

Practice Advisory: Unlawful Presence and INA §§ 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I): A summary of the [May 6, 2009 Interoffice Memorandum from Donald Neufeld, Lori Scialabba, and Pearl Chang revising the Adjudicator’s Field Manual](#).

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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.

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- 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)¹.

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.

¹ 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 absentia* 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.

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.aifl.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 X*³ 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

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 I-94 expires, or 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 POA, she may not necessarily be in status. This distinction can be found in several Service memos over the years.

Of course, lurking beneath the POA/lawful status distinction has been the more critical question of whether someone not in a lawful status, but otherwise POA, 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 POA 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 POA 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 POA.
 - 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 POA. However, the period of time encompasses by the new grant of VD is considered a POA.
 - 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.

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.