"Say It Ain't So!": Unlawful Presence & Status Violations

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INA § 212(a)(9)

- Who is inadmissible under 212(a)(9)?
  - Aliens with prior expulsion orders seeking readmission (212(a)(9)(A))
  - Aliens with accrued unlawful presence seeking readmission (212(a)(9)(B))
  - Aliens with more than one year of unlawful presence who departed and reentered or attempted to reenter illegally (212(a)(9)(C))
  - Aliens with a prior removal order who reentered or attempted to reenter illegally (212(a)(9)(C))

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3-Year Bar INA §212(a)(9)(B)(i)(I)

- Unlawfully present
- More than 180 days
- On or after April 1, 1997
- Voluntarily departs
- Before proceedings (no 3 year bar if after proceedings)
- Departure stops time

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10-Year Bar
INA §212(a)(9)(B)(i)(II)

- Unlawfully present
- More than one year
- On or after April 1, 1997
- Voluntarily departs or is removed
- Departure stops time

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Unlawful Presence

- Entered illegally
- Time after I-94 expires
- IJ or INS/USCIS determines status violation
- Mexicans 30 days after enter with B-1/B-2 NIV/BCC
- Not Canadians who enter as tourists
- Not Mexicans who enter with BCC (Forms I-186 or I-580) unless get I-94

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Lawful Presence for 3- and 10-year Bar

- Under 18
- Voluntary departure
- Pending adjustment
- Pending or granted asylum or withholding, provided worked with EAD
- Family unity
- Deferred action
- Parole under 212(d)(5)

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Lawful Presence for 3- and 10-Year Bar

- Battered spouse, child
- Cuban/Haitian entrant
- NACARA adjustment
- Pending or granted TPS, DED
- Granted withholding, CAT
- File to remove condition for LPR, through appeal
- Tolling if file change or extension of status (for 3-year bar) if filed while in status
- Stay of removal order

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Who Has Unlawful Presence? How Much?

- Maria, now age 17, entered the U.S. without papers 4 years ago
- Pedro entered the U.S. on August 23, 2011 on a ten-year tourist visa and was authorized to stay for six months. He has been working illegally for the past 10 weeks.
- Roberto, from Colombia, entered the U.S. without inspection on July 4, 2005 and then applied for asylum on December 4, 2005.

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Who Has Unlawful Presence? How Much?

- Jose, a Canadian citizen, entered the U.S. six years ago by just driving across the border and being waived through.
- Ali entered the United States on an F-1 student visa seven years ago. He was issued an I-94 that stated "duration of status." He flunked out of school after the first year and has been working here illegally since then.

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AAO Unreported Decision On 3-Year Bar

- Inadmissibility under the three-year bar ends three years after the person's departure from the U.S., provided three years spent outside U.S.
- Person paroled back into the country
- Parole not an admission, so legally still outside U.S.
- Non-precedent AAO decision, affirmed by USCIS Chief Counsel

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Example

Carmela was present in the U.S. unlawfully for eight months before she applied for adjustment of status. When she departed the U.S. on advance parole on May 2, 2008, she triggered the three-year bar. After she was paroled in two weeks later, USCIS required her to file a waiver, which was denied. Laura appealed the waiver denial to the AAO, and in June 2011, the AAO issued a decision determining that Laura no longer needed a waiver, because more than three years had passed since the departure triggering the bar.

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Permanent Bar INA §212(a)(9)(C)(i)

- Unlawfully present
- More than one year in the aggregate
- Leave the United States
- Attempted EWI or EWI

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Unlawful Presence for Permanent Bar

- No statutory exceptions for minors, asylum applicants, Family Unity, battered women/children, tolling for extension or change of status
- USCIS and DOS interpreting statute narrowly
- CDJ stopped applying exceptions in 2008

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Example

Alberto was brought into the country illegally when he was one year old. His mother returned to Mexico with him two years later to attend a funeral. She and Alberto were caught trying to reenter one week later. Is Alberto subject to the permanent bar?

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Permanent Bar INA §212(a)(9)(C)(ii)

- Prior order of removal, exclusion, or deportation (at any time)
- Departure effecting the order
- Attempted EWI or EWI
- On or after April 1, 1997

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Relief from Illegal Reentry Bar

- For non-VAWA, can seek permission to reapply for admission after 10 years outside the U.S.
- Apply to district office where intend to reside
- Waiver for VAWA self-petitioner: must show connection between battery or extreme cruelty and removal, departure, reentry or attempted reentry

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212(a)(9)(B) in Action

Andres entered the country illegally in October 2011. He married a U.S. citizen two months ago, and she recently filed an I-130 for him. Andres knows he will have to consular process, but he can't decide when to return to Mexico. Advice?

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212(a)(9)(B) & (C)

Upon further questioning you find out that Andres had been residing in the United States prior to October 2011. In 2009 he was here unlawfully for four months and in 2010 he was here unlawfully for five months. The Immigration Service doesn't know about any of these visits. Advice?

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212(a)(9)(C) in Action

Andres decides to wait until his visa appointment is scheduled in Ciudad Juarez, which occurs in April 2012. At that time you prepare the I-601 waiver, since Andres has now been unlawfully present for more than 180 days. He attends the interview and is told it will take two months to schedule his appointment to file the waiver and another two months for a decision, so Andres just reenters the U.S. illegally. Advice?

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Matter of Torres-Garcia 23 I & N Dec. 866 (BIA 2006)

- Person who enters U.S. EWI after removal is not eligible for I-212 approval until 10 years have elapsed since the date of last departure
- CIS policy guidance implements BIA decision: I-212 can't be approved for individual inadmissible under 212(a)(9)(C)(i)(II) until 10 years have elapsed since last departure from the U.S.
- Ninth Circuit has followed that reasoning in Duran Gonzales reversing *Perez-Gonzalez*

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Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771 (BIA 2012)

An alien who leaves the United States temporarily pursuant to a grant of advance parole does not thereby make a "departure . . . from the United States" within the meaning of section

INA §212(a)(9)(B)(i)(II),

8 USC §1182(a)(9)(B)(i)(II) (2006).

Matter of Lemus, 24 I&N Dec. 373 (BIA 2007), clarified.

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Questions and Answers?

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