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Unlawful Presence INA § 212(a)(9)(B)

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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.

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