

# INADMISSIBILITY

- Section 245(c)(2) unauthorized employment
- Unlawful presence under INA § 212(a)(9)(B)

I will slowly add more...

- Unauthorized Employment INA §245(c)(2) Special Immigrant Juvenile Exemptions Unlawful Presence

# Unauthorized Employment INA §245(c)(2)

## Unauthorized Employment

**Section 245(c)(2) covers unauthorized employment**

“ With certain exceptions, an applicant is barred from adjusting status if:

He or she continues in or accepts unauthorized employment prior to filing an application for adjustment of status;[\[1\]](#) or

He or she has ever engaged in unauthorized employment, whether before or after filing an adjustment application.[\[2\]](#)

**These bars apply not only to unauthorized employment since an applicant's most recent entry but also to unauthorized employment *during any previous***

*periods of stay in the United States.*[\[3\]](#)

## **B. Periods of Time to Consider and Effect of Departure**

The [INA 245\(c\)\(2\)](#) bar applies to unauthorized employment prior to filing the adjustment application. The departure and subsequent reentry of an applicant who was employed without authorization in the United States prior to filing an adjustment application does not erase the this bar. Otherwise, an applicant who engaged in unauthorized employment could simply depart the United States, reenter immediately, and become eligible to file for adjustment of status.[\[4\]](#)

The [INA 245\(c\)\(8\)](#) bar applies to any time engaged in unauthorized employment while physically present in the United States regardless of whether it occurred before or after submission of the adjustment application. USCIS places no time restrictions on when unauthorized employment must have occurred, because the INA does not state that the unauthorized employment must have occurred during any particular period of time.[\[5\]](#)

An officer, therefore, should review an applicant's entire employment history in the United States to determine whether the applicant has engaged in unauthorized employment. In addition to an applicant's most recent entry and admission, an officer should examine all of the applicant's previous

entries and admissions into the United States. An officer should disregard how much time has passed since each entry and whether the applicant subsequently left the United States and returned lawfully.

# EXEMPTIONS

This section and other lapses in status does not apply to special immigrant juveniles.

Spouses of US Citizens are also exempt from the grounds of inadmissibility for accepting employment without authorization.

## Evidence to Consider

An officer may request, review, and consider the following documentation to determine whether the applicant may be barred from adjustment based on unauthorized employment under [INA 245\(c\)\(2\)](#) or [INA 245\(c\)\(8\)](#):

- Arrival/Departure Record (Form I-94); Notice of Action (Form I-797); Pay stubs; ~~W-2s~~

# Special Immigrant Juvenile Exemptions

245(h)(2)(B) of the INA and in the implementing regulations at 8 C.F.R. 245.1(e)(3).

## 8 C.F.R. 245.1(e)(3)

### (3) Special immigrant juveniles —

(i) Eligibility for adjustment of status. For the limited purpose of meeting one of the eligibility requirements for adjustment of status under section 245(a) of the Act, which requires that an individual be inspected and admitted or paroled, an applicant classified as a special immigrant juvenile under section 101(a)(27)(J) of the Act will be deemed to have been paroled into the United States as provided in § 245.1(a) and section 245(h) of the Act.

(ii) Bars to adjustment. An applicant classified as a special immigrant juvenile is subject only to the adjustment bar described in section 245(c)(6) of the Act. Therefore, **an applicant classified as a special immigrant juvenile is barred from adjustment if deportable due to engagement in terrorist activity or association with terrorist organizations** (section 237(a)(4)(B) of the Act). There is no waiver of or exemption to this adjustment bar if it applies.

**(iii) *Inadmissibility provisions that do not apply.* The following inadmissibility provisions of section 212(a) of the Act do not apply to an applicant classified as a special immigrant juvenile and do not render the applicant ineligible for the benefit:**

**(A) Public charge (section 212(a)(4) of the Act);**

**(B) Labor certification (section 212(a)(5)(A) of the Act);**

**(C) Aliens present without admission or parole (section 212(a)(6)(A) of the Act);**

**(D) Misrepresentation (section 212(a)(6)(C) of the Act);**

**(E) Stowaways (section 212(a)(6)(D) of the Act);**

**(F) Documentation requirements for immigrants (section 212(a)(7)(A) of the Act);**

**(G) Aliens unlawfully present (section 212(a)(9)(B) of the Act);**

**(iv) Inadmissibility provisions that do apply. Except as provided for in paragraph (e)(3)(iii) of this section, all inadmissibility provisions in section 212(a) of the Act apply to an applicant classified as a special immigrant juvenile.**

**(v) Waivers.**

**(A) Pursuant to section 245(h)(2)(B) of the Act, USCIS may grant a waiver for humanitarian purposes, to assure family unity, or in the public interest for any applicable provision of section 212(a) of the Act to an applicant seeking to adjust status based upon their classification as a special immigrant**

**juvenile, except for the following provisions:**

**(1) Conviction of certain crimes (section 212(a)(2)(A) of the Act) (except for a single offense of simple possession of 30 grams or less of marijuana);**

**(2) Multiple criminal convictions (section 212(a)(2)(B) of the Act) (except for a single offense of simple possession of 30 grams or less of marijuana);**

**(3) Controlled substance traffickers (section 212(a)(2)(C) of the Act) (except for a single offense of simple possession of 30 grams or less of marijuana);**

**(4) Security and related grounds (section 212(a)(3)(A) of the Act);**

**(5) Terrorist activities (section 212(a)(3)(B) of the Act);**

**(6) Foreign policy (section 212(a)(3)(C) of the Act); or**

**(7) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing (section 212(a)(3)(E) of the Act).**

## **INA §237(c) Waived for Special Immigrant Juveniles**

**Furthermore, associated deportability grounds under section 237(c) of the INA are waived for special immigrant juveniles.**

**Inadmissibility provisions not listed at section 245(h)(2) *do apply* to special immigrant juveniles seeking adjustment of status. Accordingly, a special immigrant juvenile adjustment applicant would have to obtain a waiver of inadmissibility or other form of relief from applicable grounds of inadmissibility in order to be eligible for adjustment of status.**

**The inadmissibility grounds that do apply to special immigrant juveniles are as follows:**

*INA 212(a)(1) — Health-related*

*INA 212(a)(2) — Crime-related*

*INA 212(a)(3) — Security-related*

*INA 212(a)(6)(B) — Failure to attend removal proceedings*

*INA 212(a)(6)(E) — Smugglers*

*INA 212(a)(6)(F) — Subject of civil penalty*

*INA 212(a)(6)(G) — Student visa abusers*

*INA 212(a)(8) — Ineligible for citizenship*

*INA 212(a)(9)(A) — Certain foreign nationals previously removed*

*INA 212(a)(9)(C) — Foreign nationals unlawfully present after previous immigration violations*

*INA 212(a)(10) — Practicing polygamists, guardians required to accompany helpless persons, international child abductors,*

*unlawful voters, and former citizens who renounced citizenship to avoid taxation*

## **Section 245(h)(2)(B) Waivers**

*Section 245(h)(2)(B) of the INA provides for a special immigrant juvenile-specific waiver for adjustment of status purposes. The USCIS may grant a waiver of*



*inadmissibility to a special immigrant juvenile applicant for one of the following reasons:*

1. Humanitarian purposes;<sup>2</sup> Family unity;<sup>3</sup> or When it is otherwise in the public interest.

## Section

**245(h)(2)(B) prevents the USCIS from weighing the special immigrant juvenile's relationship with his or her parents or adoptive parents in considering a waiver. This prohibition also extends to a parent who was not determined by a juvenile court to have abused the juvenile .**

**It is also important to note that the section 245(h)(2)(B) waiver applies *only* for the purpose of a special immigrant juvenile's adjustment of status application.**

## **INA 245(h)(2) Waivers CANNOT Waive**

**However, the special immigrant juvenile-specific waiver at section 245(h)(2) cannot waive the following grounds of inadmissibility:**

*INA 212(a)(2)(A) — Conviction of certain crimes*

*INA 212(a)(2)(B) — Multiple criminal convictions*

*INA 212(a)(2)(C) — Controlled substance traffickers*

*INA 212(a)(3)(A) — Security and related grounds*

*INA 212(a)(3)(B) — Terrorist activities*

*INA 212(a)(3)(C) — Foreign policy related*

*INA 212(a)(3)(E) — Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing*

## **Unauthorized Employment & Violations of Terms of Nonimmigrant Visa**

**The bar at section 245(c)(2) covering unauthorized employment and other lapses in status does not apply to special immigrant juveniles. Special immigrant juveniles are also exempted from section 245(c)(8), which covers aliens who accepted unauthorized employment while their presence in the United States was not authorized and those who violate the terms of their nonimmigrant visas (see 62 FR 39417, 39422 (Jul. 23, 1997)).**

**Sections 245(c)(1), (c)(3)-(5) do not apply to special immigrant juvenile adjustment applicants since the issues are ameliorated by the fact that special immigrant juveniles are deemed to have been paroled for purposes of adjustment by virtue of the approval of the Form I-360.**

# **Inadmissibility and Deportability By Secretary of State Determination**

## **Inadmissibility and Deportability By Secretary of State Determination**

**Under section 237(b)(4)(C)(i) of the Immigration and Nationality Act, “an alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have serious adverse foreign policy consequences for the United States is deportable.” There exists a parallel inadmissibility provision in section 212(a)(3)(C)(i) of the Act providing “an alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious foreign policy consequences for the United States is inadmissible.” (We discussed both provisions in brief in our article on [deportability for security and related grounds](#).) These provisions provide for inadmissibility and**

**deportability by Secretary of State determination.**

**Section 237(b)(4)(C)(i) has been in the news in 2025 because Secretary of State Marco Rubio has made numerous findings under the statute regarding specific lawful permanent residents and student visa holders, including in the [high profile case of Mahmoud Khalil](#), leading to the State Department revoking their visas and to the Department of Homeland Security initiating removal proceedings.**

**Under section 212(a)(3)(C)(iv) of the INA, the Secretary of State is required to notify relevant committees of the United States House of Representatives and the United States Senate whenever he or she invokes section 212(a)(3)(C)(iii) to declare that an alien is inadmissible or deportable because his or her admission or being allowed to remain in the United States would compromise a compelling United States foreign policy interest. While this provision does not change the disposition of any specific case, it is designed to ensure that Congress is aware of how the Secretary of State is exercising his or her authority under section 212(a)(3)(C)(iv).**

**Both section 237(b)(4)(C)(i) and 212(a)(3)(C)(i) depend on factual determinations made by the United States Secretary of State.**

**The Secretary of State, in his or her capacity as the top diplomat of the United States, may determine that a specific alien's presence or activities in the United States (or proposed activities in the case of an alien who is not already present in the United States) would have serious adverse foreign policy consequences for the United States. Under section 237(b)(4)(C)(i) and 212(a)(3)(C)(i), this determination renders the alien deportable or inadmissible respectively. In the case of an alien who is already present in**

**the United States, the Department of Homeland Security may issue a Notice to Appear to an alien for deportability under section 237(b)(4)(C)(i) pursuant to the Secretary of State's determination that the alien's presence or activities in the United States would have serious adverse foreign policy consequences.**

**Under section 237(b)(4)(C)(i) of the INA, (also codified at 8 C.F.R. 1227(b)(4)(C)(i)) "[a]n alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable." There is a similar inadmissibility provision codified at section 212(a)(3)(C)(i) of the Act (also codified at 8 C.F.R. 1182(a)(3)(C)(i)): "An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible."**

**There are two exceptions to both 237(b)(4)(C)(i) and 212(a)(3)(C)(i) that are set forth in sections 212(a)(3)(C)(ii) and (iii). Although the exceptions are found within the inadmissibility provision, they are incorporated into the deportability provision by section 237(b)(4)(C)(ii) ("The exceptions described in clauses (ii) and (iii) of section 212(a)(3)(C) ... shall apply to deportability ... in the same manner as they apply to inadmissibility).**

## **Exceptions**

**The first exception is relatively narrow. Section 212(a)(3)(C)(ii) provides that: “An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.” This exception only applies to (1) an alien who is an official of a foreign government or a purported government; or (2) who is a candidate for election in a foreign government office during the period immediately preceding the election for that office. The terms “purported government” and “immediately preceding” are not clearly defined by the statute. The Department of State’s Foreign Affairs Manual summarizes the limitation on the applicability of sections 212(a)(3)(C)(i) and 237(b)(4)(C)(i) by explaining that “exclusion must be based on factors related to the applicant’s entry or proposed activities which go beyond the applicant’s beliefs, statements, and associations, and which may have the requisite potential for serious adverse foreign policy consequences.” 9 FAM 302.14-2(B)(1).**

**The second exception applies to aliens who are not government officials or qualifying candidates for foreign office. Found in section 212(a)(3)(C)(iii), it reads as follows: “An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien’s admission would compromise a compelling United States foreign policy interest.” In short, neither section 212(a)(3)(C)(i) nor 237(b)(4)(C)(i) ordinarily apply in cases where the alien’s**

past, current, or expected beliefs, statements, or associations are or would be lawful in the United States. However, while that exception is the end of the matter for foreign government officials and candidates for foreign office, other aliens may nevertheless be found inadmissible or deportable for “beliefs, statements, or associations” that would otherwise be lawful in the United States, provided that “the Secretary of State personally determines that the alien’s admission [or being allowed to remain in the United States, in the case of section 237(b)(4)(C)(i)] would compromise a compelling United States foreign policy interest.” The State Department’s Foreign Policy Manual instructs consular officers regarding the exception: “‘Compromise a compelling United States foreign policy interest’ is a significantly higher standard than the ‘have potentially serious adverse foreign policy consequences’ standard generally required for finding of ineligibility under INA 212(a)(3)(C).” 9 FAM 302.14-2(B)(2). However, it is worth noting that the different standards may have a greater effect where consular officers are making an initial recommendation or finding regarding admissibility than when the Secretary of State exercises his or her own authority to make a determination about an alien already present in the United States based on the Secretary’s position regarding the foreign policy interests of the United States.

## Matter of Ruiz-Massieu

[\*Matter of Ruiz-Massieu\*](#), 22 I&N Dec. 833 (BIA 1999) (en banc). This decision dealt with former section 241(a)(4)(C)(i) which was subsequently re-codified as 237(b)(4)(C)(i). *Matter of Ruiz-Masseiu* involved a nonimmigrant visitor for pleasure who was placed in formal deportation proceedings pursuant to the issuance of an Order to Show Cause (today removal proceedings are initiated with the issuance of a Notice to Appear), charging him with deportability

**under former section 241(a)(4)(C)(i) of the Act.**

**In *Matter of Ruiz-Masseiu* the Secretary of State at the time, Warren Christopher, had personally determined that the presence of the alien in the United States would have serious adverse foreign policy consequences regarding relations between the governments of the United States and Mexico. The Immigration Judge below had then ruled in favor of the alien, finding that the written determination by the Secretary of State did not establish deportability. The Immigration Judge sought to examine the Secretary's reasoning and found that the Government had failed to explain what about the alien's presence in the United States would adversely affect the foreign policy interests of the United States. *Id.* at 835-36.**

**The Board disagreed with the Immigration Judge and sustained the government's appeal. The key passage in its decision reads as follows: "Congress' decision to require a specific determination by the Secretary of State, based on foreign policy interests, to establish deportability under section 241(a)(4)(C)(i) of the Act, coupled with the division of authority in section 103 of the Act between the Attorney General and the Secretary of State, make it clear that the Secretary of State's reasonable determination in this case should be treated as conclusive evidence of the respondent's deportability." *Id.* at 842. In short, the Board's position is that the Secretary of State's written determination that the alien's presence in the United States would have serious adverse foreign policy consequences for the United States is sufficient to trigger deportability under section 237(b)(4)(C)(i) of the Act.**

**The Board read the Immigration Judge's decision as inviting adjudicators acting under the auspices of the United States Attorney General to determine whether a foreign policy determination by the Secretary of State is reasonable based on the facts relied upon by the Secretary of State, which**



the Board concluded is not in accord with the statute. “There is no indication that Congress contemplated the Immigration Judge, or even the Attorney General, overruling the Secretary of State on a question of foreign policy.” *Id.* at 845. Citing to the Supreme Court decision in [Kleindienst v. Mandel](#), 408 U.S. 753, 770 (1972) (which we [discussed tangentially](#) in our review of *Trump v. Hawaii* 585 U.S. 687 (2018)), the Board concluded that deportability under the current 237(b)(4)(C)(i) is triggered when the Secretary of State provides a “facially legitimate and bona fide” reason for determining that an alien’s continued presence in the United States would have serious adverse foreign policy consequences. *Id.* at 846. The Board declined to consider a hypothetical scenario where the Secretary of State provides no reasoning whatsoever. *Id.*

In short, the *Matter of Ruiz-Masseiu* provides that the determination of the Secretary of State that an alien’s presence in the United States is detrimental to a foreign policy interest thereof is decisive evidence of deportability. The decision effectively forecloses any assessment by immigration judge’s or the Board of the Secretary of State’s foreign policy determination.

# Unlawful Presence ☐

## INA § 212(a)(9)(B)

### Unlawful Presence

#### INA § 212(a)(9)(B)

**NOTE:** Remember to consider whether INA § 212(a)(9)(C) unlawful presence (the “permanent bar”) would apply.

The three- and ten-year bars at INA § 212(a)(9)(B) penalize people who stay too long in unlawful status in the United States, leave, and then apply for admission. They are only triggered when the person departs the United States. These grounds apply to people who originally were admitted or paroled but then stayed past the expiration of their authorization; those who entered without inspection; and those who knowingly made a false claim of citizenship to obtain permission to enter.

A waiver of the three- and ten-year unlawful presence bars is available for people who are the spouses, sons, or daughters of U.S. citizens or lawful permanent residents. There are two different unlawful presence waiver processes—one involves Form I-601 and the other, the provisional waiver

process, uses Form I-601A. The I-601 waiver can be used to waive multiple grounds of inadmissibility, including unlawful presence under 212(a)(9)(B), and in multiple contexts (immigration court, adjustment of status, consular processing).

In contrast, the I-601A provisional waiver process has a much narrower use: the I-601A allows immigrant visa applicants presently within the United States who will be leaving to consular process—thereby triggering unlawful presence when they depart to attend their consular interview—to apply for the waiver of unlawful presence before they leave, knowing they will be triggering this bar and need an unlawful presence waiver later on. . This allows applicants to wait in the United States while their unlawful presence waiver is pending (otherwise, these applicants who are consular processing must wait outside the United States unless and until their waiver is approved), significantly reducing the time they must be away from family to complete the process for obtaining permanent residency.

## **Three & Ten Year Bars**

**The “Three-Year Bar.”** Under INA § 212(a)(9)(B)(i)(I) noncitizens who, beginning on April 1, 1997, (a) are unlawfully present in the United States for a continuous period of more than 180 days but less than one year, and (b) then voluntarily depart the United States before any immigration proceedings commence, and (c) then apply for admission to the United States, are inadmissible for a period of three years from the date of departure.

**The “Ten-Year Bar.”** Under INA § 212(a)(9)(B)(i)(II) noncitizens who, beginning on April 1, 1997, (a) are unlawfully present in the United States for a continuous period of one year or more, (b) leave the United States

**voluntarily or by deportation/removal, and (c) then apply.**

# **Calculating Unlawful Presence**

**Start counting on April 1, 1997. Unlawful presence does not start accumulating until April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which added unlawful presence inadmissibility. For example, a person who had been unlawfully present in the United States for several years but left on or before September 27, 1997 (within 180 days after April 1, 1997) will not be inadmissible under 212(a)(9)(B) for either the three- or ten-year bar.**

**Only count continuous periods. For purposes of calculating unlawful presence under this provision, the period of unlawful presence must be continuous. Thus, a person who is unlawfully present for four months, leaves the country, and comes back to being without status for five months has not spent six months or longer in continuous unlawful presence (during a single stay) and so does not come within the three- or ten-year bar.**

**Do not count time that the noncitizen is under age 18. Unlawful presence does not accrue for purposes of the three- and ten-year bars during time the noncitizen is under age 18.**