



Immigration Visa Process: Unlawful Presence Waivers based upon the Immigration and Nationality Act (INA) §212(a)(9)(B)(v)

This course provides information on Unlawful Presence Waivers based upon INA. Questions that will be discussed about Unlawful Presence issues occurring in Immigrant Visa Processing when: 1. Can an IV form I-485 Adjustment applicant process permanent resident status 'in the U.S.' without bars or complications? 2. Can an IV form DS-260 consular processing applicant process 'outside the U.S.' without bars to admission?

Also, information about determining Unlawful Presence and Unlawful Presence Bar is included.





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He currently serves on AILA's National Field Office Liaison Committee. He has presented for APEX, among other CLE providers. He served on AILA's National Waiver Committee, helped edit AILA's Focus on Waivers, among other responsibilities. He moderates Immlog, a nationally known Yahoo! Group of attorneys, who limit their practice in immigration law. Avvo.com has also featured him as speaker on immigration.

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Course Description

Course Presentation

This course provides an intellectual foundation and introduces the Immigration Visa Process and examines Unlawful Presence Waivers based upon the Immigration and Nationality Act (INA) §212(a)(9)(B)(v).

This course explores information on Unlawful Presence Waivers based upon INA. Questions that will be discussed about Unlawful Presence issues occurring in Immigrant Visa Processing. The course discusses IV form I-485 Adjustment applicant process for permanent resident status in the U.S.

The course explores bars or complications to the application process.

Participants will review form DS-260 consular processing applicant process outside the U.S. and bars to admission.

The course will present information about determining Unlawful Presence and Unlawful Presence Bars.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



Course Learning Objectives and Outcomes

Participants will learn about the Immigration Visa Process: Unlawful Presence Waivers based upon the Immigration and Nationality Act (INA) §212(a)(9)(B)(v).

Participants will learn about IV form I-485 Adjustment applicant process and permanent resident status in the U.S. and bars or complications.

Participants will learn about IV form DS-260 consular processing applicant process outside the U.S. and bars to admission.

Participants will learn about Unlawful Presence: Determining How many visits to the U.S., How long was each visit, if over 180 days, timely filing for an extension.

Participants will learn about bars to aliens unlawfully present in the U.S.

Participants will learn about other bars and serious consequences lying triggering an indefinite fraud bar. See INA §212(a)(6)(C)(i).

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Timed Agenda:

Time	Description
0:00:00	Program Start
0:00:22	Introduction to Unlawful Presence Waivers based upon INA §212 (a) (9) (B) (v), Updated
0:12:52	8 U.S.C. 1182(a)(9)(B) INA §212(a)(9)(B)(i)
0:13:18	Aliens Unlawfully Present
0:18:27	Definition: “Unlawful Presence”
0:21:13	When Does Unlawful Presence Count?
0:25:14	When is an Alien “Out of Status” and Days Do Not Count
0:29:42	Remedies to Unlawful Presence: Exceptions
0:30:07	INA §212(a)(9)(B)(iii)
0:38:02	Unlawful Presence Waiver INA §212(a)(9)(B)(v)
0:41:48	Typical Client
0:48:24	Documentation
1:07:00	Practice Considerations
1:17:02	Case Law and Considerations
1:19:47	Program End

Unlawful Presence Waivers based upon INA §212(a)(9)(B)(v)

By Kevin L. Dixler

Unlawful Presence Issues

Occur in Immigrant Visa Processing When:

Can an IV form I-485 Adjustment applicant process permanent resident status 'in the U.S.' without bars or complications?

Can an IV form DS-260 consular processing applicant process 'outside the U.S.' without bars to admission?

Unlawful Presence: Determining

How many visits to the U.S.?

How long was each visit?

If over 180 days, did they 'timely' file for an extension?

If so, was/were the extension(s) granted?

If extensions filed, do they have copies of the approvals/denials? (Notices of Action)

If denied, how long did they stay 'before' departure?

If not, did they ever return to the U.S.?



Unlawful Presence Bar or Other Bar

If over 180 days, then depart, then return? INA
212(a)(9)(C) = No relief.

Fraud or misrepresentation (includes silence)

If admit criminal act or have conviction? OP

If used controlled substance within 3 years?

Alien smuggling other than immediate family?

Unlawful Bar and Other Bars, Cont.

If immediate family member involved in

a) drug cartel, etc.

b) Terrorist Organization (PLO)

disavowed?

Client with Approved I-130 and Waiver

Example: The Client who claims all is completed, but
got tired of his attorney/notario.

All they need is the DS-260 or is that it?

Consequences of Additional Bar

Permanent/Indefinite Disqualification

Revocation of PUP Waiver and Inadmissibility

Revocation of PUP, but new waivers to file

Unlawful Presence Bars: 3 and 10 year

8 U.S.C. §1182(a)(9)(B)

INA Section 212(a)(9)(B)(i)

ALIENS UNLAWFULLY PRESENT.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section **244(e)**) *prior to the commencement of proceedings* under section **235(b)(1)** or section **240**, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) 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 departure or removal from the United States is inadmissible.

Unlawful Presence: Consequences

- 3 year bar =180 days<1 year INA 212(a)(9)(B)(i)(I)
- 10 year bar= ≥1 year INA 212(a)(9)(B)(i)(II)
- 10 year bar =with no waiver. Possible indefinite bar to admission. Leave, then return. See INA §212(a)(9)(C) form I-212 requirement.

Nutshell: Other Bars are serious consequences. Lying triggers an indefinite fraud bar. See INA §212(a)(6)(C)(i) [Note: revocation].

Definition: “Unlawful Presence”

INA 212(a)(9)(B)(ii)

Construction of unlawful presence - Deemed unlawfully present if:

1. The alien is present after the expiration of the *period of authorized stay, (overstay, not out of status)*, or
2. *Present in the United States without being admitted or paroled.* (EWI)

When Does Unlawful Presence Accrue?

Term of art: Count = “Accrue”

When I-94 entry card expires.

When the F, J, or M Student falls out of status.

U.S.C.I.S. says so in writing, even with conditional resident status. (denial or notice). 8/9/2018.

3. The moment an alien unlawfully enters fraudulently or without inspection.

When “Out of Status” and Days Do Not Count

Canadian without an I-94 card has duration of status until deemed an overstay.

F-1 Student who successfully rebuts derogatory information.

A visa holder whose I-94 has not expired, but has fallen out of status through loss of a job.



When Does the Unlawful Presence Bar Apply

Term of Art: What “triggers” the bar

Answer: Any departure from the U.S., even before a later admission.

(e.g. H-1b or L-1 with improper extension)

Filed extension late or I-94 expired; changed job; left before change of status decision, worked unlawful, school ended and grace period over with no OPT.

Remedies to Unlawful Presence: Exceptions

Exceptions

INA §212(a)(9)(B)(iii)

(I) Minors under 18 years old.

(II) Asylees -No period of time after application is filed within unless the alien during such period was employed without authorization in the United States. (Unlawful presence before filing counts!)

(III) 1990 Family unity Protection Beneficiary - Child or spouse of approved legalization or SAW applicant, who filed for such relief. [look for I-797 approval]

(IV) Battered women and children - "violation of the terms of the alien's nonimmigrant visa" or "unlawful entry into the United States" See INA §212(a)(6)(A)(ii)

(V) _VICTIMS OF A SEVERE FORM OF HUMAN



TRAFFICKING- proven as defined in 22 U.S.C. 7102 and one central reason for the alien's unlawful presence in the United States.

Unlawful Presence: Tolling

(iv) Tolling for good cause –When an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) filed a *non-frivolous* application for a change or extension of status before the date of [I-94] expiration of the period of stay authorized by the Attorney General, *and*

(III) has not been employed without authorization in U. S. before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

Unlawful Presence Waiver

INA §212(a)(9)(B)(v)

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully

resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Unlawful Presence: Typical Client

Left the U.S. after unlawful presence, but returned to U.S. on visa, marries USC, and now wants adjustment.

The above, but filed I-485 Adjustment and was told by USCIS to file form I-601.

I-130 petition filed by spouse, which was approved, but left the U.S. to process visa at consulate. During IV processing told to file form I-601.

An undocumented alien (EWI), who marries a U.S. Citizen/LPR, has family member and wants to get lawful permanent residence (green card). I-601a PUP

Documentation

Form I-601 with \$930 filing fee

Form I-601a with \$630 filing fee+\$85 biometric fee

Memorandum of Law

Sworn Statements on hardship from qualifying family members. (Time well)

Family Impact study by forensic social worker, psychologist or psychiatrist.

Other forensic reports

Credentials of forensic witnesses

Treating Physician letter.

Evidence of hardship emotional financial, & medical.

Practice Considerations

Putting together a Memorandum of Law should be like any brief. Some will present an opinion letter.

Minimum of 12 to 15 hours, but 20 is best to budget.

Know your client!

Attorneys like to think x hours. . . . Attorneys actually spend . . . There is a lot of competition and rivalry among practitioners until they actually do the work.

Discretion is a funny thing, but if you spend enough time, you get fewer denials and happier clients. There is no long run. (you may do 3-4 waivers a year, none, or maybe 100 or more)

23 years after the law was enacted . . . it is still in effect without changes. A Child's hardship, nor applicants, does not 'directly' count!

Practice Advice: Get used to it. Grovel with Grace. If it doesn't work, try, try, again.

Finally get paid for your work, but don't sugarcoat the outcome. Counsel, don't be a used car salesman.

Get your money up front before filing! There can be requests for additional evidence, even appeals.

Practice Considerations II

Some consulates are more user friendly than others. Some have less knowledge of the law. Consider advisory opinions if there are I-601a revocations for other bars. (i.e. smuggling, medical, substances, public charge, unlawful re-entry)

A Stateside State Department can only advise consular officials, not command them to take action.



The Administrative Appeals Office can review form I-601 decisions by USCIS, where there are mistakes of law or discretion. Must appeal within 30 days. Form I-290B, correct location.

Aliens unlawfully present after previous immigration violations - Mandatory 10 year wait.

INA §212(a)(9)(C) (i)

Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section **235(b)(1)**, section **240**, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.-Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

212(a)(9)(C) Waiver - VAWA Only.

(iii) WAIVER- The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--



(I) the alien's battering or subjection to extreme cruelty;
and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

Case Law and Considerations

Matter of Anderson – 16 I&N Dec. 596 (BIA 1978)

Matter of Tijam – 21 I&N Dec. 408 (BIA 1998)

Matter of Recinas – 23 I&N Dec. 467 (BIA 2002)

Matter of Cervantes-Gonzalez – 22 I&N Dec. 560 (BIA 1999)

Salameda v. INS, 70 F.3d 447 (7th Cir. 1995)

Notions of Family Unity in Immigration – case law

Useful Links

www.aila.org

www.uscis.gov

www.state.gov

U.S. Dept. of Justice – BIA Virtual Law Library
<http://www.justice.gov/eoir/vll/libindex.html>

www.nationalimmigrationproject.org

Books on Waivers

The Waiver's Book, 2nd Edition, American Immigration Lawyers Assn. (2017)

Provisional Waivers, Practitioners Guide, 2nd Edition, American Immigration Lawyers Assn. (2017)

Kurzban's Immigration Law Sourcebook, 16th Edition, 2018. American Immigration Council (2018)



Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org

