary departure, the departure is still voluntary because removal proceedings have not yet commenced.

The statutory language of section 212(a)(9)(B)(i)(I) of the Act specifically requires that the alien must have departed the United States prior to the commencement of removal proceedings. Removal proceedings commence with the filing of the Notice to Appear (NTA) with the immigration court following service of the NTA on the alien. See 8 CFR 1003.14. An alien, who departs the United States after the NTA has been filed with the immigration court, therefore, is not subject to the three-year bar according to the statutory language. To avoid future inadmissibility, however, the alien must leave before he or she has accrued more than one year of unlawful presence, and becomes inadmissible under section 212(a)(9)(B)(i)(II) of the Act, rather than section 212(a)(9)(A)(i)(I) of the Act. This provision provides the alien with an incentive to end his or her unlawful presence by leaving the United States, rather than contesting removal.
The burden is on the applicant to establish that the NTA had already been filed by the time the applicant had departed. The record of proceedings before the immigration court will generally indicate when the NTA was actually filed, and the filing date shown in the court's record will be controlling.

Even if the applicant is not subject to the three-year or the ten-year bar, there may be other grounds of inadmissibility that apply based on the fact that the removal proceedings were initiated and the alien departed the United States during the proceedings. For example, a conviction that made the alien subject to removal as a deportable alien may also make the alien inadmissible.

(D) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act (The 10-Year Bar).** An alien, who voluntarily departs the United States or who was removed from the United States after having been unlawfully present for more than one (1) year, triggers the 10-year bar to admission under section 212(a)(9)(B)(i)(II) of the Act. Any period of unlawful presence accrued prior to April 1, 1997 does not count for purposes of section 212(a)(9)(B)(i)(II) of the Act.

Unlike the 3-year bar, the 10-year bar applies even if the alien leaves after removal proceedings have commenced; the individual will be inadmissible, even if he or she leaves after the NTA has been filed with the immigration court. Moreover, filing the NTA does not stop the accrual of unlawful presence. 8 CFR 239.3.

(E) **Specific Requirements for Inadmissibility under Section 212(a)(9)(C)(i)(I) of the Act (The Permanent Bar)**

(i) **General Requirements.** To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must then have entered or attempted to reenter the United States without being admitted. Any unlawful presence accrued prior to April 1, 1997, or any unlawful entry or attempted reentry into the United States prior to April 1, 1997, does not count for purposes of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

(ii) **Special Note On the Effect of An Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence**

Is an alien, who had accrued more than one (1) year of unlawful presence, and who is paroled into the United States but not admitted, subject to section 212(a)(9)(C)(i)(I) of the Act?

An alien's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act is fixed at the time of the alien's unlawful entry or attempted reentry.
An alien who had accrued more than one (1) year of unlawful presence, and who has never returned or attempted to return without admission after that unlawful presence, and who is paroled into the United States pursuant to section 212(d)(5) of the Act, but not admitted, is not subject to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. It is the Department of Homeland Security’s (DHS) policy that for purposes of section 212(a)(9)(C)(i)(I) inadmissibility, an alien’s parole is not deemed to be an "entry or attempted reentry without being admitted," even though parole is not considered admission. See section 101(a)(13)(B) and section 212(d)(5)(A) of the Act. This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. See Leng May Ma v. Barber, 357 U.S. 185, 188-189 (1958), quoting Kaplan v. Tod, 267 U.S. 228 (1925).

As noted, however, an alien’s inadmissibility for returning unlawfully after accruing sufficient unlawful presence is fixed at the time of the alien’s unlawful return or attempt to return. Paroling an alien who is already inadmissible does not relieve the alien of inadmissibility. For example, if an alien who is already present in the United States without being admitted because he or she entered without inspection, and who, in the past, had accumulated unlawful presence in excess of one (1) year, is taken into custody, and then later paroled pursuant to section 212(d)(5) of the Act, the alien’s parole would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

For a more detailed explanation and examples, please see (a)(6)(B) of this subsection, below.

(5) Triggering the Bar by Departing the United States

An alien must leave the United States after accruing more than 180 days or one (1) year of unlawful presence in order to trigger the 3-year or 10-year bar to admission under section 212(a)(9)(B) of the Act. This includes departures made while traveling after having approved advance parole or with a valid refugee travel document. See section (a)(6) of this chapter.

Note: By granting advance parole or a refugee travel document, USCIS does not authorize the alien’s departure from the United States; it merely provides a means for the alien to return to the United States, regardless of admissibility. Therefore, even if the alien has an advance parole document, the alien’s actual departure from the United States will still trigger the bar to inadmissibility under section 212(a)(9)(B) of the Act.

Section 212(a)(9)(C)(i)(I) of the Act does not explicitly mention “departure” as a prerequisite for the bar to apply. However, according to the wording of the statute, an alien with the requisite period of unlawful presence must “enter or attempt to enter without admission” in order to incur inadmissibility. Thus, the alien cannot violate the provision unless the alien leaves the United States and then returns or attempts to
return. See Matter of Rodarte-Roman, 23 I&N Dec. 905 (BIA 2006)(Departure triggers the bars; the IJ erred when denying adjustment of status because of the individual's accrual of unlawful presence in excess of one (1) year without departure.).

(6) **Triggering the 3-Year and the 10-Year Bars But Not the Permanent Bar When Departing with Advance Parole or with a Refugee Travel Document**

(A) **Travel on Advance Parole Issued to Applicants for Adjustment of Status on Form I-512, Authorization For Parole Of An Alien Into The United States, pursuant to 8 CFR 212.5(f) and 8 CFR 245.2(a)(4).** An alien with a pending adjustment of status application, who has accrued more than 180 days of unlawful presence time, will trigger the bars to admission, if he or she travels outside the United States subsequent to the issuance of an advance parole document. When the alien presents the advance parole document at a port of entry, he or she may be permitted to return to the United States as a parolee because aliens who request parole into the United States are not required to establish admissibility under section 212(a) of the Act. However, the fact that the alien is permitted to return to the United States as a parolee does not confer a waiver of inadmissibility under section 212(a)(9)(B)(i)(I) and (II) of the Act. Consequently, a waiver under section 212(a)(9)(B)(v) of the Act would be required when determining the alien's eligibility to adjust status to lawful permanent residence.

(B) **A Special Note on the Effect on Section 212(a)(9)(C) of the Act of an Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence.** Parole is not admission. See section 101(a)(13)(B) of the Act. An individual is subject to section 212(a)(9)(C)(i)(I) of the Act, if he or she has accrued more than one (1) year of unlawful presence in the United States during a single stay or during multiple stays, who departs, and subsequently enters or attempts to reenter "without being admitted." The statutory language omits the word "parole" and makes it unclear whether an alien, who enters on parole, triggers the bar to inadmissibility under section 212(a)(9)(C) of the Act. Therefore, if an alien is paroled into the United States pursuant to section 212(d)(5)(A) of the Act after having accrued more than one (1) year of unlawful presence, is he or she inadmissible under section 212(a)(9)(C)(i)(I) of the Act because the alien was not "admitted"? The answer is "no" for the following reason:

An alien's inadmissibility pursuant to section 212(a)(9)(C)(i)(I) of the Act is fixed as of the date of the alien's entry or attempted reentry without being admitted. If an alien, who has accrued unlawful presence in excess of one (1) year, came to a port of entry and applied for admission to the United States or asked to be paroled into the United States, the alien will not be deemed to have attempted to enter the United States without "being admitted," if DHS actually paroles the alien. The significant point is that the alien will have arrived at a port of entry and presented himself or herself for inspection. If the alien is paroled, the alien will continue to be considered an applicant for admission, and so cannot be said to have entered or attempted to enter without admission. Thus, if DHS paroles the alien under section 212(d)(5) of the Act, the alien's departure and subsequent return as a parolee does not trigger the section 212(a)(9)(C)(i)(I)-bar for
purposes of a subsequent admissibility determination by DHS (such as at the time of the adjustment of status adjudication). This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. See Leng May Ma v. Barber, 357 U.S. 185, 188-189 (1958), quoting Kaplan v. Tod, 267 U.S. 228 (1925).

**Example:** An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 2, 2000, the individual commences to accrue unlawful presence as having overstayed his or her period of admission. The alien applies for adjustment of status on January 1, 2005. The individual is in authorized stay during the pendency of the adjustment of status application and does not accrue unlawful presence. See section (b)(3)(A) of this AFM chapter. Based on the pending adjustment application, the alien applies for advance parole (Form I-131), which is approved. The alien then leaves the United States on April 1, 2005; at this time, the alien has triggered the 10-year bar to admission to the United States because the alien had accrued unlawful presence in excess of one (1) year (from January 2, 2000, to January 1, 2005). On April 15, 2005, the alien returns to the United States through a port of entry, presents his advance parole document, and is paroled into the United States. The alien will not be considered to have triggered inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Because the alien is currently a parolee, the alien is deemed to still be at the port of entry. At the time of the adjudication of the adjustment of status application, the alien's request for admission (through the adjustment of status application) will be decided. Thus, the individual is a parolee, he or she is not deemed to have "entered or attempted to reenter without being admitted." (Note: The alien still may be inadmissible under section 212(a)(9)(B) of the Act at the time of the adjustment of status application.)

By contrast, the parole of an alien after the alien had already become inadmissible under section 212(a)(9)(C)(i) would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

**Example:** An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 1, 2000, the alien commences to accrue unlawful presence for having overstayed his or her period of admission. The alien applies for adjustment of status on January 1, 2005. The alien departs the United States and returns illegally by crossing the border 30 miles west of the nearest port of entry on April 15, 2005. The alien is now inadmissible under section 212(a)(9)(C)(i)(I) of the Act. (An additional consequence, unrelated to the illegal entry, is that the alien also abandoned his or her adjustment application). Even if the alien were later taken into custody and paroled under section 212(d)(5) of the Act, or were to later travel and return on a grant of advance parole, the alien would remain inadmissible under section 212(a)(9)(C)(i)(I) of the Act since the
alien did, in fact, enter without admission after having accrued the requisite period of unlawful presence.

The instructions to Form I-131, Application for Travel Document, and Form I-485, Application to Register Permanent Residence or Adjust Status, as well as the standard Form I-512, Authorization for Parole of an Alien into the United States, include language warning the alien that traveling abroad and returning to the United States by using Form I-512 may make the alien inadmissible under section 212(a)(9)(B) of the Act.

(C) Travel on a Valid Refugee Travel Document Issued pursuant to Section 208(c)(1)(C) of the Act and 8 CFR 223. An asylee who had accrued more than 180 days of unlawful presence time prior to having filed the bona fide asylum application, will trigger the bar to admission, if he or she departs the United States while traveling on a valid refugee travel document. When the asylee presents the travel document at a port of entry, he or she can be permitted to reenter the United States to resume status as an asylee; however, the asylee will be inadmissible when he or she applies to adjust status to lawful permanent resident, and a waiver would be required at that time.

(7) Multiple Grounds of Inadmissibility and the Relationship Between Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act
Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act establish different grounds of inadmissibility based on prior unlawful presence. Whether a specific ground applies to an alien depends on an analysis of the facts of the person’s case in light of that specific ground.

It is possible that the alien’s immigration history makes the alien inadmissible under both section 212(a)(9)(B) of the Act and section 212(a)(9)(C)(i)(I) of the Act.

Example: An alien with more than one (1) year of unlawful presence leaves the United States, thus triggering the 10-year bar to admissibility under section 212(a)(9)(B)(i)(II) of the Act. Three (3) years after the alien's last departure, the alien returns to the United States and enters illegally, thus without having been admitted. The alien is now inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act.

Also, an alien with sufficient unlawful presence who is removed from the United States, may be inadmissible under section 212(a)(9)(A), as well as section 212(a)(9)(B)(i)(II) and/or section 212(a)(9)(C)(i) of the Act depending on the circumstances of the individual case.
(B) Benefits That May Be Available Despite Inadmissibility under Section 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act
Section (c) of this chapter specifies forms of relief from inadmissibility under sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act ("Waivers"). Even without a grant of a waiver, aliens who are subject to these grounds of inadmissibility, may still obtain certain benefits as outlined below in (b)(2) and (b)(3), if otherwise eligible.

(A) Under Section 212(a)(9)(B)(i)(I) or (II) of the Act. An alien, who is inadmissible under section 212(a)(9)(B)(i) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act;
- Adjustment of status under section 202 of NACARA;
- Adjustment of status under section 902 of HRIFA;
- Adjustment of status under section 245(h)(2)(A) of the Act;
- Change to V nonimmigrant status under 8 CFR 214.15 (but the alien may need a waiver to obtain adjustment of status to LPR after having acquired V nonimmigrant status);
- LPR status pursuant to the LIFE Legalization Provision: A Legalization applicant under section 1104 of the LIFE Act may travel with authorization during the pendency of the application without triggering inadmissibility under section 212(a)(9)(B) of the Act. See 8 CFR 245a.13(e)(5).

(B) Under Section 212(a)(9)(C)(i)(I) of the Act. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act.

(C) Special Concerns Regarding Section 245(i) - Applications. The USCIS position is that inadmissibility under section 212(a)(9)(B) or (C) of the Act makes an alien ineligible for adjustment of status under section 245 of the Act, regardless of whether the alien applies under section 245(a) or section 245(i) of the Act. The BIA has endorsed this view. In Matter of Briones, 24 I&N Dec. 355 (BIA 2007), the Board held that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is not eligible for adjustment under section 245(i) of the Act. An alien who is inadmissible under section 212(a)(9)(B) of the Act is also ineligible for section 245(i) adjustment. Matter of Lemus, 24 I&N Dec. 373 (BIA 2007).

USCIS adjudicators will follow Matter of Briones and Matter of Lemus in all cases, regardless of the decisions of the 9th Circuit in Acosta v. Gonzales, 439 F.3d 550 (9th Cir. 2006) or of the 10th Circuit in Padilla-Caldera v. Gonzales, 453 F.3d 1237 (10th Cir. 2005). Following these Board cases, rather than Acosta and Padilla-Caldera, will allow the Board to reexamine the continued validity of these court decisions.

USCIS adjudicators should also be aware that the 9th Circuit has held that the Board’s decision in Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006) is entitled to judicial
Unlawful Presence, sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (AFM Update AD 08-03)
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deferece, and that the decision in Perez-Gonzales v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), is no longer good law. Gonzales v. Department of Homeland Security, 508 F.3d 1227 (9th Cir. 2007).

(9) Effective Date of Sections 212(a)(9)(B) and (C)(i)(l) of the Act


For purposes of section 212(a)(9)(C)(i)(l) of the Act, one (1) full year of unlawful presence must have accrued. Therefore, the earliest an individual could have been subjected to this ground of inadmissibility was April 2, 1998.

(B) The Child Status Protection Act and Its Influence on Unlawful Presence. On August 6, 2002, the Child Status Protection Act (CSPA) (PL 107-208, August 6, 2002) was enacted to provide relief to certain children, who “aged-out” during the processing of certain applications. The CSPA applies to derivative children of asylum and refugee applicants, children of United States citizens, children of Lawful Permanent Residents (LPRs), and derivative beneficiaries of family-based, employment-based, and diversity visas. The CSPA changes how a child’s age should be calculated for purposes of eligibility for certain immigration benefits; it does not change the definition of "child" pursuant to section 101(b)(1) of the Act.

The CSPA was effective on August 6, 2002. In general, its provisions are not retroactive: Any qualified petition or application that was pending on the effective date is subject to the provisions of the CSPA. For detailed information, please consult the policy memorandum, Domestic Operations, April 30, 2008, Revised Guidance for the Child Status Protection Act (AD07-04), or AFM Chapter 21.2(e).

Calculation of Unlawful Presence, if the CSPA Is Applicable: Any derivative beneficiary child who is in a “period of stay authorized” because of a pending application or petition, does not accrue unlawful presence merely because of his or her “aging-out,” if the requirements and conditions of the CSPA are met. For more information about the applicability of the CSPA, see AFM sections describing individual types of immigration benefits and Chapter 21.2(e).

The CSPA applies only to those benefits expressly specified by the statute. Nothing in the CSPA provides protection for nonimmigrant visa holders (such as K or V nonimmigrants), or to NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile Applicants, and/or derivatives. However, there may be
limited coverage for K-2 and K-4 individuals. See Chapter 21.2(e). This list is not exhaustive.

**b) Determining When an Alien Accrues Unlawful Presence**

1. *Aliens Present in Lawful Status or as Parolees*
   An alien does not accrue unlawful presence, if he or she is present in the United States under a period of stay authorized by the Secretary of Homeland Security, or if he or she has been inspected and paroled into the United States and the parole is still in effect.

An alien who is present in the United States without inspection accrues unlawful presence from the date of the unlawful arrival, unless the alien is protected from the accrual of unlawful presence as described in this *AFM* chapter. Note that an alien, who arrived at a port of entry and obtained permission to come into the United States by making a knowingly false claim to be a citizen, is present in the United States without having been inspected and admitted. *See Matter of S—*, 9 I&N Dec. 599 (BIA 1962).

(A) *Lawful Permanent Residents (LPRs).* An alien lawfully admitted for permanent residence will not accrue unlawful presence unless the alien becomes subject to an administratively final order of removal by the IJ or the BIA (which means that during the course of proceedings, the alien was found to have lost his or her LPR status), or if he or she is otherwise protected from the accrual of unlawful presence. Unlawful presence will start to accrue the day after the order becomes administratively final, and not on the date of the event that made the alien subject to removal.

(B) *Lawful Temporary Residents (Section 245A(b) of the Act and 8 CFR 245a).* A lawful temporary resident must file an application to adjust from temporary to permanent resident status before the beginning of the 43rd month from the date he or she was granted lawful temporary resident status. See 8 CFR 245a.3(a)(2). However, unlike conditional permanent residents, the status of a lawful temporary resident does not automatically terminate, if the alien fails to file a timely application, and the DHS needs to advise the alien of its intent to terminate his or her Temporary Residence Status. *See* section 245A(b)(2) of the Act, and 8 CFR 245a.2(u)(2). The same procedures apply, if the alien’s status is terminated for the reasons specified in section 245A(b)(2) of the Act. Lawful Temporary Resident status also terminates upon the entry of a final order of deportation, exclusion, or removal. *See* 8 CFR 245.2(u)(2).

If the DHS advises the alien of its intent to terminate lawful temporary resident status, the alien continues to be a lawful temporary resident and does not accrue unlawful presence until a notice of termination is issued. If the termination is appealed, the period of authorized stay continues through the administrative appeals process. The termination of an alien’s lawful temporary resident status cannot be reviewed in removal proceedings before an immigration judge. The alien would accrue unlawful presence
time during removal proceedings or while a petition for review is pending in Federal court.

(C) **Conditional Permanent Residents under Sections 216 and 216A of the Act**

(i) **Termination upon the Entry of an Administratively Final Order of Removal.** As is the case with other LPRs, an alien lawfully admitted for permanent residence on a conditional basis under section 216 or 216A of the Act begins to accrue unlawful presence upon the entry of an administratively final order of removal. A conditional LPR will also accrue unlawful presence before the entry of an administratively final removal order, if USCIS terminates the alien's conditional LPR status, as described below.

(ii) **Automatic Termination.** Pursuant to section 216 or section 216A of the Act, an alien, who was granted conditional permanent resident status must properly file a petition to remove the conditions placed on his or her status within the 90-day period immediately preceding the second anniversary of the date on which lawful permanent resident status on a conditional basis was granted. See Sections 216(c)(1) and 216A(c)(1) of the Act. The petition is filed on Form I-751, Petition to Remove Conditions of Residence, or on Form I-829, Petition by Entrepreneur to Remove Conditions. See 8 CFR 216.4 and 8 CFR 216.6. Failure to do so results in the automatic termination of conditional resident status and the initiation of removal proceedings at the expiration of the 90-day period, unless the parties can establish good cause for failure to file the petition. See section 216(c)(2) and 8 CFR 216.4(a)(6); section 216A(c)(2) and 8 CFR 216.6(a)(5); section 216(c)(4) and 8 CFR 216.5. The alien begins to accrue unlawful presence as of the date of the second anniversary of the alien's lawful admission for permanent residence. See id. Also, failure to appear for the personal interview that may be required by USCIS in relation to the I-751 or I-829 petition results in the automatic termination of the conditional legal permanent resident status, unless the parties establish good cause for the failure to appear. See section 216(c)(2)(A) of the Act and 8 CFR 216.4(b)(3); section 216A(c)(2)(A) of the Act and 8 CFR 216.6(b)(3).

(iii) **Late Filings of the Petition to Remove the Conditional Basis Of LPR Status by the Alien.** Current regulations at 8 CFR 216.4(a)(6) and 8 CFR 216.6(a)(5) allow a conditional resident to submit a late filing to USCIS, if jurisdiction has not yet vested with the immigration judge, and if certain requirements are met. If the late filed petition is accepted and approved, no unlawful presence time will be deemed to have accrued. If jurisdiction has already vested with the immigration judge, the judge may terminate removal proceedings upon joint motion by the alien and DHS. Consequently, if a late filing is accepted and approved while the alien is in proceedings, the alien will not accrue unlawful presence time. If, however, the late filing is rejected, the alien begins to accrue unlawful presence time on the date his or her status as a conditional resident automatically terminated.
(iv) Termination on Notice. If the DHS advises the alien of its intent to terminate conditional permanent resident status, the alien continues to be a conditional permanent resident and does not accrue unlawful presence until a notice of termination is issued. The alien begins to accrue unlawful presence on the day after the notice of termination is issued, unless the alien seeks review of the termination in removal proceedings. See 8 CFR 216.3.

(v) Review in Removal Proceedings. If the alien seeks review of the termination in removal proceedings, DHS bears the burden of proving that the termination was proper. Thus, the alien will be deemed not to accrue unlawful presence unless the immigration judge affirms the termination. See 8 CFR 216.3. If the immigration judge affirms the termination, the alien will begin to accrue unlawful presence on the day after the immigration judge’s removal order becomes administratively final.

(D) Aliens Granted Cancellation of Removal or Suspension of Deportation. Section 240A of the Act provides for two (2) different types of cancellation of removal: cancellation of removal for an alien who has been admitted for permanent residence (section 240A(a) of the Act), and cancellation of removal and adjustment of status for certain aliens who have been present in the United States for a period of not less than ten (10) years (section 240A(b) of the Act). Therefore, the effect of a grant of cancellation of removal on the accrual of unlawful presence (or of suspension of deportation under former section 244 of the Act) depends on the alien’s status immediately before relief was granted, and as outlined below:

- If an alien who has already acquired LPR status becomes subject to removal but applies for and receives a grant of cancellation of removal under section 240A(a) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien retains his or her LPR status. No period of unlawful presence will have accrued because the grant of cancellation or suspension prevents the loss of LPR status.

- If an alien who is not already an LPR obtains a grant of cancellation of removal under section 240A(b) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien becomes an alien lawfully admitted for permanent residence as of the date of the final decision granting relief. As such, the alien will no longer accrue unlawful presence after cancellation of removal or suspension of deportation is granted. Moreover, given the special nature of these forms of relief, any unlawful presence that may have accrued before the grant of cancellation of removal or suspension of deportation will be eliminated for purposes of any future application for admission.

Example: An alien had accrued ten (10) years of unlawful presence in the United States, and is subsequently granted cancellation of removal. The
alien is now an LPR. If, after becoming an LPR, the alien travels abroad and returns to the United States through a port of entry, none of the pre- grant unlawful presence will be considered in determining the alien’s admissibility. Section 212(a)(9)(B)(i) of the Act does not apply to LPRs.

(E) **Lawful Nonimmigrants**. The period of authorized stay for a nonimmigrant may end on a specific date or may continue for “duration of status (D/S).” Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) **Nonimmigrants Admitted until a Specific Date (Date Certain)**. Nonimmigrants admitted until a specific date will generally begin to accrue unlawful presence the day following the date the authorized period of admission expires, as noted on Form I-94, Arrival/Departure Record. If USCIS finds, during the adjudication of a request for immigration benefit, that the alien has violated his or her nonimmigrant status, unlawful presence will begin to accrue either the day after Form I-94 expires or the day after USCIS denies the request, whichever is earlier. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation or removal proceedings, unlawful presence begins to accrue the day after the immigration judge’s order or the day after the Form I-94 expired, whichever is earlier. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. Removal proceedings have no impact on whether an individual is accruing unlawful presence. See 8 CFR 239.3.

**Example**: An individual is admitted in H-1B status until September 20, 2007, as evidenced on Form I-94, Arrival/Departure Record. On January 1, 2007, an NTA is issued and the individual is placed in removal proceedings. The individual will not start to accrue unlawful presence unless the immigration judge holds that the alien had violated his or her nonimmigrant status, or until his or her Form I-94 expires, whichever is earlier.

(ii) **Nonimmigrants Admitted for Duration of Status (D/S)**. If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge’s order. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. See 8 CFR 239.3.

(iii) **Non-controlled Nonimmigrants (e.g. Canadian B-1/B-2)**. Nonimmigrants, who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S for purposes of determining unlawful presence.
(F) **Other Types of Lawful Status**

(i) **Aliens in Refugee Status.** In general, the period of authorized stay begins on the date the alien is admitted to the United States in refugee status. If refugee status is terminated, unlawful presence will start to accrue the day after the refugee status is terminated.

If the individual is a derivative refugee, either by accompanying or by following to join the principal, the alien will commence to accrue unlawful presence as follows:

- If the derivative refugee is outside the United States: The period of stay authorized begins on the date the alien either enters as an accompanying or following-to-join refugee pursuant to section 207(c)(2) of the Act and 8 CFR 207.7.

- If the derivative refugee is inside the United States: The accrual of unlawful presence ceases when USCIS accepts the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730) on the individual’s behalf. USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide Form I-730 petition is filed on behalf of the individual, the individual will be protected from the accrual of unlawful presence. No period of time during which the bona fide petition is pending shall be taken into account in determining the period of unlawful presence. If the petition is subsequently denied, the individual will again begin to accrue unlawful presence, if the individual has previously accrued unlawful presence.

- Because filing a Form I-730 stops the accrual of unlawful presence, but does not cure any unlawful presence that has already accrued, an individual who departs the United States during the pendency of the petition, with or without advance parole, will trigger the 3-year or the 10-year bar. In this case and because an individual seeking refugee status has to be admissible as an immigrant pursuant to section 207 of the Act, the individual will be required to file Form I-602, Application by Refugee For Waiver of Grounds of Excludability, to overcome the bars to admissibility before the Asylee/Refugee Relative Petition can be approved. If the alien is not permitted to reenter the United States, the individual will have to seek the waiver through the U.S. consulate where the approved I-730 is processed.

(ii) **Aliens Granted Asylum.** The period of authorized stay begins on the date the alien files a bona fide application for asylum. See section 212(a)(9)(B)(iii)(II) of the Act; see also section (b)(2)(B) of this chapter. This includes aliens, who entered the United States illegally but who were subsequently granted asylum. If asylum status is terminated, unlawful presence starts to accrue the day after the date of termination. A grant of asylum does not eliminate any prior periods of unlawful presence.

An individual who is included in the principal’s asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal
applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide). However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the derivative beneficiary, the individual is in a period of stay authorized until the determination is made that the application by the principal was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

Finally, a derivative beneficiary, who is physically present in the United States, but who was not included on the asylum application, is protected from the accrual of unlawful presence once the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries, who obtain their status through an Asylee/Refugee Relative Petition.

(iii) Aliens Granted Temporary Protected Status (TPS) pursuant to Section 244 of the Act. If an alien’s TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant. See section 244(f) of the Act. Please see (b)(3)(G) of this section of this AFM chapter for the effect of a violation of TPS status on the accrual of unlawful presence, and for the effect of a pending TPS application on the accrual of unlawful presence.

If an alien is granted TPS, he or she is, while the grant is in effect, deemed to be in lawful nonimmigrant status for purposes of adjustment of status and change of status according to section 244(f) of the Act.

A grant of TPS does not, however, cure any unlawful presence that may have accrued before the grant of TPS. If the alien was present without inspection and admission or parole, the alien remains an alien who has not been inspected and admitted or paroled, despite the grant of TPS. See INS General Counsel Opinion, 91-27, March 4, 1991. Therefore, if before TPS is granted, the applicant had previously accrued unlawful presence sufficient to trigger the bars, and the applicant travels outside the United States after having obtained advance parole, his or her departure triggers the bars for purposes of an adjustment of change of status application; that is, the individual may be ineligible to adjust despite the wording of section 244(f) of the Act, and depending on the basis upon which the alien seeks adjustment. Also, if a waiver was granted for inadmissibility under section 212(a)(9)(B) or (C) of the Act for purposes of the TPS application, the alien is still inadmissible for purposes of adjustment of status because the standard of the waiver granted for TPS status is different than the one granted in relation to an immigrant benefits application (although both are filed on Form I-601, Application for Waiver of Grounds of Inadmissibility).
(G) Aliens Present as Parolees. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of the accrual of unlawful presence, the specific type of parole and the reasons for the grant of parole do not matter; however, conditional parole pursuant to section 236 of the Act cannot be considered parole for purposes of section 212(a)(9)(B)(ii) of the Act. See section 40.9.1(a)(3)(D) of this AFM chapter.

An alien, who has been paroled into the United States does, however, begin to accrue unlawful presence as follows:

When a parolee remains in the United States beyond the period of parole authorization, unlawful presence begins to accrue the day following the expiration of the parole authorization.

Example: The alien's parole expires January 1, 2007, and the alien does not depart. January 2, 2007 will be the alien's first day of unlawful presence.

If the parole authorization is revoked or terminated prior to its expiration date, unlawful presence begins to accrue the day after the revocation or termination.

An alien paroled for the purpose of removal proceedings will begin to accrue unlawful presence the day after the date the removal order becomes administratively final, or unless the alien is otherwise protected from the accrual of unlawful presence.

(2) Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

As noted in section (a)(2) of this AFM chapter, an alien must be in the United States in an unlawful status in order to accrue unlawful presence; however, there are some situations in which unlawful presence does not accrue despite unlawful status. The alien may be protected from accruing unlawful presence by section 212(a)(9)(B) of the Act itself, or by USCIS policy. This section (b)(2) deals with individuals, who are actually in unlawful status but who, by statute, do not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act.

The exceptions listed in this section (b)(2) apply only to grounds of inadmissibility listed in section 212(a)(9)(B) of the Act, and do not apply for purposes of inadmissibility under section 212(a)(9)(C) of the Act. There are two reasons for this conclusion: 1) The terms of sections 212(a)(9)(B)(iii) and (iv) of the Act refer only to specific subsections of section 212(a)(9)(B)(i) of the Act; and 2) Inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rests on a more serious immigration violation than simple unlawful presence: To be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, the alien must not only have accrued sufficient unlawful presence but also returned or attempted to return to
the United States without admission. Since the precise language of sections 212(a)(9)(B)(iii) and (iv) of the Act clearly make them apply only to inadmissibility under section 212(a)(9)(B) of the Act and not to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, and because violations of section 212(a)(9)(C)(i)(I) of the Act are more culpable than mere unlawful presence, USCIS has concluded that these statutory exceptions do not apply to section 212(a)(9)(C)(i)(I) cases. See June 17, 1997, Office of Programs memorandum – Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act); see also Section (b)(3) below for the same remark.

(A) **Minors Who Are under 18 Years of Age**. An alien whose unlawful status begins before his or her 18th birthday does not begin to accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act until the day after his or her 18th birthday pursuant to section 212(a)(9)(B)(iii)(I) of the Act.

(B) **Aliens with Pending Asylum Applications (Including Children Aging Out and Dependents of Asylum Applicants)**

(i) **Principal Applicant.** An alien, whose bona fide application for asylum is pending, is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act unless the alien is employed without authorization while the application is pending. See section 212(a)(9)(B)(iii)(II) of the Act. It does not matter whether the application is or was filed affirmatively or defensively.

DHS has interpreted the phrase “bona fide asylum application” to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous. If this is the case, unlawful presence does not accrue while the application is pending unless the alien engages in unauthorized employment. DHS considers the application for asylum to be pending during any administrative or judicial review (including review in Federal court).

A denial of an asylum claim is not determinative of whether the claim was bona fide for purposes of section 212(a)(9)(B)(iii)(II) of the Act. Similarly, the abandonment of an application for asylum does not mean that the application was not bona fide. The Asylum Division within the Refugee, Asylum, and International Operations Directorate at USCIS’ HQ can provide guidance regarding whether a filing of an asylum application can be deemed "bona fide" based on the specific facts of the case and should be contacted, if there are any questions as to the determination.

(ii) **Dependents in General.**
An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide).
However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the dependent, the individual is in a period of stay authorized, for example until the determination is made that the application was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

A dependent's asylum case is no longer considered pending if the principal asylum applicant notifies USCIS that the dependent is no longer part of the principal's application, or if USCIS determines that the dependent relationship no longer exists (for example because of divorce, or if the individual is no longer considered a "child"). In such cases, USCIS will remove the individual from the pending asylum application; the individual must file his or her own asylum application as a principal applicant within a reasonable amount of time. The individual will commence to accrue unlawful presence from the time USCIS has removed the dependent from the principal's application. Individuals, who do file a bona fide application within a reasonable period of time, will be deemed to have a pending application and they do not accrue unlawful presence from the time the new bona fide application is pending.

Finally, a derivative beneficiary, who is physically present in the United States but who was not included on the asylum application, is in a period of stay authorized at the time the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(I) of the Act to apply to all applicants for asylum, including derivative beneficiaries who obtain their status through an Asylee/Refugee Relative petition.

Adjudicators should keep in mind that if the principal asylum applicant's dependent is not yet 18 years old, then the dependent will be protected from accrual of unlawful presence under section 212(a)(9)(B)(ii)(I) of the Act.

(iii) Children Who Age Out and The Child Status Protection Act (CSPA). The CSPA amended section 208(b)(3)(B) of the Act to allow continued classification as a child for an unmarried son or daughter, who was under 21 years of age on the date the parent filed for asylum, provided that the son or daughter turned 21 years of age while the application remained pending. Therefore, if the requirements of the CSPA are met (the alien is present in the United States, named in the asylum application of his or her parent, and the application was pending on or after August 6, 2002) the individual may continue to be classified as a "child" and can be considered to have a pending application. Thus, unlawful presence does not accrue in such cases.

**Example:** Form I-589, Application for Asylum and for Withholding of Removal, was filed on February 7, 2000, listing a 20-year old derivative son in the United States. The son turned 21 on October 1, 2000. The application remained pending through August 6, 2002, and continues to be pending. For purposes of the asylum application, the son
continues to be a "child" because the application was filed prior to his 21st birthday. The son will not start to accrue unlawful presence until and unless the application is denied.

(C) Aliens Physically Present in the United States with pending Forms I-730

Accrual of unlawful presence stops upon the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730). USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide petition is properly filed on behalf of the individual, the individual will no longer accrue unlawful presence.

If the alien was already accruing unlawful presence when the Form I-730 was filed, and the Form I-730 is subsequently denied, the individual will again begin to accrue unlawful presence on the day after the denial of the petition. If, at the time of the filing of the Form I-730, the alien was protected from the accrual of unlawful presence (for example, was in lawful status or had another application pending), but the other basis for protection expired while the Form I-730 was pending, then the alien will begin to accrue unlawful presence on the day after the denial of the Form I-730.

No period during which the bona fide Form I-730 was pending will be counted in determining the accrual of unlawful presence. Since the filing of a Form I-730 does not cure any unlawful presence that has already accrued, if the individual departs during the pendency of the petition, the individual will trigger the 3-year and the 10-year bar, if, prior to the filing of the petition, the individual has already accrued sufficient unlawful presence. Because a refugee has to be admissible as an immigrant pursuant to section 207 of the Act, the individual, upon his return to the United States, will be required to file Form I-602, Application By Refugee For Wavier of Grounds of Excludability, to overcome the bars to admissibility before Form I-730 can be granted to confer derivative refugee status. If the alien departs without advance parole, the individual will have to seek the waiver through the U.S. consulate where the approved Asylee/Refugee Relative Petition will be processed.

(D) Beneficiary of Family Unity Protection (FUP) Granted pursuant to Section 301 of the Immigration Act of 1990; 8 CFR 236.15. No period of time in which an alien is a beneficiary of FUP shall be taken into account in determining the period of unlawful presence in the United States, for purposes of section 212(a)(9)(B) of the Act. If the FUP application (Form I-817) is approved, the accrual of unlawful presence will be deemed to have stopped as of the date of the filing of Form I-817, Application for Family Unity Benefits, and will continue through the period the alien retains FUP protection. The grant of FUP protection does not, however, erase prior unlawful presence.

The filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.
Section 212(a)(9)(B)(iii)(III) of the Act, by its terms, applies only to Family Unity Program benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence. See AFM chapter 40.9.2(b)(3)(F), below.

(E) **Certain Battered Spouses, Parents, and Children.** An approved VAWA self-petitioner and his or her child(ren) can claim an exception from inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can establish a substantial connection between the abuse suffered, the unlawful presence, and his or her departure from the United States. He or she claims this exception by submitting evidence of such substantial connection with his or her adjustment application. If the exception is granted, the individual is deemed to not be inadmissible under section 212(a)(9)(B)(i) of the Act for purposes of future immigration benefits. This exception does not apply to inadmissibility under section 212(a)(9)(C)(i) of the Act, which has its own VAWA waiver in section 212(a)(9)(C)(iii) of the Act.

(F) **Victims of Severe Form of Trafficking in Persons.** Section 212(a)(9)(B)(i) of the Act does not apply to certain victims of severe forms of trafficking. See section 212(a)(9)(B)(iii)(V) of the Act. Similar to the battered spouses, a victim of a severe form of trafficking in persons may claim an exception to inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can demonstrate that the severe form of trafficking (as that term is defined in section 7102 of Title 22 U.S.C.) was at least one central reason for the alien's unlawful presence in the United States. An individual can claim the exception by submitting evidence of the central reason with Form I-914, Application for T Nonimmigrant Status, or, at the time of the adjustment, when filing Form I-485, Application to Register Permanent Residence or Adjust Status. 8 CFR 214.11; 8 CFR 245.23 If the exception is granted by USCIS, the individual will be deemed to have never accrued any unlawful presence for purposes of the current nonimmigrant benefits application or any future benefits application.

If the exception is not granted, the individual may apply for a discretionary waiver of the ground of inadmissibility. If seeking T nonimmigrant status, the alien would apply under section 212(d)(3)(A) or 212(d)(13) of the Act by filing Form I-192, Advance Permission to Enter as Nonimmigrant. See 8 CFR 212.16. If the alien is already a T nonimmigrant, and is seeking adjustment of status, the alien would file Form I-601, Application for Waiver Grounds of Inadmissibility. See 8 CFR 212.18.

(G) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) ("Tolling").** Pursuant to section 212(a)(9)(B)(iv) of the Act, a nonimmigrant, who has filed a timely request for extension of nonimmigrant status (EOS) or change of nonimmigrant status (COS), is protected from accruing unlawful presence during the pendency of the application for up to 120 days (the accrual of unlawful presence is "toggled"). Section 212(a)(9)(B)(iv) of the Act is only applicable to the three-year bar of section 212(a)(9)(B)(i)(I) of the Act, and is also referred to as the
"tolling-provision." However, unlawful presence for purposes of the 3-year bar will only be tolled, if

1) the alien has been lawfully admitted or paroled into the United States, and
2) the application for EOS or COS is timely filed, and not frivolous, and
3) the alien does not engage and/or has not been engaging in unauthorized employment. See section 212(a)(9)(B)(iv) of the Act.

By policy, USCIS has extended the 120-day statutory tolling period to cover the entire period during which an application for EOS or COS is pending; this extension is valid for the 3-year and the 10-year bars. For a more detailed description of this extension and guidance concerning whether unlawful presence accrues after the 120-day period specified by the statute, please see section 3(C) below.

(3) **Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

As noted in section (a)(2) of this AFM chapter, there are some circumstances in which an alien whose status is actually unlawful is, nevertheless, protected from the accrual of unlawful presence. As a matter of policy, USCIS has determined that an alien whose status is actually unlawful does not accrue unlawful presence in the situations described in this subsection. These exceptions are based on policy, unlike the statutory exceptions listed in sections 212(a)(9)(B)(iii) and (iv) of the Act that were discussed in section (b)(2) of this AFM chapter. It is USCIS' policy that these exceptions apply to unlawful presence accrued for purposes of sections 212(a)(9)(B) and (C)(i)(I) of the Act unless otherwise noted in this section.

(A) **Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry (Sections 209, 245, and 245(i) of the Act, sections 202 of Public Law 99-603 (Cuban-Haitian Adjustment), section 202(b) of NACARA, section 902 of HRIFA, and aliens with properly filed, pending Registry applications under section 249 of the Act)**. Accrual of unlawful presence stops on the date the application is properly filed pursuant to 8 CFR 103 and the regulatory filing requirements governing the particular type of benefit sought. Note that, if the application is properly filed according to the regulatory requirements, the applicant will not accrue unlawful presence, even if it is ultimately determined that the applicant was not eligible for the benefit in the first place. The accrual of unlawful presence is tolled until the application is denied.

**Example**: An alien, who has been unlawfully in the United States for 90 days, and who had worked without authorization during the 90 days, applies for adjustment of status based on an approved I-130, Petition for Alien Relative. The
application for adjustment of status is properly filed, that is, the application is fully executed, signed, and the applicant pays the proper fee. See 8 CFR 103.2(a)(7). Also, with the application package, the alien provides a copy of Form I-797, Notice of Approval for the Alien Relative Petition, and a copy of the newest Visa Bulletin, demonstrating that a visa number is immediately available in his or her preference category. See 8 CFR 245.2. Therefore, USCIS accepts the application and stamps it as received and properly filed as of January 1, 2007. What is not readily apparent from the initial review of the application is that the alien had previously worked without authorization, and therefore, he or she is not eligible to apply for adjustment of status pursuant to section 245(c) of the Act. However, because the application was accepted by USCIS as (technically) properly filed, the applicant is now in authorized stay and does not accrue any unlawful presence during the pendency of the properly filed application for adjustment of status.

At the time of the interview, on April 1, 2007, the applicant's adjustment of status application is denied based on section 245(c) of the Act, for having been employed without authorization. On April 2, 2007, the alien's accrual of unlawful presence resumes because he or she no longer has a pending application for adjustment of status. The alien departs the United States on May 1, 2007, after having secured an immigrant visa interview at the US Embassy/consular section in his or her home country. In assessing the alien's inadmissibility under section 212(a)(9) of the Act, the consular officer will count the alien's 90 days of unlawful presence that accrued prior to the filing of the adjustment of status application, and the 30 days of unlawful presence that accrued after the adjustment of status application was denied. However, the consular officer will not count the time period during which the adjustment of status application was pending because the individual was in a period of stay authorized and did not accrue unlawful presence during the pendency of the adjustment application. In total, the alien had accrued 120 days of unlawful presence in the United States; the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Except in the case of a NACARA or HRIFA application, the application must have been filed affirmatively (with USCIS) rather than defensively (before the immigration judge as a form of relief from removal) for it to toll the accrual of unlawful presence; that is, an alien, who files an application for adjustment of status after being served with a Notice to Appear (NTA) in removal proceedings, is not protected from the accrual of unlawful presence. Accrual of unlawful presence resumes the day after the application is denied. However, if the application that was filed with USCIS is denied, and the alien has a legal basis upon which to renew the application in proceedings before an immigration judge, the protection against the accrual of unlawful presence will continue through the administrative appeal. See for example for adjustment of status applications under section 245 of the Act: 8 CFR 245.2(a)(5)(ii) and 8 CFR 1245.2(a)(5)(ii).
(B) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) ("Tolling").** As noted in 40.9.2(b)(2)(G) of this AFM chapter, by statute, an alien does not accrue unlawful presence for up to 120 days while a non-frivolous EOS or COS application is pending, provided that the alien does not work and/or has not worked unlawfully. This is referred to as "tolling:" while the application is pending after having been properly filed, the alien will not accrue unlawful presence. The above described statutory exception applies to section 212(a)(9)(B)(i)(I) of the Act; it does not apply to section 212(a)(9)(B)(i)(II) or (C)(i)(I) of the Act.

However, according to USCIS policy, an alien does not accrue unlawful presence (the accrual of unlawful presence is tolled), and is considered in a period of stay authorized for purposes of sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act during the entire period a properly filed EOS or COS application is pending, if the EOS or COS application meets the following requirements:

- the non-frivolous request for EOS or COS was filed timely. To be considered timely, the application must have been filed with USCIS, i.e. be physically received (unless specified otherwise, such as mailing or posting date) before the previously authorized stay expired. See 8 CFR 103.2(a)(7); 8 CFR 214.1(c)(4); 8 CFR 248.1(b). An untimely request may be excused in USCIS' discretion pursuant to 8 CFR 214.1(c)(4) and 8 CFR 248.1(b); **and**
- the alien did not work without authorization before the application for EOS or COS was filed or while the application is pending; **and**
- the alien has not failed to maintain his or her status prior to the filing of the request for EOS or COS.

If these requirements are met, the period of authorized stay covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act and extends to the date a decision is issued on the request for EOS or COS.

A request for EOS or COS may be filed on Form I-539, Application to Extend/Change Nonimmigrant Status, or may be included in the filing of Form I-129, Petition for a Nonimmigrant Worker.

Please see Section 40.9.2(b)(2)(G) of this AFM chapter for a detailed description of the statutory tolling provision under section 212(a)(9)(B)(iv) of the Act, covering only inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

(C) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) Who Depart the United States During the Pendency.** Departure from the United States while a request for EOS or COS is pending, does not subject an alien to the 3-year, 10-year, or permanent bar, if he or she departs after the expiration of Form I-94, Arrival/Departure Record unless the application was frivolous,
untimely, or the individual had worked without authorization. D/S nonimmigrants, who depart the United States while an application for COS or EOS is pending, generally do not trigger the 3-year, 10-year, or permanent bar under sections 212(a)(9)(B)(i) or 212(a)(9)(C)(i)(I) of the Act.

- **Evidentiary Considerations:** If the applicant subsequently applies for a nonimmigrant visa abroad, the individual has to establish to the satisfaction of the consular officer that the application was timely filed and not frivolous. The requirement that the application was timely may be established through the submission of evidence of the date the previously authorized stay expired, together with a copy of a dated filing receipt, a canceled check payable to USCIS for the EOS or COS application, or other credible evidence of a timely filing.

- **Determination by a Consular Officer that the Application Was Non-Frivolous:** To be considered non-frivolous, the application must have an arguable basis in law and fact, and must not have been filed for an improper purpose (such as to prolong one’s stay to pursue activities inconsistent with one’s status). In determining whether an EOS or COS application was non-frivolous, DOS has instructed consular posts that it is not necessary to make a determination that USCIS would have ultimately ruled in favor of the alien. See 9 Foreign Affairs Manual (FAM) 40.92 Notes, Note 5c.

**(D) Nonimmigrants - Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence.** The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) **Approved Requests.** If a request for EOS or COS is approved, the alien will be granted a new period of authorized stay, retroactive to the date the previous period of authorized stay expired. This applies to aliens admitted until a specific date and aliens admitted for D/S.

(ii) **Denials Based on Frivolous Filings or Unauthorized Employment.** If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, any and all time after the expiration date marked on Form I-94, Arrival/Departure Record, will be considered unlawful presence time, if the alien was admitted until a specific date. However, if the alien was admitted for D/S, unlawful presence begins to accrue on the date the request is denied.

(iii) **Denials of Untimely Applications.** If a request for EOS or COS is denied because it was not timely filed, unlawful presence begins to accrue on the date Form I-94 expired. If, however, the alien was admitted for D/S, unlawful presence begins to accrue the day after the request is denied.
(iv) **Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS.** If a timely filed, non-frivolous request for EOS or COS is denied for cause, unlawful presence begins to accrue the day after the request is denied.

(v) **Motion to Reopen/Reconsider.** The filing of a motion to reopen or reconsider does not stop the accrual of unlawful presence. See 8 CFR 103.5(a)(iv) (Effect of motion or subsequent application or petition). However, if the motion is successful and the benefit granted, the grant is effective retroactively. The alien will be deemed to not have accrued unlawful presence. If DHS reopens proceedings, but ultimately denies the petition or application again, the petition or application will be considered to have been pending since the initial filing date. Thus, unlawful presence will accrue as specified in paragraphs (ii), (iii) or (iv). In the case of a timely, non-frivolous application, unlawful presence will accrue from the date of the last denial of the petition or application, not from the earlier, reopened decision.

(vi) **Appeal to the Administrative Appeals Office (AAO) of the Underlying Petition Upon Which an EOS or COS Is Based.** If an individual applies for an EOS or COS as part of an I-129, Petition for Nonimmigrant Worker, the adjudicator has to adjudicate two requests: The petition seeking a particular classification, and the request for an EOS or COS.

The denial of an EOS or COS cannot be appealed. See 8 CFR 214.1(c)(5) and 248.3(g). However, the denial of the underlying petition for the status classification can, in general, be appealed. The filing of an appeal to the AAO for the denial of the underlying petition, however, has no influence on the accrual of unlawful presence. Unlawful presence starts to accrue on the day of the denial of the request for EOS or COS regardless of whether the applicant or the petitioner appeals the denial of the petition to the AAO. However, if the denial of the underlying petition is reversed on appeal, and the EOS or COS subsequently granted, the individual is not deemed to have accrued any unlawful presence between the denial of the petition and request for EOS or COS, and the subsequent grant of the EOS or COS.

(vii) **Nonimmigrants - Multiple Requests for EOS Or COS ("Bridge Filings") and Its Effect on Unlawful Presence.** The terms “authorized status” (authorized period of admission or lawful status) and “period of stay authorized by the Secretary of Homeland Security” are not interchangeable. They do not carry the same legal implications. See Section (a)(2) of this AFM chapter. An alien may be in a period of stay authorized by the Secretary of Homeland Security but not in an authorized status.

An alien whose authorized status expires while a timely filed request for EOS or COS is pending, is in a period of stay authorized by the Secretary of Homeland Security. The alien does not accrue unlawful presence as long as the timely filed request is pending. However, the filing of a request for EOS or COS does not put an individual into valid
and authorized nonimmigrant status, i.e. he or she is not in authorized status. Therefore, if an individual has filed an initial application for EOS or COS and subsequently files additional (untimely) requests for EOS or COS, the subsequently filed request will not stop the individual from accruing unlawful presence, if the initial request is denied.

(E) **Aliens with Pending Legalization Applications, Special Agricultural Worker (SAW) Applications, and LIFE Legalization Applications.** An alien who properly filed an application under section 245A of the Act (including an applicant for Legalization under any Legalization-related Class Settlement Agreements), section 210 of the Act, or section 1104 of the LIFE Act, is in a period of authorized stay as long as the application remains pending. Accrual of unlawful presence stops on the date the application is filed and resumes the day after the application is denied. However, if the denial is appealed, the period of authorized stay continues through the administrative appeals process. Denied applications cannot be renewed before an immigration judge. Therefore, the period of authorized stay does not continue through removal proceedings or while a petition for review is pending in Federal court.

(F) **Aliens granted Family Unity Program Benefits under section 1504 of the LIFE Act Amendments of 2000**

Section 212(a)(9)(B)(III)(iii) of the Act, by its terms, applies only to Family Unity Program (FUP) benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence.

As with section 301 FUP cases, if the Form I-817 is approved, then the alien will be deemed not to accrue unlawful presence from the Form I-817 filing date throughout the period of the FUP grant.

A grant of FUP benefits under section 1504 does not, however, erase any unlawful presence accrued before the grant of FUP benefits under section 1504 of the LIFE Act Amendments of 2000.

Also, as with section 301 FUP cases, the filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

(G) **Aliens with Pending Applications for Temporary Protected Status (TPS) pursuant to Section 244 of the Act.** The period of authorized stay begins on the date a prima facie application for TPS is filed, provided the application is ultimately approved. If the application is approved, the period of authorized stay continues until TPS status is terminated. If the application is denied, or if prima facie eligibility is not established, unlawful presence accrues as of the date the alien’s previous period of authorized stay
expired. The application for TPS can be renewed in removal proceedings pursuant to 8 CFR 244.11 and 8 CFR 1244.11, and the period of authorized stay continues through removal proceedings.

(H) **Aliens Granted Voluntary Departure pursuant to Section 240B of the Act**

Voluntary departure is a discretionary relief that allows certain favored aliens to leave the country willingly. Voluntary departure can either be granted by DHS, by the immigration judge, or by the Board of Immigration Appeals (BIA). The length of the voluntary departure period that can be granted depends on the stages of proceedings the alien is in. If the alien is not in removal proceedings, DHS can grant voluntary departure for up to 120 days. See section 240B(a) and 8 CFR 240.25. The denial of voluntary departure at this stage, cannot be appealed; however, the denial is without prejudice to the alien for a later application of voluntary departure in removal proceedings. See 8 CFR 240.25(e).

If the alien is in removal proceedings but these proceedings are not yet completed, or if the alien’s proceedings are at the conclusion, the immigration judge or the judge at the BIA, may grant voluntary departure. See section 240B(a) or (b) of the Act; 8 CFR 1240.26. If the IJ denies voluntary departure, the denial can be appealed to the BIA. 8 CFR 1240.26(g). The time period granted can be up to 120 days if granted prior to completion, or up to 60 days if granted at the conclusion of proceedings. See 8 CFR 1240.26(e). Under certain circumstances, the voluntary departure period can be extended, or voluntary departure reinstated. Voluntary departure is always granted in lieu of removal proceedings or a final order of removal. Therefore, if an alien timely departs according to the voluntary departure period, the alien is not subject to a final order of removal. However, if the alien fails to depart, and there was an alternate order of removal, the alternate order will become effective upon the alien’s failure to depart. See 8 CFR 1240.26(d).

On December 18, 2008, the Department of Justice amended the voluntary departure rule; the changes became effective on January 20, 2009 and apply prospectively only. 73 FR 76927 (December 18, 2008). The new rules clarified the relationship between voluntary departure and the filing of a motion to reopen/reconsider or petition for review. It also clarified the impact of the failure to post bond on voluntary departure and the alternate order of removal.

**General Rule for the Accrual of Unlawful Presence in Connection With A Grant of Voluntary Departure:** Accrual of unlawful presence stops on the date an alien is granted voluntary departure and resumes on the day after voluntary departure expires, if the alien has not departed the United States according to the terms of the grant of voluntary departure.

(i) **Voluntary Departure Granted by DHS pursuant to 8 CFR 240.25 (Including Extension of Voluntary Departure).** If DHS grants voluntary departure before initiation of removal
proceedings, time spent in voluntary departure does not add to an alien's unlawful presence. A grant of voluntary departure prior to the initiation of removal proceedings may not exceed 120 days. See section 240B(a)(2) of the Act. Pursuant to 8 CFR 240.25, voluntary departure may be extended at the discretion of the Field Office Director, except that the total period allowed, including any extensions, may not exceed the 120-day limit. Courts may not extend voluntary departure but they may reinstate voluntary departure.

(ii) **Voluntary Departure Granted Pursuant to Section 240B of the Act after the Initiation of Removal Proceedings.** If a person is granted voluntary departure after commencement of removal proceedings, unlawful presence ceases to accrue with the grant, and resumes after the expiration of the voluntary departure period. Voluntary departure after the initiation of removal proceedings is governed by section 240B(b) of the Act and 8 CFR 1240.26.

If the immigration judge grants voluntary departure, the alien is not subject to the 3-year bar because of the wording of section 212(a)(9)(B)(i)(I) of the Act. However, the fact that proceedings commenced does not stop the accrual of unlawful presence time for purposes of the 10-year and the permanent bar. See 8 CFR 239.3.

(iii) **Reversal of a Denial of Voluntary Departure.** If the denial of voluntary departure by the Immigration Judge is reversed on appeal by the BIA, the time from the denial to the reversal will be considered authorized stay in the United States (Remember: A denial of voluntary departure by USCIS cannot be appealed.)

(iv) **Reinstatement of Voluntary Departure by the Board Of Immigration Appeals (BIA) or the Immigration Judge.** An immigration judge or the BIA may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure, and if reopening was granted prior to the expiration of the original period of voluntary departure. See 8 CFR 1240.26(h). In no event can the reinstatement of voluntary departure result in a total period of time, including any reinstatement, exceeding the 60 or the 120 days of voluntary departure stated in section 240B of the Act. If voluntary departure is reinstated by the BIA or by the immigration judge, the time from the expiration of the grant of voluntary departure to the grant of reinstatement is not considered authorized stay. However, the time of the reinstated voluntary departure to the ending period of this voluntary departure, is considered authorized stay. Reinstatement of voluntary departure is regulated at 8 CFR 1240.26(h).

(v) **Effect of a Petition for Review.** In a case involving a grant of voluntary departure before January 20, 2009, if a Federal court with jurisdiction to review the removal order stays the running of the voluntary departure period while the case is pending, the alien will continue to be considered to be under a grant of voluntary departure and will not accrue unlawful presence.
For any EOIR grant of voluntary departure on or after January 20, 2009, however, the filing of a petition for review terminates a grant of voluntary departure and makes the alternate removal order immediately effective. 8 CFR 1240.26(i). If the alien files a petition for review, therefore, the alien will no longer be protected from the accrual of unlawful presence based on the voluntary departure grant. If the alien remains in the United States while the petition is pending, the accrual of unlawful presence will begin the day after the petition for review is filed. This regulation, however, gives the alien 30 days after filing the petition for review in order to leave the United States voluntarily. If the alien leaves within this 30-day period, the alien will continue to be protected from the accrual of unlawful presence up to the date of the alien’s actual departure.

(vi) Voluntary Departure and the Filing of A Motion to Reopen To the Board of Immigration Appeals (BIA)

A motion to reopen is a form of procedural relief that asks the BIA to change its decision in light of newly discovered evidence or a change in circumstances since the hearing. See Dada v. Mukasey, 128 S.Ct. 2307, 2315 (2008). In general, a motion to reopen has to be filed within 90 days. See 240(c)(7) of the Act. Therefore, an alien granted voluntary departure for a period of up to 60 days is either faced with the choice of departing according to the voluntary departure order, or to make use of his or her statutory right to file the motion to reopen and to await the result of the adjudication of the motion.

In 2008, the Supreme Court addressed the issue and held that to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally and without regards to the underlying merits of the motion to reopen, a voluntary departure request before expiration of the departure period. See Dada v. Mukasey, 128 S.Ct. 2307, 2320 (2008). As a result, the alien has the option either to abide by the terms and receive the agreed upon benefits of voluntary departure; or, alternatively, to forego those benefits and remain in the United States to pursue an administrative motion.

Therefore, if an alien was initially granted voluntary departure by the immigration judge or the Board of Immigration Appeals before January 20, 2009, but the alien later requests withdrawal of the voluntary departure order, the alien will commence to accrue unlawful presence at the time of the administratively final order of removal unless the alien is otherwise protected from the accrual of unlawful presence (such as the grant of a stay of removal by the BIA). The motion to reopen does not toll voluntary departure. If the alien requests a withdrawal of the voluntary departure order, the alien will accrue unlawful presence as if voluntary departure had never been granted even if the request for withdrawal is made, for example, on the last day of the voluntary departure period.

The Dada decision does not apply, however, to any EOIR grant of voluntary departure that is made on or after January 20, 2009. Under 8 CFR 1240.26(b)(3)(iii), filing a
motion to reopen or reconsider during the voluntary departure period automatically terminates the grant of voluntary departure, and makes the alternative removal order effective immediately. Thus, for a grant of voluntary departure on or after January 20, 2009, the alien will no longer be protected from the accrual of unlawful presence beginning the day after the date the alien files a motion to reopen or to reconsider.

(I) **Aliens Granted Stay of Removal.** A stay of removal is an administrative or judicial remedy of temporary relief from removal. The grant of a stay of removal can be automatic or discretionary. See sections 240(b)(5) and 241(c)(2) of the Act; 8 CFR 241.6, 8 CFR 1241.6, 8 CFR 1003.6, and 8 CFR 1003.23(b)(1)(v). During a grant of stay of removal, DHS is prevented from executing any outstanding order of removal, deportation, or exclusion. Therefore, an alien granted stay of removal does not accrue unlawful presence during the period of the grant of stay of removal. A stay of removal does not erase any previously accrued unlawful presence.

If an individual is ordered removed in absentia pursuant to section 240(b)(5)(A) of the Act, and he or she challenges the order in a motion to rescind the in absentia order pursuant to section 240(b)(5)(C) of the Act, the alien’s removal order will be stayed automatically until the motion is decided. See section 240(b)(5)(C) of the Act. The order will be stayed through a possible appeal to the Board of Immigration Appeals (BIA) or Federal court. See Matter of Rivera-Claro, 21 I&N Dec. 232 (BIA 1996). For purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act, an individual, who filed a motion to rescind an in absentia order of removal pursuant to section 240(b)(5)(C) of the Act, will not accrue unlawful presence during the pendency of the motion, including any stages of appeal before the BIA or Federal court.

(J) **Aliens Granted Deferred Action.** A DHS field office director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice in determining, as a matter of prosecutorial discretion, to give some cases lower enforcement priority. Deferred action is, in no way, an entitlement, and does not make the alien’s status lawful. Deferred action simply recognizes that DHS has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws. There is no specific authority for deferred action codified in law or regulation although certain types of benefits refer to a grant of deferred action. For more information on Deferred Action, please see Detention and Removal Operations Policy and Procedure Manual (DROPPM), Chapter 20.8.

Accrual of unlawful presence stops on the date an alien is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not eliminate any prior periods of unlawful presence.

(K) **Aliens Granted Withholding of Removal under Section 241(b)(3) of the Act or Deportation under Former Section 243 of the Act.** Accrual of unlawful presence
stops on the date that withholding is granted and continuous through the period of the grant.

(L) **Aliens Granted Withholding of Removal or Deferral of Removal under the United Nations Convention Against Torture Pursuant to 8 CFR 208.16 and 8 CFR 208.17.** Accrual of unlawful presence stops on the date that withholding or deferral is granted and continuous through the period of the grant.

(M) **Aliens Granted Deferred Enforced Departure (DED).** The period of authorized stay begins on the date specified in the Executive Order or other Presidential directive and ends when DED is no longer in effect.

(N) **Aliens Granted Satisfactory Departure under 8 CFR 217.3.** Under 8 CFR 217.3(a), a Visa Waiver Program (VWP) alien, who obtains a grant of satisfactory departure from U.S. Immigration and Customs Enforcement, and who leaves during the satisfactory departure period, is deemed to not have violated his or her VWP admission. Thus, unlawful presence will not accrue during the satisfactory departure period, if the alien departs as required. If the alien remains in the United States after the expiration of the grant of satisfactory departure, unlawful presence will begin to accrue the day after the satisfactory departure period expires unless some other provision or policy determination protects the person from accrual of unlawful presence. See section (b) of this AFM chapter.

(4) **Effect of the Protection from the Accrual of Unlawful Presence on Previously Accrued Unlawful Presence: Protection from the Accrual of Unlawful Presence Does Not Cure Previously Accrued Unlawful Presence**

Unless stated otherwise, protection from the accrual of unlawful presence under any section of this AFM chapter does not cure any unlawful presence that the alien may have already accrued before the alien came to be protected.

**Example:** An alien accrues 181 days of unlawful presence. He or she then applies for adjustment of status. Although the alien had accrued 181 days of unlawful presence before he or she applied for adjustment of status, the alien stops to accrue unlawful presence once the adjustment of status application is properly filed. However, the already accrued unlawful presence of 181 days continues to apply to the alien. If the alien departs after having obtained a grant of advance parole, the individual will be subject to the 3-year bar under section 212(a)(9)(B)(i)(I) of the Act.

(5) **Effect of Removal Proceedings on Unlawful Presence**

(A) **Initiation of Removal Proceedings.** The initiation of removal proceeding has no effect, neither to the alien’s benefit nor to the alien’s detriment, on the accrual of unlawful presence. See 8 CFR 239.3. If the alien is already accruing unlawful presence
when removal proceedings are initiated, the alien will continue to accrue unlawful presence unless the alien is protected from the accrual of unlawful presence (as described in these AFM chapters). If the alien is not accruing unlawful presence when removal proceedings begin, the alien will continue to be protected from the accrual of unlawful presence until the immigration judge determines that the individual has violated his or her status, or until Form I-94, Arrival/Departure Record expires, whichever is earlier (and regardless of whether the decision is subsequently appealed).

Example 1: An alien, who is present without inspection, is placed in proceedings. The alien was already accruing unlawful presence when placed in proceedings, and will continue to do so while in proceedings unless a provision described in this AFM chapter stops the accrual of unlawful presence.

Example 2: An alien, admitted as an LPR, is placed in removal proceedings because of a criminal conviction. As an LPR, the alien does not accrue unlawful presence. The alien will not begin to do so unless the alien becomes subject to a final order of removal, that is, when LPR status is terminated.

Example 3: An alien, admitted as a nonimmigrant for duration of status, is placed in removal proceedings. The alien does not accrue unlawful presence while the proceedings are pending. If the immigration judge rules in the alien’s favor on the removal charge, no unlawful presence applies to the alien. If the immigration judge sustains the removal charge, unlawful presence begins to accrue the day after the immigration judge’s decision becomes administratively final.

Example 4: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge sustains the removal charge, and the alien appeals. The Board of Immigration Appeals affirms the decision. Once the removal order becomes administratively final, the alien will accrue unlawful presence from May 2, 2010, the day after the immigration judge’s order.

Example 5: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge rules in the alien’s favor and dismisses the removal charge. The alien will not be deemed to have accrued any unlawful presence.

Example 6: An alien in unlawful status properly files with USCIS an adjustment of status application. USCIS denies the application and places the alien in proceedings. The alien renews the application before the Immigration Judge. Because the alien is renewing an affirmative application that had stopped the
accrual of unlawful presence, the alien does not accrue unlawful presence while the
adjustment application is pending before the IJ.

Example 7: An alien whose nonimmigrant admission ended on November 6,
2008, is placed in removal proceedings. On February 6, 2009, the alien files an
adjustment application with the immigration judge. The alien had never filed with
USCIS. Because the application is not the “renewal” of an affirmative
application, filing the application with the immigration judge does not stop the
accrual of unlawful presence.

Example 8: Same facts as in Example 7, except that the alien’s application is
under NACARA or HRIFA. In this situation, filing the application does stop the
accrual of unlawful presence.

Example 9: An alien is admitted as a nonimmigrant until January 10, 2011. On
March 15, 2009, DHS places the alien in removal proceedings, claiming that the
alien had violated a condition of admission. Removal proceedings are still
pending on January 11, 2011. Regardless of the outcome of the proceedings, the
alien will accrue unlawful presence the day after the I-94 expires, that is, on
January 11, 2011.

The result in Example 9 is consistent with Matter of Halabi, 15 I&N Dec. 105 (BIA
1974), where the Board of Immigration Appeals (BIA) held that the expiration of
the alien’s authorized period of stay rendered the alien subject to removal without
the need to resolve the original charge listed in the Notice to Appear (in Halabi,
the individual was originally charged with having violated his status). The BIA
indicated that being able to charge the alien as a visa overstay from the date the
alien’s period of authorized stay expired, although while in removal proceedings,
did not “punish” the alien for contesting the original removal charge. See Halabi,
at 106; see also Reno v. American-Arab Anti-Discrimination Committee, 525 U.S.
471, 491 (1999) (Removal of an alien, who has remained longer than authorized,
is not punishment but simply a matter of the alien’s “being held to the terms
under which he was admitted.”); cf. Westover v. Reno, 202 F.3d 475 (1st Cir.
2000) (dicta), and Halabi at 107-08 (Roberts, Board Chair, dissenting). The alien
may avoid any accrual of unlawful presence, for example, by offering to settle the
removal proceeding by agreeing to leave the United States no later than the date
his or her status expires in return for dismissal of the charge of having violated
his or her status before that date. See 8 CFR 239.2(a)(4) (notice to appear may
be cancelled, if alien has left the United States). Leaving at the expiration of the
period of authorized stay and the resulting dismissal of removal proceedings
would also avoid the risk of a ruling against the alien on the original charge of
having violated his or her status before it expired.
(B) Effect of Filing an Appeal or Petition for Review on Unlawful Presence. As noted, the initiation of removal proceedings does not affect the accrual of unlawful presence. See 8 CFR 239.3. Thus, the fact that an alien or DHS files an appeal to the Board of Immigration Appeals (BIA) or seeks judicial review of a removal order or the relief granted, does not affect the alien’s position in relation to the accrual of unlawful presence. If the Board or a Federal court vacates the removal order, however, the alien will not be deemed to have accrued unlawful presence solely on the basis of the vacated removal order. If the Board or the Federal court affirms the removal order, the alien will be deemed to have accrued unlawful presence from the date of the immigration judge’s order, unless the alien was already accruing unlawful presence on that date.

(6) Effect of an Order of Supervision pursuant to 8 CFR 241.5 on Unlawful Presence

Unless protected by some other provision included in this AFM chapter, an alien present in an unlawful status continues to accrue unlawful presence despite the fact that the alien is subject to an order of supervision under 8 CFR 241.5.

(c) Relief from Inadmissibility under Section 212(a)(9)(B)(i)(I) and (II), and Section 212(a)(9)(C)(i)(I) of the Act

(1) Waiver of the 3-Year Bar or the 10-Year Bar under Section 212(a)(9)(B)(i) of the Act

(A) Nonimmigrants. If a nonimmigrant is inadmissible, the nonimmigrant may apply for advance permission to enter as a nonimmigrant despite his or her inadmissibility pursuant to section 212(d)(3) of the Act, which is granted in the discretion of the Secretary of Homeland Security. If the alien is an applicant for a nonimmigrant visa at the American consulate, the alien will have to apply for this type of temporary permission through the consulate. The application is adjudicated by the United States Customs and Border Protection (CBP), Admissibility Review Office (ARO) pursuant to section 212(d)(3)(A)(i) of the Act. If the alien is an applicant at the U.S. border for admission because he or she is not required to apply for a visa (other than visa waiver applicants), the application is filed with a CBP designated port of entry or designated PreCLEARance office. See section 212(d)(3)(A)(ii) and 8 CFR 212.4.

If the nonimmigrant status applicant is an applicant for T or U visa status, the applicant has to file Form I-192 with USCIS at the Vermont Service Center (VSC).

(B) Immigrants and Adjustment of Status Applicants Who Are the Spouses, Sons, or Daughters of U.S. Citizens or LPRs, and Fiancé(e)s of U.S. Citizens. DHS has discretion to waive an alien’s inadmissibility under section 212(a)(9)(B) of the Act if the alien is applying for an immigrant visa or adjustment of status and the alien is the spouse, son, or daughter of a U.S. citizen or LPR, or the fiancé(e) of a U.S. citizen (in
relation to a K-1/K-2 visa). The alien must establish that denying the alien’s admission to the United States, or removing the alien from the United States would result in extreme hardship to the alien’s U.S. citizen or LPR spouse, parent, or the K visa petitioner. See section 212(a)(9)(B)(v) of the Act; see 8 CFR 212.7(a). The application is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with the respective fee as stated in 8 CFR 103.7(b). There is no judicial review available, if the waiver is denied but the denial can be appealed to the Administrative Appeals Office of USCIS pursuant to 8 CFR 103.

If the alien seeks a waiver in relation to an application for a K-1 or K-2 visa, approval of the waiver is conditioned on the K-1’s marrying the citizen who filed the K nonimmigrant visa petition within the statutory time of three (3) months from the day of the K-1 nonimmigrant’s admission. The reason for this condition is that, at the time of the issuance of the K-1 or K-2 nonimmigrant visa, the K-1 and K-2 nonimmigrants are not yet legally related to the petitioner in the manner required by section 212(a)(9)(B)(v) of the Act. If the K-1 nonimmigrant does not marry the petitioner, and the K-1 and K-2 nonimmigrants do not acquire LPR status on that basis, USCIS may ultimately deny the Form I-601.

There is no waiver available to an alien parent if only his or her U.S. citizen or LPR child experiences extreme hardship on account of the mother’s or father’s removal.

(C) Asylees and Refugees Seeking Adjustment of Status. Section 212(a)(9)(B) grounds of inadmissibility can be waived for Asylees and Refugees seeking adjustment of status pursuant to section 209(c) of the Act. Such aliens must file Form I-602, Application by Refugee For Waiver of Grounds of Excludability. Under current USCIS policy, it is within the adjudicator’s discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. See AFM chapter 41.6; October 31, 2005, Domestic Operations memorandum – Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM Update 05-33).

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. See 8 CFR 207.3(b). However, if a ground of inadmissibility arose after the alien’s approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. See AFM Chapter 23.6 (Asylee and Refugee Adjustment).

(D) TPS Applicants. Section 212(a)(9)(B) of the Act may be waived for humanitarian purposes, to assure family unity, or when it would be in the public interest to grant the waiver. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. See section 244 of the Act; 8 CFR 244.3.
Granting a waiver to a TPS applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have a ground of inadmissibility waived is generally an "extreme hardship" standard for section 212(a)(9)(B) of the Act (3-year and 10-year bars), and not the lesser standard for TPS, i.e. the standard that the waiver may be granted for "humanitarian purposes, to assure family unity, or public interest."

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the alien is not inadmissible under section 212(a)(9)(B) of the Act for purposes of the adjustment of status application. Rather, the adjudicator should direct the applicant to file a new Form I-601 to overcome the specific grounds of inadmissibility for adjustment of status purposes.

(E) Legalization under Section 245A of the Act and Any Legalization-related Class Settlement Agreements, and Legalization Applicants pursuant to 8 CFR 245a.2(k) and 8 CFR 245a.18. The waiver can be granted for humanitarian purposes, to ensure family unity, or when the granting of such a waiver is otherwise in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Inadmissibility pursuant to Section 245A or 210 of the Immigration and Naturalization Act.

(2) Waiver of the Permanent Bar under Section 212(a)(9)(C)(i)(I) of the Act

Generally, there is no "waiver" of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Rather, an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act must, generally, obtain consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act. See AFM chapter 43 concerning Consent to Reapply, which is sought by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

As stated by the Board of Immigration Appeals (BIA) in Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006), the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the filing procedures in 8 CFR 212.2 are still in effect, the substantive requirements of the provisions in section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal; a USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212. A Form I-212 cannot be approved for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act unless the alien has been abroad for at least 10 years. Matter of Torres-Garcia, supra. This rule applies in the 9th Circuit as well as in other circuits. Gonzales v. Department of Homeland Security, 508 F.3d 1227 (9th Cir. 2007).
There are, however, some waivers that are also available to certain categories of aliens, who are inadmissible under section 212(a)(9)(C)(i)(l) of the Act. If an alien is eligible for one of these waivers, and the waiver is granted, it is not necessary for the alien to obtain approval of a Form I-212.

(A) **HRIFA and NACARA Applicants.** A waiver can be granted at the discretion of USCIS. The waiver is sought by filing Form I-601, Application for Waiver of Grounds of Inadmissibility. See 8 CFR 245.13(c)(2) and 8 CFR 245.15(e)(3). However, the standard that applies to the adjudication is the same standard as if the alien had filed Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. See February 14, 2001 Office of Field Operations Memorandum, *Changes to Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), based Upon the Provisions of and Amendments to the Legal Immigration Family Equity Act (LIFE).*

(B) **Legalization, SAW, LIFE Act Legalization, and Legalization Class Settlement Agreement Applicants.** A waiver can be granted to such an applicant, if the applicant establishes that a waiver should be granted based on humanitarian reasons, to ensure family unity, or because granting the waiver would be in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Excludability under Section 245A or 210 of the Act. See 8 CFR 210.3(e), 8 CFR 245a.2(k), and 8 CFR 245a.18(c).

(C) **TPS Applicants.** TPS applicants may obtain waivers for certain grounds of inadmissibility, including inadmissibility under section 212(a)(9)(C) of the Act. See section 244(c)(2) of the Act. The permanent bar may be waived for humanitarian purposes, to assure family unity, or when the granting of the waiver is in the public interest. See 8 CFR 244.3. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. See *id.*

Granting a waiver to an applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have waived inadmissibility is different from the one used for TPS applicants. In order to overcome the permanent bar to admissibility under section 212(a)(9)(C)(i)(l) of the Act, an applicant for an immigrant visa has to file Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, rather than Form I-601, and no earlier than ten (10) years after the alien's last departure. See section 212(a)(9)(C)(ii) of the Act.

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the person is not inadmissible under section 212(a)(9)(C)(i)(l) of the Act for purposes of the adjustment of status application. Any
Form I-212 that is filed by a TPS applicant would be adjudicated according to same principles that apply generally to aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act, including the requirement that the alien may not obtain consent to reapply under section 212(a)(9)(C)(ii) unless the alien satisfies the 10-year absence requirement in the statute.

(D) Certain Battered Spouses, Parents, and Children. An approved VAWA self-petitioner and his or her child(ren) can apply for a waiver from inadmissibility under section 212(a)(9)(C)(i) of the Act, if he or she can establish a "connection" between the abuse suffered, the unlawful presence and departure, or his or her removal, and the alien's subsequent unlawful entry/entries or attempted reentry/reentries. See section 212(a)(9)(C)(iii) of the Act. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with fee. If the waiver is granted, the ground of inadmissibility and any relating unlawful presence is deemed to be erased for purposes of any future immigration benefits applications.

(E) Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act. Asylee and Refugee applicants for adjustment of status may obtain a waiver of inadmissibility in lieu of consent to reapply. The waiver is filed on Form I-602, Application by Refugee for Waiver of Grounds of Excludability. See 8 CFR 209.1 and 8 CFR 209.2(b); see also AFM chapter 41.6. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. See AFM chapter 41.6; October 31, 2005, Domestic Operations memorandum – Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM Update 05-33).

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. See 8 CFR 207.3. However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. See AFM chapter 23.6 (Asylee and Refugee Adjustment).

Note that the 10-year waiting period normally imposed on applicants for consent to reapply under this ground of inadmissibility (see section 212(a)(9)(C)(ii) of the Act) does not apply to refugee and asylee adjustment applicants.

(F) Nonimmigrants. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) may, as a matter of discretion, be admitted as a nonimmigrant under section 212(d)(3) of the Act. The alien may make the application when applying for the nonimmigrant visa with the Department of State or, if eligible, file Form I-192 to seek this benefit. Obtaining relief under section 212(d)(3) does not relieve the alien of the need to obtain consent to reapply under section 212(a)(9)(C)(ii) of the Act if the alien seeks to acquire permanent residence.
4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

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By Laura L. Lichter and Mark R. Barr

On May 6, 2009 USCIS issued an Interoffice Memorandum on the “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act.” The memo, co-authored by Donald Neufeld, Acting Associate Director of the Domestic Operations Directorate, Lori Scialabba, Associate Director of the Refugee, Asylum and International Operations Directorate, and Pearl Chang, Acting Chief of the Office of Policy and Strategy, aims to provide “comprehensive guidance to adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility,” with the policies previously articulated in a variety of Service memoranda on the subject incorporated into a newly designated section of the Adjudicator’s Field Manual (AFM).

For the most part, the comprehensive memo simply reiterates guidance previously provided on the subject over the course of the last 10+ years, however there are some troubling departures from prior practice. This advisory is designed as a summary of the lengthy (51 pages) memo, but with additional practice pointers sprinkled throughout addressing items that are new, noteworthy, controversial, or, in at least one instance, simply erroneous.

While the Service should be applauded for its helpful re-packaging of various agency policies into one comprehensive document, practitioners should also be on the alert for those issues in the memo that revamp prior agency interpretations without the issuance of formal regulations, with their attendant notice and comment periods, a practice increasingly relied upon by USCIS. Practitioners are urged to raise this issue in all appropriate circumstances, and not simply allow the agency to skirt its obligation to follow formal rule-making procedures.

I. The Three and Ten Year Bars

Section 212(a)(9)(B)(i)(I) makes inadmissible any alien who “was unlawfully present in the United States for a period of more than 180 days but less than 1 year . . . [who] again seeks admission within 3 years of the date of such alien’s departure or removal.” Likewise, section 212(a)(9)(B)(i)(II) makes inadmissible any alien who “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 removal or departure.”

Practice pointer: The detailed memo pointedly leaves out any discussion of whether or not a person subject to either bar can “cure” her inadmissibility through time spent inside the U.S.
Such guidance would have been helpful, since the statute itself is silent on the question of whether an alien subject to either bar can wait for the requisite three or ten years to pass while inside the U.S.

In an unpublished decision, the Service’s Administrative Appeals Office (AAO) interpreted the statute to mean that an applicant for adjustment of status can satisfy the three year bar to admission through time spent outside or inside the U.S. *See In re Salles-Vaz* (AAO, Feb. 22, 2005). In *Salles-Vaz*, the AAO held that an adjustment application initially inadmissible under 212(a)(9)(B)(i)(I) was no longer barred by that provision, as more than three years had passed from the date of his last departure to the date of its decision. The AAO stated:

The passage of time has created a new circumstance which renders the applicant free from any bar to inadmissibility based upon his unlawful presence. [ . . . ] It is apparent, therefore, that the applicant’s period of inadmissibility has now expired and he is no longer subject to the bar. Consequently, although the AAO does not agree with counsel’s arguments as to why the bar never applied to the applicant in the first place, at this point the bar has lapsed and no longer affects the applicant’s admissibility. Therefore, unless he has departed from the United States within three years prior to the date of this decision, the applicant is no longer required to seek a waiver of inadmissibility in connection with his adjustment of status application.

In correspondence with private counsel, the Service has similarly confirmed this view, as its’ Chief Counsel has written that “the inadmissibility period continues to run even if the alien is paroled into the United States or is lawfully admitted as a nonimmigrant under section 212(d)(3), despite his or her inadmissibility under section 212(a)(9)(B).” *See* Letter from Lynden Melmed to Daniel C. Horne, January 26, 2009, and from Robert Divine to David P. Berry, July 14, 2006, posted at AILA InfoNet as Doc. No. 09012874.

The Service’ curious decision not to incorporate this guidance into its latest re-packaging of interpretations on ULP is hopefully a passive endorsement of the above view, and not an indication that the policy will be revamped in the coming days.

→ An individual must leave the U.S. after accruing the requisite period of unlawful presence (ULP) in order to trigger either bar. Departures include those made under advance parole or with a valid refugee travel document.

→ For both bars, any period of ULP accrued prior to April 1, 1997 will not count towards the period of time needed to trigger the bars.

→ For both bars, the filing of a Notice to Appear (NTA) does not stop the accrual of ULP.

→ Both bars can be waived pursuant to INA § 212(a)(9)(b)(v).
Despite a finding of inadmissibility under either bar, an individual may still be eligible for the following benefits:

- Registry under INA § 249.
- Adjustment of status under section 202 of NACARA.
- Adjustment of status under section 902 of HRIFA.
- Adjustment of status under INA § 245(h)(2)(A).
- Change to V nonimmigrant status under 8 CFR § 214.15.
- LPR status pursuant to LIFE Legalization, under which provision a LIFE Act applicant may travel with authorization during the pendency of the application without triggering the three or ten year bar.

A. The Three Year Bar

For the three year bar to apply, the individual must have accumulated at least 180 days, but less than one year, of ULP, and then voluntarily departed the U.S. prior to the commencement of removal proceedings. There is no requirement for a formal grant of voluntary departure.

For the three year bar to apply, the individual must have departed prior to the filing of an NTA with the Immigration Court. An individual who voluntarily depart after the NTA was filed with the court is not subject to the three year bar (but may become subject to the ten year bar if she fails to leave before she accumulates more than one year of ULP).

B. The Ten Year Bar

For the ten year bar to apply, the individual must have accumulated more than one year of ULP, and then either voluntarily departed the U.S. or been removed from the U.S.

Unlike the three year bar, the ten year bar applies even if the individual leaves after the commencement of removal proceedings.

II. The Permanent Bar

Under INA § 212(a)(9)(C)(i)(I), an individual is who has been ULP in the U.S. for an aggregate period of more than one year and who enters, or attempts to enter, the U.S. without being admitted is permanently inadmissible.

Note: the person may also become subject to inadmissibility if s/he departs without first terminating removal proceedings or receiving a grant of Voluntary Departure under INA § 240B(a) if the Immigration Judge enters an in abentia removal due to the person’s failure to appear at his or her removal proceeding.
For purposes of the permanent bar, an individual’s ULP is counted in the aggregate. Therefore, if a person accrues a total of more than one year of ULP, whether during a single stay or multiple stays, she will be subject to the permanent bar if she departs the U.S. and then enters, or attempts to enter, without inspection.

Any period of ULP accrued prior to April 1, 1997 will not count towards the period of time needed to trigger the permanent bar.

An individual cannot violate the provision unless she departs the U.S. and then returns or attempts to return without being admitted.

An individual subject to INA § 212(a)(9)(C)(i)(I) may seek consent to reapply for admission after having been outside of the U.S. for at least ten years, pursuant to INA § 212(a)(9)(C)(ii) and 8 CFR § 212.2.

INA § 212(a)(9)(C)(i)(I) is considered by the Service to be a permanent bar for which neither the retroactive nor the prospective grant of consent to reapply is possible. Matter of Torres-Garcia, 23 I & N Dec. 866 (BIA 2006). Under this interpretation, while the regulation at 8 CFR § 212.2 continues to dictate the filing procedures of a Form I-212 waiver, the substantive requirements are governed by INA § 212(a)(9). Therefore, an I-212 applicant must be physically outside the U.S. for a period of at least ten years since her last departure before becoming eligible to be granted consent to reapply.2

An individual who accumulated more than one year of ULP, but is later paroled into the U.S. (but not “admitted”) is not subject to the permanent bar as a result of the parole entry. Where an individual has made prior entries, or attempted entries, without inspection prior to the entry on parole, however, that individual would be subject to the ten year bar.

The requirement for a ten year absence does not apply to a VAWA self-petitioner seeking a waiver under INA § 212(a)(9)(C)(iii).

Despite a finding of inadmissibility under the permanent bar, an individual may still be eligible for the following benefits:

Registry under INA § 249.

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2 See related practice advisory regarding Duran Gonzales, a circuit-wide class action challenging DHS’ refusal to follow Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004). In Duran Gonzales, the Ninth Circuit overturned Perez-Gonzalez, deferring to the BIA’s holding that individuals who have previously been removed or deported are not eligible to apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application. See http://www.ailf.org/lac/lac_lit_92806.shtml.
Practice Pointer: Perhaps destined to be the memo’s most controversial item is the agency’s explicit instruction to its adjudicators to ignore controlling circuit court precedent regarding the availability of section 245(i) relief for those individuals subject to the permanent bar under section 212(a)(9)(C)(i)(I).

As practitioners are aware, adjustment under INA § 245(i) allows a person to adjust status notwithstanding the fact that he or she entered without inspection, overstayed, or worked without authorization. However, section 245(i) does not necessarily waive every ground of inadmissibility, and questions arise where that provision conflicts with a ground of inadmissibility under section 212(a) that relates to entry without inspection.

In Matter of Briones, 24 I & N Dec. 355 (BIA 2007), the Board ruled that section 245(i) does not cure a person’s inadmissibility under the permanent bar, at section 212(a)(9)(C)(i)(I). Prior to the Board’s decision, however, both the Ninth and Tenth Circuit Court of Appeals had come to the opposite conclusion, holding that section 245(i) does apply to people inadmissible under section 212(a)(9)(C)(i)(I). See Acosta v. Gonzales, 439 F.3d 550 (9th Cir. 2006), Padilla-Caldera v. Gonzales, 453 F.3d 1237 (10th Cir. 2006).

Now, understandably, both decisions are likely to come under increasing attack by ICE, and are likely to face a Brand X3 type argument in future litigation. Acosta is particularly vulnerable to future judicial review, as it was based on a case that was subsequently reversed. See Gonzales v. DHS, 508 F.3d 1227 (9th Cir. 2007) (reversing the court’s prior decision in Perez-Gonzales v. Ashcroft, 379 F.3d 783 (9th Cir. 2004)).

However, unless and until Acosta and Padilla-Caldera are overturned, they remain controlling law in their respective circuits. Therefore, it comes as quite a shock that the Service would explicitly instruct its examiners to ignore the law. The memo states:

USCIS adjudicators will follow Matter of Briones and Matter of Lemus in all cases, regardless of the decisions of the 9th Circuit in Acosta v. Gonzales . . . or of the 10th Circuit in Padilla-Caldera v. Gonzales. Following these Board cases, rather than Acosta or Padilla-Caldera, will allow the Board to reexamine the continued validity of these court decisions.

Again, the desire of the Service to have a uniform policy is understood, and ICE litigators, operating within an adversarial process, would arguably have good-faith reasons for seeking

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3 In Brand X, the Supreme Court reviewed the issue of deference to an agency interpretation of a statute that conflicts with a circuit court’s prior interpretation of a statute. National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005). According to Brand X, in limited circumstances, an agency may disagree with a circuit court decision and offer a different interpretation of a statute where the prior court decision was based on an ambiguous statute.
appellate review of future Immigration Judge decisions based on Acosta or Padilla-Caldera. Yet this should not deter practitioners from resisting the Service policy to ignore existing precedent in their circuits. It is another thing altogether for Service adjudicators—who should apply the existing law in a neutral fashion within a non-adversarial examination procedure—to advance the government’s litigation tactics.

III. Unlawful Presence

→ Unlawful presence (ULP) is defined as presence after the expiration of the period of stay authorized by the Secretary of Homeland Security (formerly “POSABAG,” when authorized under the authority of the Attorney General), or any presence without being admitted or paroled.

→ An individual who is present in the U.S. without inspection accrues ULP from the date of the unlawful arrival, unless she is otherwise protected from the accrual of ULP.

→ Similarly, an individual paroled into the U.S. will accumulate ULP once the parole is no longer in effect, unless she is otherwise protected from the accrual of ULP.

→ Note that an individual who obtained permission to come into the U.S. by making a knowingly false claim to U.S. citizenship has not been inspected and admitted, and thus accrues ULP from the date of arrival.

→ For many individuals, the “POSA” is noted on the I-94. Other POSAs have been created by statute or by USCIS policy.

→ Unlawful status and ULP are related, but distinct, concepts. On the one hand, a person in lawful status cannot accrue ULP. However, a person not in lawful status may or may not accumulate ULP.

A. No ULP due to lawful status

→ A person in any of the following lawful statuses cannot accumulate ULP:

1. **Lawful permanent residents.** An LPR does not accrue ULP, unless the individual becomes subject to an administratively final order of removal—at which point she will begin to accumulate ULP the day after the order becomes administratively final.

2. **Lawful temporary residents.** A lawful temporary resident does not accrue ULP unless and until DHS issues a notice of termination following proper notice. If the person appeals the termination, ULP does not accrue during the appeal process. However, because termination cannot be reviewed by an Immigration Judge, ULP would accrue during removal proceedings or while a Petition for Review was pending in federal court.
3. **Conditional permanent residents.** A conditional permanent resident will only begin to accrue ULP after the following:

→ The entry of an administratively final order of removal.

→ Automatic termination of status pursuant to INA §§ 216(c)(2), 216A(c)(2), 216(c)(4) for failure to file a petition to remove the conditions in a timely manner, or failure to appear for the personal interview in connection with that petition. However, if a late petition is subsequently accepted and approved, no ULP will have accrued.

→ Termination following notice by DHS, where the individual does not seek review of the termination in removal proceedings.

→ The issuance of an administratively final removal order affirming DHS termination of conditional resident status.

4. **Persons granted Cancellation of Removal or Suspension of Deportation.** An individual who had already acquired LPR status and is then granted Cancellation of Removal (or Suspension of Deportation) will retain her LPR status. Therefore, no period of ULP would accrue. An individual who was not already an LPR and is then granted Cancellation of Removal (or Suspension of Deportation) becomes an LPR on the date of the grant and will stop accumulating ULP. Any ULP that accrued prior to the grant is eliminated for purposes of future applications for admission.

5. **Lawful nonimmigrants.** Such individuals only begin to accrue ULP as follows:

→ Nonimmigrants admitted until a certain date will generally begin to accrue unlawful presence the day following the date noted on the I-94.

→ If USCIS finds, while adjudicating a request for an immigration benefit, that the individual has violated her nonimmigrant status, ULP will begin to accrue the day after USCIS denies the benefit, or the day after the I-94 expires, whichever is earlier. If an Immigration Judge makes a determination of status violation, then ULP begins to accrue the day after the order becomes final (i.e., after appeal is waived or dismissed)—not the date of any interim finding on the matter, whichever is earlier.

→ Nonimmigrants admitted for duration of status or “D/S” will begin to accrue ULP the day after USCIS denies a request for an immigration benefit if the USCIS finds an immigration status violation while adjudicating the request. If an Immigration Judge makes a determination of status violation, then ULP begins to accrue the day after the order becomes final.

→ Nonimmigrants not issued an I-94 will be treated the same as nonimmigrants admitted for duration of status for ULP purposes.
Practice Pointer: Taking guidance from the Department of State (DOS), the memo makes it clear that Canadians, and other non-controlled nonimmigrants, who are inspected at the border but not given I-94s, are treated as nonimmigrants admitted for the duration of status for purposes of determining ULP. See section (b)(1)(E)(iii). While this has been an unarticulated Service policy for some time, the only prior written statement of the policy came in a DOS cable from 1999. See Cable, DOS, 97-State-23545, reprinted in 76 No. 41 Interpreter Releases 1552-53 (Oct. 25, 1999). The memo’s clear statement on the issue should hopefully prevent any future confusion with Service examiners unfamiliar with the previously unwritten policy.

6. **Refugees.** For refugees, the POSA begins on the date of admission as a refugee. ULP begins to accrue on the day after refugee status is terminated. For a derivative refugee, the POSA begins on the day she enters the U.S. as an accompanying or follow-to-join refugee. If the derivative refugee is already inside the U.S., her POSA begins when USCIS accepts an I-730 filed on her behalf. If the I-730 is subsequently denied, ULP will begin to accrue on the day after the denial. While the filing of an I-730 will stop the accrual of ULP, it does not eliminate any previously accumulated ULP. Therefore, the beneficiary of an I-730 who accrued ULP prior to the petition’s filing may be inadmissible if she travels while the petition is pending, even with advance parole.

7. **Asylees.** For asylees, the POSA begins on the date a bona fide asylum application is filed. Prior periods of ULP, however, are not eliminated by either the filing of an asylum application, or a grant of asylum. If asylum status is later terminated, ULP begins to accrue the day after termination. The POSA for a derivative asylum applicant begins on the date the principal applicant begins her POSA. Finally, a derivative beneficiary not initially included on the principal’s asylum application will start her POSA on the date a qualifying asylee files an I-730.

8. **Individuals Granted Temporary Protected Status (TPS).** Individuals granted TPS are deemed to be in lawful status for the duration of the grant for the purposes of adjustment of status and change of status. A TPS grant, however, does not cure any previous accumulations of ULP. Accordingly, a person granted TPS who travels outside the U.S. may nonetheless trigger the ULP bars if she had accrued sufficient ULP prior to the TPS grant. Additionally, a waiver granted for inadmissibility under INA §§ 212(a)(9)(B) or (C) for purposes of the TPS application would not cure inadmissibility for a subsequent adjustment of status, since the standards for the TPS waiver are different than those used for adjustment.
9. **Parolees.** Individuals paroled into the U.S. do not accumulate ULP for the duration of the parole period, unless parole authorization is revoked or terminated prior to its expiration date. An individual paroled for removal proceedings will begin to accumulate ULP the day after the issuance of an administratively final removal order (unless otherwise protected from ULP accrual). Practitioners should take note that where an individual is paroled in for a particular purpose (e.g., adjustment of status) that the underlying parole be maintained through the pendency of the application.

B. **No ULP despite unlawful status**

→ There are a variety of situations where a person may not be in lawful status, but is still not accumulating unlawful presence.

**Practice Pointer:** The memo emphasizes the point that while an individual may be in a POSA, she may not necessarily be in status. This distinction can be found in several Service memos over the years.

Of course, lurking beneath the POSA/lawful status distinction has been the more critical question of whether someone not in a lawful status, but otherwise POSA, has a “right” to remain in the U.S., especially an individual with a pending application for benefit (including changes or extension of status, or adjustment). Officials at Immigration and Customs Enforcement (ICE) have maintained—with a notably increased frequency—that such individuals are only allowed to remain in the U.S. as a matter of agency grace, and that nothing prevents their referral in removal proceedings due to their status violations, notwithstanding their authorized periods of stay.

With the issuance of this memo, USCIS has clearly joined with ICE, stating that the Department of Homeland Security “may permit” an out-of-status individual to remain in the U.S., where that person has a pending application that stops the accrual of ULP. According to the memo, such a decision is entirely a “matter of prosecutorial discretion.”

One hopes that the memo’s clarification on this point is simply a matter of more formally stating a previously held position, and not, as some fear, an indication that the Department will increasingly choose not to exercise its prosecutorial discretion, placing people with pending adjustment applications in removal proceedings.

1. **No ULP by operation of statute**

→ In some cases, an out-of-status individual does not accrue ULP by operation of statutory exceptions in INA § 212(a)(9)(B). The Service has interpreted these exceptions to only apply to inadmissibility under the three and ten year bars and not to the permanent bar.
**Practice Pointer:** The memo makes clear that the exceptions to ULP, at INA § 212(a)(9)(B)(iii), apply only to the grounds of inadmissibility listed in section 212(a)(9)(B), and not section 212(a)(9)(C). In other words, an individual who does not accumulate ULP for purposes of the three and ten year bars, by operation of the statutory exceptions, does accumulate ULP for purposes of the permanent bar.

On the one hand, this is a longstanding agency interpretation, articulated as far back as 1997 in an Office of Programs memorandum. See “Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act),” June 17, 1997, Office of Programs.

On the other hand, as many practitioners are well aware, many U.S. consulates—most notably the consulate in Ciudad Juarez—made an exception to the interpretation as it related to minors. In recent practice at CDJ, the “minor exception” was applied to the permanent bar. Under that interpretation, for example, a child who was unlawfully present in the U.S. longer than one year, then taken back to Mexico by his parents and subsequently brought back into the U.S. without inspection—while still a child—did not face inadmissibility under either the 10-year bar or the permanent bar.

In the summer of 2008, the Visa Office directed CDJ to cease applying the “minor exception” to ULP findings under the permanent bar, relying principally upon INS guidance on the issue. See “Practice Alert – Unlawful Presence Under INA § 212(a)(9)(C) Applied to Minors,” August 18, 2008, posted on AILA InfoNet as Doc. No. 08081872. The current memo’s reiteration of this “old” policy, therefore, minimizes any possibility of the Visa Office reversing course in the near future.

The statutory exceptions include the following:

a. **A minor under the age of 18** does not accrue ULP for purposes of the three and ten year bars until the day after her 18th birthday.

b. **An individual with a pending bona fide asylum application**—affirmative or defensive—does not accrue ULP for purposes of the three and ten year bars unless she works without authorization.

→ A bona fide application is non-frivolous, properly filed, and one with a reasonably arguable basis in fact or law. A later denial of the claim is not determinative of whether the claim was bona fide. Similarly, an abandoned claim is not automatically deemed not bona fide.
The pendency of a bona fide asylum application includes administrative and judicial review.

A person included on the principal’s asylum application is in a POSA as of the date the principal enters a POSA, unless the derivative beneficiary works without authorization or the application for the derivative is not bona fide.

A derivative beneficiary’s asylum claim is no longer considered pending once: (1) the principal applicant informs USCIS that the dependent is no longer a part of the application; or (2) USCIS determines that the dependent relationship no longer exists. In these cases, the derivative will begin to accrue ULP once USCIS removes her from the principal application. If the derivative later files her own, bona fide asylum application, ULP will stop accumulating on the date of the filing.

Note that under the Child Status Protection Act, a derivative child who turns 21 while the asylum application is pending (and is unmarried) will continue to be classified as a child and will therefore not accrue any ULP.

An derivative beneficiary who was not included on the principal’s asylum application will enter a POSA when the qualifying asylee files an I-730.

c. **An individual with a pending I-730** does not accumulate ULP for purposes of the three and ten year bars. If the I-730 is later denied, ULP accrual would begin, unless the individual was otherwise protected from ULP. The filing of a bona fide I-730 does not, however, cure any prior accumulation of ULP. Therefore, a person with a pending I-730 who had previously accumulated the requisite periods of ULP may be inadmissible upon return to the U.S. and need to file an I-602.

d. **A beneficiary of Family Unity Protection (FUP) under the Immigration Act of 1990 § 301** is protected from accruing ULP for purposes of the three and ten year bars. If the FUP application is approved, ULP is deemed to stop as of the date of filing. However, the filing of the FUP application by itself does not stop the accrual of ULP. Finally, a grant of FUP protection does not cure prior periods of ULP.

e. **Certain battered spouses, parents and children** are protected from accumulating ULP. An approved VAWA self-petitioner, and her children, can claim an exception from the three and ten year bars where there is a substantial connection between the abuse, the ULP, and her departure from the U.S.

f. **Victims of severe form of trafficking in persons** do not accumulate ULP towards the three and ten year bars. Similar to VAWA beneficiaries, a trafficking
victim must demonstrate that the trafficking was at least once central reason for the ULP.

g. **A nonimmigrant with a pending extension of status (EOS) or change of status (COS) request**, according to the statute, does not accrue ULP for a period of up to 120 days for the purpose of the three year bar only, so long as: (1) the application was timely, (2) the individual was lawfully admitted or paroled into the U.S., and (3) the individual did not engage in unauthorized employment.

By operation of Service policy, however, this exception has been extended to cover the **entire** period during which an EOS or COS is pending, and to the ten year bar.

2. **No ULP under Service policy**

   → In some cases, an out-of-status individual does not accrue ULP by operation of USCIS policy. These policy exceptions, which apply to both the three and ten year bars and the permanent bar at INA § 212(a)(9)(C)(i)(I), include the following:

   a. **An individual with a properly filed, pending application for adjustment of status or registry** does not accumulate ULP as of the date the application is properly filed. The accrual of ULP is tolled until the application is denied.

      → The adjustment application can be under INA §§ 209, 245, or 245(i), Public Law 99-603 § 202, NACARA § 202(b), or HRIFA § 902.

      → Except for a NACARA or HRIFA application, the application must be filed affirmatively to stop the accrual of ULP. However, ULP will continue to be tolled where an application initially denied by USCIS is renewed in removal proceedings.

   b. **A nonimmigrant with a pending extension of status (EOS) or change of status (COS) request** does not accrue ULP for a period of up to 120 days for the purpose of the three year bar only according to the statute. But as a matter of USCIS policy, ULP is tolled for the entire period during which an EOS or COS is pending, and also covers the ten year bar and the permanent bar under INA § 212(a)(9)(C)(i)(I). The EOS/COS applicant must show that: (1) the application was timely; (2) she maintained her status prior to filing the request, and (3) she did not engage in unauthorized employment.

      → If the EOS/COS request is approved, the individual is granted a new POSA, retroactive to the date the prior POSA expired.

      → If the EOS/COS is denied because it was frivolous, or because the applicant worked without authorization, ULP will be deemed to begin after the expiration date marked on the I-94. If the individual was previously admitted
for duration of status, ULP will begin to accrue the day after the EOS/COS denial.

→ If the EOS/COS is denied because it was untimely, ULP will be deemed to begin on the date the I-94 expired. If the individual was admitted for duration of status, ULP will begin to accrue on the day after the EOS/COS denial.

→ If the EOS/COS request is denied for cause, ULP will begin to accrue on the day after the denial.

→ If the individual then files a motion to reopen or reconsider, the mere filing of the motion will not stop the accrual of ULP. However, if the motion is successful and the benefit granted, the individual will be deemed to not have accrued ULP during the pendency of the motion. If the motion is successful but the benefit is still denied, ULP will only accrue from the date of the last denial, as long as the initial request was timely and non-frivolous.

→ If the denial of the underlying petition, upon which an EOS/COS is based, is appealed to the Administrative Appeals Office, the mere filing of the appeal will not stop the accumulation of ULP. However, if the petition denial is reversed on appeal, and EOS/COS subsequently granted, no ULP will be deemed to have accrued between the denial of the petition and request for EOS/COS and the subsequent grant of the EOS/COS.

→ An individual who files an initial, timely and non-frivolous EOS/COS request will stop the accumulation of ULP but may still fall out of lawful status during the pendency of the request. Therefore, any subsequent, untimely EOS/COS request made after the expiration of her POSA will not stop the accrual of ULP if the first, timely EOS/COS is denied.

c. **A nonimmigrant with a pending EOS/COS request who departs the U.S. while the request is pending** does not accrue ULP, so long as the request was timely and non-frivolous, and the individual did not work without authorization.

d. **An individual with a pending Legalization, Special Agricultural Worker, or Life Legalization application** does not accrue ULP. Accrual stops on the day of filing and resumes the day after denial. If the denial is appealed, the POSA continues throughout the administrative appeal process, but not during removal proceedings or judicial review.

e. **An individual granted Family Unity Program (FUP) benefits under the LIFE Act Amendments of 2002 § 1504** does not accrue ULP. Note that the statutory exception to ULP for FUP grantees only applies to those individuals covered under the Immigration Act of 1990 § 301. As a matter of policy, USCIS treats
section 1504 cases the same as section 301 cases for purposes of ULP. As with section 301 FUP cases, if the application is approved, no ULP will accrue from the date of filing throughout the FUP grant. If, on the other hand, because the mere filing of the application does not stop ULP, if the application is denied, ULP will continue to accrue as if no application had been filed. Finally, a grant of FUP benefits under section 1504 does not cure any previously accumulated ULP.

f. **An individual who files an application for Temporary Protected Status (TPS)** will not accrue ULP while the application is pending provided it is ultimately approved, and the POSA will continue until TPS is terminated. If the application is denied, however, or if prima facie eligibility is not established, ULP will begin on the date the individual’s previous POSA expired.

g. **An individual granted voluntary departure (VD) under INA § 240B** will not accrue ULP. ULP stops accruing on the date an individual is granted VD and resumes on the day after VD expires if the individual has not departed the U.S.

→ If an Immigration Judge denies VD and the decision is reversed on appeal by the BIA, the time from the denial to the reversal will be considered a POSA.

→ If an Immigration Judge or the BIA reinstates voluntary departure in a removal proceeding that was reopened for a purpose other than solely making an application for VD, and if the reopening was granted prior to the expiration of a previous grant of VD, then the time from the initial VD expiration to the grant of reinstatement is not considered a POSA. However, the period of time encompasses by the new grant of VD is considered a POSA.

→ An individual granted VD before January 20, 2009 who seeks a review of a final removal order in a Petition for Review, where the circuit court stays the running of the VD period while the case is pending, does not accrue ULP.

→ On the other hand, for any EOIR VD grant after January 20, 2009, the mere filing of a Petition for Review will automatically terminate the VD and make the underlying alternate removal order effective. Therefore, that person will not be protected from accruing ULP during the pendency of the Petition for Review if she remains in the U.S. The accrual of ULP will begin on the day after the Petition for Review is filed. On the other hand, if the individual leaves within 30 days of filing the Petition for Review, she will not accumulate any ULP between the filing of the Petition and her departure.

→ A person granted VD by the Immigration Judge or the BIA before January 20, 2009 who later requests withdrawal of that order in connection with a motion to reopen or reconsider will accrue ULP as of the date of the administratively
final order of removal, as if VD had never been granted, unless the individual is otherwise protected from the accrual of ULP.

Under the new VD regulations, effective January 20, 2009, the mere filing of a motion to reopen or reconsider during the VD period automatically terminates the VD order. Therefore, ULP would accrue on the day after the individual files a motion to reopen or reconsider.

h. **An individual granted an administrative or judicial stay of removal**, either automatic or discretionary, does not accumulate ULP. The issuance of a stay, however, does not erase prior periods of ULP.

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**Practice Pointer**: The memo appears to give erroneous advice regarding the issuance of an automatic stay of removal in connection with the filing of a motion to rescind an *in absentia* order of removal. The memo correctly notes that the filing of such a motion will stay an individual’s removal until the motion is decided. *See section (b)(3)(I).* However, it then goes further, noting that “[t]he order will be stayed through a possible appeal to the Board of Immigration Appeals (BIA) or Federal Court.” (emphasis added). Unfortunately, the regulations make clear that motions to rescind *in absentia* removal orders provide an automatic stay only through review by the Immigration Judge. 8 CFR § 1003.23(b)(4)(ii). Even motions to rescind *in absentia* deportation or exclusion orders only carry automatic stays through an administrative appeal—not judicial review. 8 CFR § 1003.23(b)(4)(iii)(C).

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i. **An individual granted deferred action** does not accumulate ULP. Accrual of ULP stops on the date an individual is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not cure any prior periods of ULP.

j. **An individual granted withholding of removal (or deportation)** does not accrue ULP. The accrual stops on the date of the grant and continues through the period of the grant.

k. **An individual granted withholding or deferral of removal under the Convention Against Torture** does not accrue ULP. The accrual stops on the date of the grant and continues through the period of the grant.

l. **An individual granted deferred enforced departure (DED)** does not accrue ULP. The accrual stops on the date of the grant and continues through the period of the grant.
m. An individual admitted under the Visa Waiver Program and granted satisfactory departure under 8 CFR § 217.3 does not accrue ULP. A person granted satisfactory departure by ICE who leaves during the requisite period is deemed to not have violated her VWP admission, and therefore ULP does not accrue during the satisfactory departure period. On the other hand, if the person granted satisfactory departure does not leave the U.S. on time, ULP will accrue the day after the expiration of the satisfactory departure period.

C. Common situations that have no bearing on the accrual of ULP

→ The memo makes clear that certain steps in the removal process have no effect on the accrual of ULP. They include:

1. The initiation of removal proceedings does not stop, or start, the accrual of ULP.

2. The filing of an appeal or Petition for Review does not affect an individual’s position in relation to the accrual of ULP.

3. The issuance of an Order of Supervision does not stop, or start, the accrual of ULP.

IV. Relief from ULP Inadmissibility

A. Waiver of the three and ten year bars

1. Nonimmigrants. A nonimmigrant subject to the three or ten year ULP bar may seek a discretionary waiver under INA § 212(d)(3).

2. Spouses, sons or daughters of USCs or LPRs, and Fiancé(e)s of USCs. An immigrant subject to the three or ten year bar may, in certain circumstances, apply for a waiver under INA § 212(a)(9)(B)(v).

→ The individual must first have a qualifying relative, which would include a spouse or parent who is a USC or LPR. The waiver applicant must then demonstrate that the denial of admission would result in extreme hardship to the qualifying relative(s).

→ Note that a USC or LPR child is not a qualifying relative under the statute.

→ For waiver applicants seeking admission on a K-1 or K-2, the extreme hardship showing would be in relation to the K-1 nonimmigrant’s USC fiancé(e).

3. Asylees and refugees seeking adjustment of status. An asylee or refugee subject to the three- or ten-year bar can seek a waiver under INA § 209(c). The waiver is submitted on Form I-602, although USCIS retains the discretion to grant the waiver without the application.

4. TPS applicants. A TPS applicant subject to the three- or ten-year bar may be granted a waiver for humanitarian purposes, to assure family unity, or in the public interest.
Note that a waiver granted under the TPS provisions will not waive the same grounds of inadmissibility in the immigrant context. This is because the standard for the TPS waiver differs from than the “extreme hardship to a qualifying relative” standard used in waiving inadmissibility for applicants seeking admission as immigrants.

5. **Legalization under INA § 245A, legalization applicants under 8 CFR §§ 245a.2(k) and 245a.18, and any legalization-related class settlement agreements.**

Like the TPS waiver, this waiver can be granted for humanitarian purposes, to ensure family unity, or when it would be in the public interest.

B. **Waiver of the permanent bar under INA § 212(a)(9)(C)(i)(I)**

→ While there is generally no waiver of inadmissibility under INA § 212(a)(9)(C)(i)(I), certain small categories of individuals may be admitted in spite of the bar.

1. **HRIFA and NACARA applicants.** USCIS retains jurisdiction to consider a waiver application from a HRIFA or NACARA applicant. The waiver is submitted on Form I-601, although the standard for adjudicating the waiver is the same as if the person filed Form I-212.

2. **Legalizations, SAW, LIFE Act Legalization, and Legalization class settlement agreement applicants.** These individuals may be granted a waiver based on humanitarian reasons, to ensure family unity, or because it would be in the public interest. The waiver is submitted on Form I-690.

3. **TPS applicants**

   The permanent bar for a TPS applicant may be waived for humanitarian reasons, to ensure family unity, or because it would be in the public interest.

   → Note that a waiver of the permanent bar granted under the TPS provisions will not waive the same grounds of inadmissibility in connection with a subsequent application for adjustment of status, because a normal adjustment applicant does not have an available waiver of the permanent bar. A person previously granted TPS with a waiver of the permanent bar would still have to wait ten years from the date of her last departure.

4. **Certain battered spouses, parents, and children**

   An approved VAWA self-petitioner and her children can be granted a waiver under INA § 212(a)(9)(C)(i) if there is a connection between the abuse, the ULP and departure (or removal), and the subsequent entry, or attempted entry, without inspection.

5. **Asylee and refugee adjustment applicants**

   The ten year absence normally imposed on applicants for consent to reapply does not apply to asylee and refugee adjustment applicants. Therefore, such individuals may obtain a waiver of inadmissibility in lieu
of consent to reapply. The waiver is filed on Form I-602, although USCIS retains the discretion to grant the waiver without the application.

6. **Nonimmigrants** A nonimmigrant subject to INA § 212(a)(9)(C)(i)(I) may be admitted as a matter of discretion pursuant to INA § 212(d)(3). However, obtaining a waiver under this section would not relieve the same individual of the need to obtain consent to reapply if she later sought permanent residence.
(date)

District Adjudication Officer  
St. Louis Field Office  
U.S. Citizenship and Immigration Services  
1222 Spruce St., Room 2.205  
St. Louis, MO 63103

Dear Officer:

I am providing this letter to you today advising you that we will immediately be filing a FOIA request to obtain a copy of the recording that was made of the interview which you just concluded with my clients:

(name and A-number)

(name and A-number)

Please ensure that the recording be preserved, accordingly.

Sincerely,

Law Offices of Suzanne Brown, P.C.

cc: Scott Langerman, USCIS Counsel  
2001 Metro Drive, Suite 100,  
St. Paul, MN 55425
### Fraud Referral Sheet

**DATE:**

**CE.OFFICER:**

**RECEIPT NUMBER/A-NUMBER:**

**CIS SUPERVISOR:**

**ATTACHED FILES:**

**FORM TYPE:**

**STAGE IN ADJUDICATIONS PROCESS:**

- [ ] Pre-Interview
- [x] Post-Interview
- [ ] Interview Thru/C.
- [ ] Post-Decision, submitted for:
  - [ ] Documentation
  - [ ] Investigation

**INFORMATION REQUEST**

**REASON FOR REFERRAL** (please check all that apply):

**APPLY TO ALL FORMS:**

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**Other General Fraud Indicators Guide**

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*Update 9/30/2004 AILA InfoNet Doc. 90127657. (Posted 01/28/10)*
### I-130 Family Based Petition Fraud Indicators Guide

- Short time between entry and marriage
- Unusual marriage history
- Children born during marriage to other parent
- Unusual number of children and large discrepancy in age
- Unusual dates on submitted documents
- Divorce / new marriage dates close
- Unusual or large age discrepancy between spouses (when found in conjunction with other indicators)
- Unusual association between family members
- Unusual cultural differences
- Low employment / financial status of petitioner
- Preparer, notary, and minister are the same person
- Same employer of petitioner/beneficiary
- Previous marriages to foreign nationals

### I-140 and I-130 Employment Based Fraud Indicators Guide

- Unknown or unusual addresses or email addresses
- Skills / age / salary / education does not match job requirements
- No record of correspondence with petitioner company
- Unusual data in quarterly reports
- Previous certifications before sunset of 245i (Apr 30, 2001)
- Multiple filings by petitioner is inconsistent with company size
- Location on ETA 750A or ETA 903 differs from place of employment
- No record of providing goods or services
- Boilerplate documents that are in more than one petition

### I-360 Religious Worker Fraud Indicators Guide

- Skill / age / education and religious training does not match job requirements
- Congregation size does not match number of employees
- Zoning inconsistency with organization
- Preceding two years of tax documentation list different position than that petitioned for
- Service conducted at non-religious properties

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*Update 5/20/2004
AILA InfoNet doc. #901482861. (Posted 01/23/10)*

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### 1-539 Student Visa Fraud Indicators Guide

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### 1-589 and I-730 Asylum Fraud Indicators Guide

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<td>Common addresses on different applications/petitions</td>
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<tr>
<td>Children that are not on I-589 but later claimed on I-730</td>
</tr>
</tbody>
</table>

### L-90, L-121, L-765 Fraud Indicators Guide

<table>
<thead>
<tr>
<th>Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multiple filings</td>
</tr>
<tr>
<td>Name does not match what is in DHS system</td>
</tr>
<tr>
<td>e.g., CIS, NSS, etc.</td>
</tr>
<tr>
<td>Photographic evidence suggests imposter</td>
</tr>
<tr>
<td>Citizens of eligibility based on suspicious asylum claims</td>
</tr>
</tbody>
</table>

### OTHER Forms and Fraud Indicators:

- **OTHER FRAUD INDICATORS IDENTIFIED (PLEASE SPECIFY)**
  - 
  - 
  - 
  - 
  - 

Update 02/28/2010

AILA InfoNet Doc. (13711)  | (Hosted 02/28/10)
REQUIRED: ARTICULATE REASON FOR REFERRAL BASED ON FRAUD INDICATORS CHECKED
(Note locations in file or attachment where indicator can be found)

See Adjunctor's Notes attached.

☐ EXPEDITED PROCESSING REQUEST (please specify reason):

For FONS Use Only:

FONS Reference:

AFOVIS Assigned:

Priority: ☐ Expedited ☐ Normal
Subjects were initially interviewed based on Beneficiaries' history with CIS. The Beneficiaries' claims included allegations of assault, stalking, and domestic violence, which were found to be credible. However, during the interview, the Beneficiaries were questioned separately, and it was noted that they had been living together for a significant period. The Beneficiaries claimed that they had moved in together after the marriage of their respective partners, suggesting a stable relationship. However, it was also noted that the Beneficiaries had not provided any documentation to support their claims.

During the interview, it was also noted that the Beneficiaries had been living in a domestic violence shelter for several months prior to their interview. The shelter provided temporary housing and support services to help the Beneficiaries stabilize their lives. However, it was also noted that the Beneficiaries had not provided any evidence of their housing situation beyond the shelter.

The Beneficiaries' claims were supported by the testimony of witnesses who had observed their behavior and testified to their credibility. The witnesses included neighbors, family members, and friends who had observed the Beneficiaries' interactions and provided corroborating evidence of their claims.

However, during the interview, the Beneficiaries were also questioned about their marital status. They claimed to be married, but it was noted that they had not provided any documentation to support their claims. The Beneficiaries also claimed that they had been living together for several years, but it was noted that they had not provided any evidence of their living arrangements.

The Beneficiaries' claims were also questioned about their financial situation. They claimed to be receiving financial support from their respective partners, but it was noted that they had not provided any evidence of their financial support. The Beneficiaries also claimed to have been living in a domestic violence shelter, but it was noted that they had not provided any evidence of their housing situation.

During the interview, the Beneficiaries were also questioned about their plans for the future. They claimed to be planning to marry soon, but it was noted that they had not provided any evidence of their plans. The Beneficiaries also claimed to be seeking assistance from their respective families, but it was noted that they had not provided any evidence of their family support.

The Beneficiaries' claims were also questioned about their ability to support themselves. They claimed to be able to support themselves, but it was noted that they had not provided any evidence of their ability to support themselves. The Beneficiaries also claimed to have been living in a domestic violence shelter, but it was noted that they had not provided any evidence of their housing situation.
They both were consistent in claiming that they married each other approximately 1 month after meeting. Mr. proposed to her weeks after they met, and they were married one week later. This of course, was because he was in love with her, and had nothing to do with his immigration status.

All of the above information is verifiable on the CD enclosed in the file.
First meeting with spouse:
where?
under what circumstances?
when?
others present? who? names/addresses
first date - when, where

Gifts: personal gifts
what given? received? when, where, why

Wedding ceremony
when (time of day)
where
who officiated
how many attended
names of witnesses - relationship - residences -
reception - where, when, how many
toasts? by whom
gifts? most significant? from whom
exchange rings? who purchased?
got to see rings.
any inscription? (verify initials, dates)
who applied for license, where, when
who made wedding arrangements/reception arrangements

Honeymoon - where, when, how long, if not now, future?
who made arrangements
how did you travel - going? return?

Personal friends/references
Joint friends/references

Marriage consummated
If not: reason.
Medical/dental spouse wear glasses? why?
Name(s) of doctor(s)/dentist(s) - name of Medical Plan

Any major medical or dental problems?
On-going treatments?
Prescriptions?
Sample Questions for an Adjustment of Status Interview

At the beginning of the interview, you will be placed under oath. The forms will be reviewed for accuracy and typically the following information will be verified:

Name
Address
Marital status
Parents’ Birth Dates
Job
The address of your job
Date of Birth
Entry date
Parents names
Parents’ places of Birth
Workplace
How long you’ve worked at that job

Interviewer will request Medical Exam, Affidavit of Support and evidence of a bona fide, legitimate marriage (if your case is based on marriage to a US citizen or Permanent Resident)

These types of questions will be asked:

Have you ever committed a crime or drug offense for which you weren’t arrested?**
Have you ever been arrested anywhere in the world?**
Have you ever received a pardon?**
Have you ever exercised diplomatic immunity?**
Have you ever or are you likely to receive public assistance?**
Have you ever been a prostitute or procured someone for prostitution?**
Have you ever engaged in unlawful gambling or other commercial vice?**
Have you ever assisted an alien to enter the U.S. illegally?**
Are you a terrorist or do you support terrorist groups?**
Are you a spy or have you engaged in espionage?**
Are you a communist or have you been a member of the Communist party?**
Are you a Nazi or were you associated with the Nazi government of Germany?**
Have you ever persecuted someone on account of their race, religion, ethnicity, social group or political opinion?**
Have you ever been removed or deported form the United States?**
Have you ever been in immigration proceedings?**
Have you ever been convicted of the use of false documents?**
Did you ever obtain a visa or other immigration benefit by fraud or misrepresentation?**
Have you ever held a US citizen child outside the US against the custody order of a court?**
Do you plan to engage in polygamy (more than one spouse)?**
Have you ever had another social security number?***
Have you ever had a fake green card, social security or driver’s license?**
Have you ever been outside the US since you first entered?***

**If the answer to any of these questions is YES, call Suzanne or Rachel before the interview to discuss as you may require a waiver and additional documentation may be requested.

Petitioner refers to US citizen or Permanent Resident Beneficiary refers to the alien
If the application is based on your marriage, you will be asked to provide evidence that your marriage is bona fide, and asked questions such as:

How and when did you meet? Where was your first date? Do you live together? What do you two have in common?

Who introduced you? Have you consummated your marriage?

When did you begin living together? Do either of you have any children?

What are the names/ages of your children? Do you plan to have any children together?

What is the relationship between the Beneficiary and the Petitioner’s children (if any)? Does the Petitioner have any contact with the father/mother of his/her children?

Who went to your wedding? Where were you married?

What did you do after the ceremony? Did you go to a restaurant? Which one?

How many people were at the wedding? Does he have a wedding ring?

Did you buy an engagement ring? Who proposed?

When did you decide to marry? How long did you date?

Do you have pictures of the wedding? Does the Beneficiary have relatives in the US?

Has the Petitioner met them?

How often do you see your family members? Do your siblings live near you?

Has the Beneficiary met Petitioner’s parents?

What do your parents think about the marriage? Have you been spoken with by the Beneficiary’s parents?

Does the Beneficiary work? What is the Beneficiary’s work schedule?

What hours and days? What is the Petitioner’s schedule?

What shifts do you work? Who takes care of the children?

Are you paid weekly, monthly, how? What do you do on your days off?

What is the salary of the Beneficiary? What is the salary of the Petitioner?

Do you have a joint checking account? Who pays the bills?

Do you have insurance together? Who owns the car?

Did the Beneficiary have a car before? What kind of car is it?

Did you file tax returns together?

What is your religion? Do you go to prayer services? Together?

Have you ever had any domestic disturbances?** Have the police ever been to your home?***

Have you ever called the police on one another?***

**If the answer to any of these questions is YES, call Saranne or Rachel before the interview to discuss, as you may require a waiver and additional documentation may be requested.
POSSIBLE WAYS TO PROVE YOU MARRIED IN GOOD FAITH

___ Birth Certificates of children born of your relationship

___ Photographs that show both of you together or with family and friends, taken at the wedding, at other functions or events, and throughout your relationship

___ Copies of joint income tax returns

___ Bank books, personal checks or letters from the bank where you have or had a joint checking or savings account, stating when it was opened

___ If wife took her husband's last name, documents that show her married name: driver's license, state or employee ID cards, passport, credit cards or check cashing card, video club membership cards, etc.

___ Apartment lease or letter from your current or former landlord (a) showing that both spouses live or lived in the apartment and since what date, or date rent receipts showing the address and the names of one or both of you

___ Letter from a current or former employer of one or both spouses showing a change in records to reflect the new marital status

___ Evidence of a life insurance policy naming spouse as beneficiary

___ Evidence of medical or health insurance plans naming spouse as member or beneficiary

___ Letters (and their envelopes if possible), birthday or holiday cards, telephone bills or any other proof of correspondence between the couple

___ If there was a church wedding, religious marriage certificate

___ Gas, electric, telephone and other utility bills showing date, address and name of one or both of you

___ Evidence of vacations taken together: airline tickets, snapshots, hotel bill, etc.

___ Receipts, invoices or installment contracts for major purchases made together, such as car, furniture, television, VCR, stereo, refrigerator, washer, dryer showing date, address and name of one or both of you

___ Real property deeds showing joint ownership
Re: Approval of Adjustment of Status Application.

Dear

Congratulations on the recent approval of your adjustment of status application and your new status as a Lawful Permanent Resident of the United States! We are extremely pleased that we have achieved a favorable outcome in this matter. Please read this letter carefully. Once reviewed, you should retain this letter as part of your permanent record. Also, if you are employed, please advise your employer that you are now a U.S. Permanent Resident and that your I-9 form should be amended accordingly to reflect your new status.

Since we will not be advised by United States Citizenship and Immigration Service (USCIS) when you receive your actual green card, please let us know when you receive it by forwarding us a clear and legible copy for our records. Also, please take note of the following important information regarding your new status as a Permanent Resident.

TRAVEL DOCUMENTS

• GREEN CARD AS A TRAVEL DOCUMENT

A Permanent Resident uses the Alien Registration Card in lieu of a visa to return to the United States from trips abroad (with the recommendation being that such trips be less than six months in duration). If you remain outside the United States for a period of one year or more, your residency will probably be deemed to be abandoned, and you would not be permitted to enter unless you obtained a returning resident visa at the consulate while overseas, or filed for and obtained a Re-entry Permit from USCIS before leaving the United States. The returning resident visa may be difficult to obtain because the Consul must be satisfied that you could not have foreseen the need to remain outside the United States for such an extended period of time.

• RE-ENTRY PERMITS

If you intend to be outside the United States for more than one year, it is advisable that you obtain a Re-entry Permit which will authorize you to remain outside the United States for up to two years. You must apply for the Re-entry Permit (sometimes called a "white passport") before you leave the United
States. Please note that although the Re-entry Permit remains valid for two years, obtaining a Re-entry Permit does not guarantee that you will be admitted as a returning resident after a prolonged absence. Such determinations are based upon a review of the facts existing at the time of admission and the degree to which ties to the United States can be established.

Processing times for Re-entry Permits can sometimes be lengthy. Therefore, it is prudent that your travel needs be carefully planned with this in mind. Please contact our office for further assistance.

When a Permanent Resident is outside of the United States for more than six months, each entry will be considered as a new application for admission. This means that all of the grounds of exclusion that were examined when you got your Permanent Resident will be reviewed again. Be particularly careful on your trip planning if you have:

- Committed any crime
- Received any public benefits
- Contracted or been diagnosed with any contagious disease

Please contact our office if you have any questions before planning an extended trip outside the U.S.

LEAVING YOUR RESIDENCE

ABANDONMENT OF PERMANENT RESIDENCE:

Even short departures from the United States may result in the loss of permanent resident status. When you are inspected by an immigration officer upon your return to the United States, you may be found to have lost your permanent residence if the immigration officer determines that your home is no longer in the United States. Loss of permanent residence may occur if any one of the following occurs:

- You accept a job abroad. Taking a permanent job or a job for an indefinite term overseas can create problems, but a clearly temporary job that is for a specific and relatively short period of time is sometimes acceptable.
- You fail to file a resident tax return.
- You stay outside the United States for more than one year without a valid re-entry permit.
- You are otherwise found to have abandoned your residence in the United States.

In determining whether you have abandoned residence, USCIS (or the U.S. Consul, if you are applying for a visa as a "returning resident") will consider a number of factors which bear upon your intent to reside in the United States. These include:
The amount of time you have spent in the United States;
Where you are working;
Whether your trips abroad are clearly temporary in purpose;
What your ties are to the United States;
The existence of a home in the United States;
Your payment, or failure to pay, taxes as a resident of the United States;
Your ownership of property; and
The reasons for your trips abroad.

If you are planning on spending extensive periods of time abroad, we strongly recommend that you contact this office to discuss steps that may be taken in order to protect and support your status as a Lawful Permanent Resident of the United States.

IF YOU WORK OUTSIDE THE UNITED STATES

Before moving abroad to take up employment, even temporary employment, you should consult with our office. Under certain circumstances, your residence in the United States can be preserved for naturalization purposes, and in any case, we can provide you with advice on how to maximize your chances for maintaining your residence.

POSSIBLE LOSS OF STATUS

Even though you have a "green card," you can be deported from the United States under certain circumstances, including:

Conviction of even a minor drug-related offense;
Conviction of certain felonies;
Conviction of any two crimes not arising out of a single scheme;
Knowingly encouraging or aiding anyone else to enter the United States illegally or fraudulently;
Failing to notify the Immigration Service of a change of address; or
Engaging in espionage, sabotage, or terrorist activities.

You may also lose your status if you were ineligible to obtain that status in the first place. This can happen if USCIS discovers that you misrepresented yourself or any of your documents at the time you obtained permanent residence. You may also be found to be ineligible for permanent residence if you separate from your spouse or the employer who petitioned for you shortly after obtaining your status.
and the Immigration Service finds that you did not intend to live with your spouse, or work for your employer, at the time you became a permanent resident.

- **PROCEEDINGS TO TAKE AWAY YOUR STATUS**

If you are living in the United States as a permanent resident, USCIS can bring an action to rescind that status, or an action to deport you from the United States. The former begins with the service by USCIS of a “Notice of Intent to Rescind.” The latter begins with the service of a “Notice to Appear.” Your failure to respond to either of those documents could result in the loss of your residence and your removal from the United States. USCIS can serve the Notice of Intent to Rescind by simply mailing it to you at the last address in their files which you have given them. Therefore, it is extremely important that you keep USCIS advised of your address following any change of address. Should you be faced with a criminal prosecution, or should you receive a Notice of Intent to Rescind or a Notice to Appear, please consult our offices or another competent immigration attorney immediately.

**TAXATION**

- **U.S. RESIDENT TAX RETURN**

Every permanent resident of the United States is a U.S. tax resident. As such, you are required to pay U.S. taxes on all your income—worldwide. You may receive credit for certain taxes paid abroad. Your failure to pay taxes can result in a finding that you have abandoned your permanent resident status, even if you can legitimately claim nonresident status under a tax treaty. You are also liable for state income taxes.

- **ESTATE TAXES**

The estates of persons who are U.S. tax residents when deceased are subject to U.S. estate tax. If you have not already done so, you may wish to consider consulting a professional with regard to minimizing the amount of taxes which would be involved under such circumstances. If you do not know of an appropriate tax professional, please contact our office for a referral.

- **WILLS**

Contrary to what many people think, it is economical to have a will even if you do not have substantial assets. More importantly, the law of your state decides who will receive your property at your death. A will is the only way to ensure that you can choose who that will be. If you do not have an attorney to attend to this for you, please contact our office to arrange for a referral to have your will drafted or reviewed.

**SOCIAL SECURITY**
• **OBTAINING A SOCIAL SECURITY CARD**

Generally, you may obtain a Social Security Card once you are legally authorized to work in the United States. Such authorization may be evidenced by receipt of an employment authorization card, an Alien Registration Card (Green Card), or receipt of temporary evidence of Green Card status (as established by presentation of an I-551 stamp in your passport). You will need to file an application for a Social Security Number in person at the Social Security Office. When filing this application at the Social Security Office, you should bring the following documents with you: your original birth certificate, passport, and employment authorization document, stamped passport or Green Card. Call 1-800-772-1213 for further information including the address of your local Social Security office, or visit their website at [http://www.uscis.gov/portal/site/uscis](http://www.uscis.gov/portal/site/uscis).

• **RESTRICTIONS ON YOUR SOCIAL SECURITY CARD**

If you already have your Social Security card, but it is annotated indicating that it is not valid for employment without a USCIS employment authorization document, you should contact Social Security with evidence of your permanent resident status to have the restrictions removed.

• **YOUR SOCIAL SECURITY ACCOUNT**

Even if you have a valid Social Security number, you should check to make sure you received credits under Social Security for any taxable work you did before you got your Green Card. Sometimes the Social Security Administration misplaces the records if you did not have a valid card, and this is the time to reconcile the records. Ask for a form SSA-7004, “Request for Earnings and Benefit Estimate Statement,” from Social Security to check these records. If you have any concerns about connecting Social Security about your past, contact our office first to analyze any possible risk. You should check your earnings statement every three to four years because errors more than four years old usually cannot be corrected.

• **MISUSING A SOCIAL SECURITY NUMBER**

You should be aware that it is a serious criminal offense to use someone else’s Social Security number or to use a fraudulently obtained one. If you have done so, seek legal advice before contesting Social Security.

**CHANGE OF ADDRESS**
It is no longer necessary to report your address annually. If you move, you are required to report your new address to the USCIS within 10 days. Failure to report your address is a ground for deportation. The correct form for entering your change of address is Form AR-11, available on the Internet at http://www.uscis.gov/portal/site/uscis or by calling our office. Whenever you send correspondence to USCIS, please send it certified mail with return receipt to show proof of mailing.

If an I-864 Affidavit of Support or your behalf was filed, then your sponsor will need to file an I-865 Affidavit of Support Change of Address if he or she moves. This includes both your direct petitioner sponsor and/or co-sponsor that you might have had. This form is also available on the Internet.

**NATURALIZATION**

- **PERMANENT RESIDENTS ARE NOT U.S. CITIZENS**

As a U.S. Permanent Resident you are not a citizen of the United States. You are thus ineligible to hold public office, you may not vote, be on a jury and you may not take advantage of certain tax provisions of the Internal Revenue Code. Voting in a U.S. political election before you are naturalized is a serious offense that will bar naturalization and could result in removal from the United States even, if you are told you may do so. Additionally, as a permanent resident, you can petition only your spouse and unmarried sons & daughters to the United States.

- **WAITING PERIOD**

You may become a citizen by being naturalized. An individual is eligible to become a U.S. citizen no earlier than five years after they have become a lawful permanent resident unless they are married to a U.S. citizen. The application can be filed three months before the actual eligibility date.

- **PHYSICAL PRESENCE AND RESIDENCE REQUIREMENT**

At the time an application for naturalization is filed, an individual must establish that he or she has been physically present in the United States at least 30 of the previous 60 months (1/2 of the previous 36 for certain married persons). A departure of less than six months normally will not break residence while a departure for more than six months and less than one year will normally break the continuous residence requirement, unless adequately explained. A departure from the United States for a year or more will presumptively break the continuous residence requirement.

- **WAITING PERIOD FOR CERTAIN PERSONS MARRIED TO CITIZENS**

An individual who is married to a U.S. citizen and has lived with that individual for three years as a resident is eligible to file for naturalization in three years, rather than five. This special rule does not
apply if you are living apart from your spouse. The rule is applicable whether or not you obtained your “green card” as a result of this marriage. Additionally, if your citizen-spouse has been assigned abroad by a U.S. corporation developing international trade or certain governmental international or nonprofit organizations, you may be eligible to naturalize immediately in an expedited procedure before you leave the United States without regard to certain residence requirements.

- **PRESERVING RESIDENCE**
  
  If you have the United States to work for a U.S. government agency, an international agency, certain religious organizations, or an American-owned company, you may, under certain circumstances, qualify for relief from the continuous residence requirement. If you fail to seek this relief, you may have to wait up to three years additional time to qualify for naturalization. You should apply for this relief before you depart the United States.

- **EXAMINATION**
  
  In addition to meeting the above requirements, you will have to show that you are a person of good moral character and pass a test in U.S. government and history, as well as a simple test of your ability to read and write English. Longtime elderly residents and those with impairments may qualify for exemption from the English language requirements.

- **DUAL CITIZENSHIP**
  
  The law of your country may allow you to retain your citizenship after you become a U.S. citizen.

**MILITARY DUTY**

- **THE DRAFT**
  The United States does not currently have a draft. However, all men age 18 to 29 are required to register for Selective Service within 30 days of their 18th birthday, or within 30 days of the time they become permanent residents of the United States. If you become a permanent resident before your 26th birthday, you are required to register for Selective Service. If you have a son who holds a “green card” or is a U.S. citizen, he is required to register within 30 days of his 18th birthday. Notwithstanding the fact that you have registered with the Selective Service, you may be exempt from military service based on your nationality. However, claiming such exemption could disqualify you from citizenship. Failure to register may also bar you from U.S. citizenship.

- **HOW TO REGISTER**
  You may complete your Selective Service Registration at any U.S. Post Office. The form is a simple postcard type document.
PETITIONING FOR RELATIVES

You may file a petition for a spouse or an unmarried child under age 21 once you have been approved for permanent residency even though your Green Card has not arrived in the mail. Please note that there is a substantial waiting period for immigrant visa numbers under this category. Available immigrant visa numbers are required in order to complete immigrant visa processing. You may also file for an unmarried child over age 21. The waiting period for that classification is currently eight years or longer.

Once you become a U.S. citizen, the waiting period for a spouse or unmarried child can be eliminated, and an application for permanent residence can be submitted immediately, once all supporting documentation has been prepared. In addition, you can file for a parent or a married child. There is no waiting period for a parent, but the waiting period for a married child is longer. In addition, you can file a petition for a brother or a sister. The waiting period is for that classification is also very long.

Our office can provide you with assistance and advice in processing a petition to classify eligible relatives under an appropriate category. Because the waiting periods are long, we recommend that you file such petitions as soon as possible if there is any indication your relative may wish to immigrate to the United States at some time in the future. Should your relative desire to come to the United States more quickly, we can advise you as to what other paths may be available. Please keep in mind that the mere filing of a petition may, in some cases, make it harder for your relative to obtain a visitor visa to come to the United States, as an intent to immigrate will be on record with USCIS.

CONDITIONAL RESIDENCE

Please note that if you adjusted through marriage to a U.S. citizen and have not been married to your spouse for 2 years, your Permanent Residence is Conditional. You are entitled to all of the same benefits of a lawful permanent residence. However, you must file form I-751 and demonstrate the continuing bona fide nature of your marriage 90 days before the 2nd year anniversary of your residency. If you are not still married at that time, you must file for a waiver of this requirement and demonstrate either: 1) you will suffer extreme hardship if you are not allowed to remain in the United States; 2) the marriage was entered into good faith but has since terminated; or 3) you were battered or subjected to extreme cruelty by your spouse. Between now and then, you should continue to save evidence of your shared life together, as you will need to submit this proof with either your jointly filed I-751 or your I-751 waiver.
CHILDREN REACHING THE AGE OF 14

If you have a child who received his or her residency prior to reaching the age of 14 years and his or her permanent resident card will not expire before his or her 16th birthday, you must file Form I-90 to replace his or her current permanent resident card. If you file Form I-90 within 30 days after reaching the age of 14 years, the filing fee will be waived. Please call our office when your child is about to reach age of 14 to discuss this further.

MAINTAINING CONTACT WITH OUR OFFICE

It has been our pleasure to assist you in becoming a Lawful Permanent Resident of the United States. Should you need the help of an immigration lawyer in the future, we hope you will call upon us. Please note that we will be closing your case file on this matter and our representation will end on this matter. If there are any original documents still in your file, we would ask that you arrange to collect them soon. After two years, we will be scanning the contents of your file onto an electronic media, and destroying the hard copies. We would also truly appreciate your recommending our services to your friends or relatives who may be in need of immigration-related assistance.

Thank you for the opportunity to have been of service.

Sincerely,

SUZANNE BROWN
Marriage-Based Adjustments—A How To Guide
April 12th, 2011

Additional Resources

August 2009 Adjudicator’s Field Manual
http://www.uscis.gov/propub/DocView/afmid/1