9 FAM 40.92 Notes

(TL:VISA-461; 09-11-2002)

9 FAM 40.92 N1 Interpretation of "Unlawful Presence"

(TL:VISA-461; 09-11-2002)

a. Subparagraph INA 212(a)(9)(B)(ii) provides the following construction for the term "unlawful presence": "… the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." Under this construction, an alien would generally be unlawfully present if he and/or she entered the United States without inspection, or stayed beyond the date specified on the Form I-94, *Nonimmigrant Visa Waiver Arrival Departure Document*, or was found by INS or an Immigration Judge to have violated status. However, even aliens fitting into one of these categories may be deemed to be in a period of authorized stay in certain circumstances, as noted below.

b. INS has interpreted "period of stay authorized by the Attorney General" to include:

(1) For aliens inspected and admitted until a date specified *on the Form I-94 or any extension*, any period of presence in the United States up until *either:*

(a) *The expiration of the Form I-94 (or any extension); or*

(b) A *Formal finding of a status violation made by INS or an immigration judge in the context of an application for an immigration benefit or in deportation proceeding, whichever comes first;*

(2) For aliens inspected and admitted for "duration of status" (DOS), any period of presence in the United States, unless INS or an immigration judge makes a formal finding of a status violation, *in which case unlawful presence will only begin to accrue as of the date of the formal finding;*

(3) For aliens granted "voluntary departure" (VD), the period of time between the granting of VD and the date for their departure;

(4) For aliens who have applied for extension of stay or change of nonimmigrant classification and who have remained in the United States after expiration of the Form I-94 while awaiting INS's decision, the entire period of the pendency of the application, provided either:

(a) That the application was subsequently approved; or

(b) If the application was denied or the alien departed while the application was still pending, that the application was timely filed and nonfrivolous and the alien did not work without authorization prior to or during the pendency of the application. [See 9 FAM 40.92 N5 below.]

(5) For aliens who have properly filed an application for adjustment of status to that of a lawful permanent resident, the entire period of the pendency of the application, even if the application is subsequently denied or abandoned, provided the alien did not file for adjustment "defensively," i.e., after deportation proceedings had already been initiated; and,

(6) For aliens covered by Temporary Protected Status (TPS), the period after TPS went into effect and prior to its expiration.

c. Consular officers should note that any unauthorized presence accrued prior to the filing of an application for adjustment of status, or the granting of voluntary departure, or the effective date of TPS is not "cured" by the subsequent period of authorized stay that these events trigger, and additional unauthorized presence will resume accruing after these authorized periods lapse.

d. For persons who have been admitted for duration of status (DOS) (as is usually the case with aliens in A, G, F, J and I visa status), unlawful presence will not accrue unless an immigration officer or immigration judge finds a status violation in the context of a request for an immigration benefit or a deportation proceeding. Therefore, a consular officer's belief that an alien violated his or her status in the United States is not, in itself, sufficient for an INA 212(a)(9)(B) finding, unless the alien entered without having been admitted or stayed beyond the Form I-94 specified date. Otherwise, only a finding of violation of status by the INS or an immigration judge can cause a period of "unlawful presence" to begin.

e. A finding of status violation by INS or an immigration judge is not required in the case of an illegal entrant or an alien who overstays the date specified on the Form I-94. If a consular officer finds that an alien entered without admission or stayed beyond the date on the Form I-94, and remained in the United States more than 180 days after entering without admission or after the expiration of his or her Form I-94, a determination of ineligibility under INA 212(a)(9)(B) would be warranted (unless some exception to INA 212(a)(9)(B) applies in the particular case).

f. *When calculating unlawful presence, the date that the Form I-94 (or any extension) expires is considered authorized and is not counted. In addition, the date of departure from the United States is not counted as unlawful presence. In cases where INS or an immigration judge makes a formal status violation finding, the date of the finding counts as unlawful presence.*

9 FAM 40.92 N2 Inadmissibility Under INA 212(a)(9)(B)

(TL:VISA-314; 08-31-2001)

a. INA 212(a)(9)(B) went into effect on April 1, 1997, and the statute is not retroactive. Periods in illegal status prior to April 1, 1997, therefore, cannot be considered when calculating the period of unlawful presence.

b. Neither of the INA 212(a)(9)(B)(i)(I) (180+ days but less than a year) or INA 212(a)(9)(B)(i)(II) (one year+) time frames is cumulative. The unlawful presence must occur in the same trip to the United States, and periods of unlawful presence accrued on separate trips cannot be added together. However, separate periods of unlawful presence occurring during the same overall period of stay (e.g., unlawful presence before and after a period of voluntary departure) should be added together to calculate total unlawful presence during a particular stay.

c. Both provisions are triggered by departure from the United States, and the bar against reentry applies from the date of departure.

9 FAM 40.92 N2.1 INA 212(a)(9)(B)(i) Departure Prior to Commencement of Proceedings Required

(TL:VISA-314; 08-31-2001)

The three-year bar of subsection INA 212(a)(9)(B)(i)(I) applies only to aliens who left the United States voluntarily before the INS commenced proceedings against them. If the alien was unlawfully present for more than 180 days and less than a year but deportation proceedings had begun before the alien's departure, he or she would not be ineligible under the three year bar of INA 212(a)(9)(B)(i)(II). Such an alien might well become ineligible under INA 212(a)(9)(A), however, if removed, or perhaps under INA 212(a)(6)(B) for failure to attend a hearing unless the alien had made an appropriate arrangement in that regard before departing.

9 FAM 40.92 N2.2 INA 212(a)(9)(B)(i)(ll) Departure At Any Time

(TL:VISA-314; 08-31-2001)

The 10-year bar of the INA 212(a)(9)(B)(i)(ll) does not contain the same language as the three-year bar relating to the alien having departed voluntarily prior to commencement of deportation proceedings. Thus, an alien who departs the United States after having been unlawfully present for a single period of one year or more subsequent to April 1, 1997, is barred from returning to the United States for 10 years, whether the departure was before, during, or after removal proceedings and whether the alien departed on his or her own initiative or under deportation orders.

9 FAM 40.92 N3 Asylee Exception to Inadmissibility Under INA 212(a)(9)(B) Requires Bona Fide Application

(TL:VISA-207; 09-19-2000)

INA 212(a)(9)(B)(iii)(II) provides that no period of time in which an alien has a bona fide application for asylum pending shall be taken into account when calculating the period of unlawful presence, unless during such period the alien was employed in the United States without authorization. The Immigration and Naturalization Service has determined that an application for asylum that has an arguable basis in law or fact, whether or not approvable, is a bona fide application for purposes of the exception set forth in INA 212(a)(9)(B)(iii).

9 FAM 40.92 N3.1 Confirming Bona fide Application for Asylum

(TL:VISA-314; 08-31-2001)

a. If a visa applicant who would otherwise be ineligible for a visa under INA 212(a)(9)(B) claims the benefit of the bona fide asylum exception, the consular officer should first determine whether the alien engaged in unauthorized employment while the asylum claim was pending, and if any part of such employment occurred on or after April 1, 1997. [See 9 FAM 40.92 N3.2 below.] If so, the alien would not be eligible for the bona fide asylum exception, and he or she should, therefore, be refused under INA 212(a)(9)(B). If not, it will then be necessary to determine whether the asylum claim was “bona fide.” To do so, the consular officer should cable a request to the INS Headquarters Office of Asylum (“HQINS for Asylum Office”), copy to CA/VO/F/P, to confirm the bona fides of such application. Posts should classify such cables “SBU-NOFORN”. The consular officer may not take the fact that the alien has received advance parole back into the United States to pursue the asylum application as proof that the INS has already made that determination.

b. The consular officer’s request for confirmation should provide the INS Asylum Office with a short, simple statement of the basic facts and should, at a minimum, include the following information:

(1) The alien's complete name, date of birth, and "A" number (INS file number);

(2) When and where the alien lived in the United States;

(3) When and where the alien filed the asylum application;

(4) Whether the alien worked in the United States;

(5) If the alien worked in the United States, whether INS had authorized such employment and, if so, what type of authorization documents the alien had been given;

(6) When the alien filed the asylum application, and

(7) Where the alien filed the asylum application.

c. The consular officer may presume the application to have been bona fide if the post receives no report from the "HQINS for Asylum Office" within 60 days from the date of the referral.

9 FAM 40.92 N3.2 Work Without Authorization After April 1, 1997, Bars Use of Asylee Exception

(TL:VISA-243; 03-13-2001)

a. Under INA 212(a)(9)(B)(iii)(II), an alien is entitled to the exception for bona fide asylum applicants only if the alien has not worked without authorization while such application is/was pending. Because INA 212(a)(9)(B) only went into effect on April 1, 1997, however, INS has determined that unauthorized employment prior to that date should not count against the alien. Therefore, only unauthorized employment occurring on or after April 1, 1997, will disqualify the alien from being eligible for the bona fide asylum exception in INA 212(A)(9)(B)(iii)(II).

b. Prior to seeking the INS confirmation that the asylum application was bona fide, the consular officer should interview the applicant with particular attention to questions relating to possible unauthorized employment by the alien. If the alien has engaged in unauthorized employment, during the pendency of the asylum application, and if any portion of the unauthorized employment occurred on or after April 1, 1997, then the alien would be ineligible for the exception and no purpose would be served in submitting the case to INS for a determination of whether the asylum claim was bona fide.

c. Consular officers should note, that aliens who apply for asylum must be able to obtain work authorization from INS even if they are not in a status that would normally allow employment. In such cases, the alien will receive an “employment authorization document” (EAD) from INS. Posts should, therefore, examine the facts carefully before concluding that a particular employment was not authorized. In some cases, the determination of whether the alien's employment was authorized will be determined on whether it can be verified that the alien in fact filed an asylum claim. Such cases must necessarily be submitted to INS.

9 FAM 40.92 N4 Other Exceptions

9 FAM 40.92 N4.1 Minors

(TL:VISA-207; 09-19-2000)

Time unlawfully in the United States while under the age of 18 does not count toward calculating the accrual of unlawful presence.

9 FAM 40.92 N4.2 Family Unity

(TL:VISA-207; 09-19-2000)

This provision stems from the Immigration Act of 1990 (IMMACT 90) and relates to the spouses and children of legalized aliens who have not themselves yet become lawful permanent residents. This exception applies only if they maintain protection under that provision, which means that they must regularly apply for re-registration under it.

9 FAM 40.92 N4.3 Battered Spouses and Children

(TL:VISA-314; 08-31-2001)

The battered spouses and children provision exception stems from the related provisions in INA 204(a)(1)(A)(iii)(I) and INA 212(a)(6)(A)(ii). In all instances, the most critical requirement is a direct relationship between the battering and the issue at hand. In INA 204, that is the right to self-petition. In INA 212(a)(6), it is having entered illegally. In INA 212(a)(9)(B), it is unlawful presence. In this context, the abuse must have started before and led to the alien's remaining in the United States past the time authorized. This requires, at a minimum, establishing the dates of arrival and termination of the authorized stay, as well as the timing of the abuse and its relationship to the continued stay beyond that date.

9 FAM 40.92 N5 “Tolling” for Good Cause

(TL:VISA-342; 01-08-2002)

a. Subparagraph (iv) of INA 212(a)(9)(B) provides for "tolling" for up to 120 days of a possible period of unlawful presence due to delay in governmental action on an application to change or extend NIV status. This subparagraph applies only to possible ineligibility under subsection INA 212(a)(9)(B)(i)(I).

b. INS has inferred that the "120 days" limitation was probably predicated on an assumption that they would be able to adjudicate the application within that time frame. Due to INS backlogs, however, some cases have been pending as long as six months or more, during which the applicants could incur the three or 10-year penalties through no fault of their own if only the first 120 days were tolled and the application was ultimately denied. Therefore, for all cases involving potential ineligibility under INA 212(a)(9)(B) whether under the three-year bar of 212(a)(9)(B)(i)(I) or the 10-year bar of INA 212a(9)(B)(i)(II), INS has decided to consider all time during which an application for extension of stay (EOS) or change of nonimmigrant status (COS) is pending to be time authorized by the Attorney General (AG) provided:

(1) The application was filed in a timely manner, i.e., before the expiration date of the Form I-94, *Nonimmigrant Visa Waiver Arrival Departure Document*;

(2) The application was "nonfrivolous"; and

(3) The alien has not engaged in unauthorized employment (whether before or after April 1, 1997.)

NOTE: Although INA 212(a)(9)(B) did not go into effect until April 1, 1997, and the law is not retroactive, unauthorized employment prior to April 1, 1997, will render an alien ineligible for the nonfrivolous COS and/or EOS exception because aliens who have engaged in unauthorized employment are generally not eligible for change or extension of nonimmigrant stay, and therefore, an application under such circumstances should generally be considered frivolous.

c. To be considered "nonfrivolous" the application must have an arguable basis in law and fact and must not have been filled for an improper purpose (e.g., as a groundless excuse for the applicant to remain in activities incompatible with his or her status). It is not necessary to determine that the INS would have approved the application for it to be considered nonfrivolous.

9 FAM 40.92 N6 Waivers

(TL:VISA-207; 09-19-2000)

a. Nonimmigrants who are ineligible for a visa under INA 212(a)(9)(B) may apply for an INA 212(d)(3)(A) waiver. [See 9 FAM 40.301.]

b. An immigrant visa applicant who is ineligible for a visa under INA 212(a)(9)(B) may not apply for a waiver unless he or she is the spouse or son or daughter of a U.S. citizen or lawful permanent resident (LPR). A waiver under INA 212(a)(9)(B)(v) will be granted in such a case only if the applicant can establish that denial of his or her admission would result in extreme hardship for the U.S. citizen or LPR.