



## ***Velasco v. USCIS* PRACTICE ADVISORY\***

**August 11, 2022**

### **New USCIS Policy Regarding Unlawful Presence Bar Under INA § 212(a)(9)(B)**

Section 212(a)(9)(B) of the Immigration and Nationality Act (INA) imposes a 3- or 10-year period of inadmissibility—commonly known as the “unlawful presence bar”—for noncitizens who depart the United States after having been unlawfully present for specified periods of time.

On June 24, 2022, USCIS announced new policy guidance<sup>1</sup> regarding the unlawful presence bar under INA § 212(a)(9)(B), establishing that “it is immaterial whether the noncitizen has spent the applicable statutory 3-year or 10-year period in or out of the United States.”<sup>2</sup> In other words, a noncitizen who seeks admission more than 3 or 10 years after triggering the bar will not be deemed inadmissible under INA § 212(a)(9)(B) even if they have returned to the United States before the relevant period of inadmissibility elapsed. As further explained below, this policy does *not* address the separate issue of the “permanent bar” under INA § 212(a)(9)(C).

The policy change follows a class action lawsuit that the Northwest Immigrant Rights Project filed in *Velasco v. USCIS*, No. 22-cv-368 (W.D. Wash. filed Mar. 25, 2022). The class action challenged USCIS’s prior policy, which required individuals to either wait outside the United States or maintain continuous lawful presence to satisfy the 3- or 10-year period before seeking admission.

This practice advisory provides a brief overview of the unlawful presence bar under INA § 212(a)(9)(B) and USCIS’s new policy, including the relief provided to individuals whose applications were denied under the agency’s prior interpretation of the statute.

#### **I. Unlawful Presence Under INA § 212(a)(9)(B)**

A noncitizen triggers the 3-year unlawful presence bar when they have been (1) unlawfully present in the United States for more than 180 days but less than one year, and (2) voluntarily departs the United States before the commencement of removal proceedings. INA § 212(a)(9)(B)(i)(I). A noncitizen triggers the 10-year bar when they have been (1) unlawfully present in the United States for one year or more, and (2) departs or is removed from the United States. INA § 212(a)(9)(B)(i)(II).

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<sup>1</sup> USCIS, Policy Alert, PA-2022-15, *INA 212(a)(8)(B) Policy Manual Guidance* (June 24, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220624-INA212a9B.pdf>.

<sup>2</sup> USCIS Policy Manual, vol. 8, ch. 6, *Effect of Seeking Admission Following Accrual of Unlawful Presence* (last updated Aug. 2, 2022), <https://www.uscis.gov/policy-manual/volume-8-part-o-chapter-6>.

Unlawful presence in the United States generally accrues in one of two ways. First, a noncitizen can enter the United States without permission and remain in the country without lawful status. INA § 212(a)(9)(B)(ii). Second, a noncitizen who is inspected and admitted at the border may accrue unlawful presence by remaining in the country beyond a period of authorized stay. *Id.*

Congress created the 3- and 10-year unlawful presence bars as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). USCIS has consistently interpreted the statute so that only periods of unlawful presence after April 1, 1997, the date IIRIRA became effective, apply towards the bars.<sup>3</sup> Accordingly, an individual who was unlawfully present in the United States but departed the United States before April 1, 1997, does not have any periods of unlawful presence that count towards the bar. Similarly, an individual who was unlawfully present but departed the United States before September 28, 1997—i.e., within 180 days after April 1, 1997—will not have triggered the unlawful presence bar under INA § 212(a)(9)(B). The INA enumerates certain other periods of time that do not count towards a noncitizen’s period of unlawful presence, such as being present without authorization while being under 18 years of age or while a bona fide asylum application is pending.<sup>4</sup> In addition, USCIS has designated other periods of time that do not count toward a noncitizen’s period of unlawful presence, such as where noncitizens have properly filed applications for adjustment of status or for extension/change of status.<sup>5</sup>

Notably, and as relevant here, the statutory text does not require that the 3 or 10 years must be spent outside of the United States after the departure which triggers the unlawful presence bar. Nor does it require that an individual who returns to the United States maintain any lawful status that they might have.

## II. USCIS’s New Policy Guidance

### A. Litigation and the New Policy

On June 24, 2022, USCIS issued a new policy for adjudicators facing questions of inadmissibility under INA § 212(a)(9)(B).<sup>6</sup> Prior to the new policy, USCIS generally required an applicant subject to the inadmissibility ground at INA § 212(a)(9)(B) to spend the 3- or 10-year bar *outside* the United States or *in lawful status* inside the United States.<sup>7</sup> The clock for the

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<sup>3</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C § 301(b)(3), 1101 Stat. 3009-1, 3009-578; *see also* Memorandum from Donald Neufeld, Acting Associate Dir., Domestic Operations Directorate et al. to Field Leadership, 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 13 (May 6, 2009), [https://www.uscis.gov/sites/default/files/document/memos/revision\\_redesign\\_AFM.PDF](https://www.uscis.gov/sites/default/files/document/memos/revision_redesign_AFM.PDF).

<sup>4</sup> *See generally* INA § 212(a)(9)(B)(iii).

<sup>5</sup> *See* Mem. From Donald Neufeld, Consolidation of Guidance Concerning Unlawful Presence, *supra* note 3, at 33–35.

<sup>6</sup> *See* USCIS, PA-2022-15, INA 212(a)(9)(B) Policy Manual Guidance (June 24, 2022), *supra* note 2.

<sup>7</sup> USCIS did not uniformly apply the old policy and practice, as some individuals were not found inadmissible when they applied for adjustment of status. However, in at least one case the agency subsequently denied the naturalization application, finding that the applicant had been inadmissible at the time of adjustment of status. *See Reis v. USCIS*, No. 5:21-cv-03077 (N.D. Cal. filed Apr. 27, 2021). And while a few noncitizens’

unlawful presence bar would not run, however, for individuals *in unlawful status* in the United States. As a result, under that prior approach, USCIS deemed inadmissible individuals who were subject to the 3- or 10-year bar and had re-entered the United States (1) without authorization, or (2) with authorization but then remained after their status expired and prior to expiration of the 3- or 10-year bar.

On March 25, 2022, NWIRP filed a nationwide class action to challenge USCIS’s policy in *Velasco v. USCIS*, No. 22-cv-00368 (W.D. Wash.). A few weeks later, on April 14, 2022, NWIRP filed a motion for class certification and a motion for a preliminary injunction. The filings explained that USCIS’s interpretation violated the law because the statute’s plain text specified that the 3- or 10-year bar begins to run from the moment of departure and is not tolled for any reason.<sup>8</sup> Moreover, neighboring subsections of the statute set temporary periods of inadmissibility and *do* require that a person seek admission *prior* to reentering the United States. By contrast, the bar at INA § 212(a)(9)(B) does not do so, meaning that Congress did not seek to impose such a requirement on people subject to the 3- or 10-year bar.<sup>9</sup>

The policy change announced on June 24, 2022, adopted this reading of the statute. Under the memo, “a noncitizen who again seeks admission more than 3 or 10 years after the relevant departure or removal, is not inadmissible under INA 212(a)(9)(B) even if the noncitizen returned to the United States, with or without authorization, during the statutory 3-year or 10-year period.”<sup>10</sup> The policy explains that “the statutory 3-year or 10-year period begins to run once the noncitizen departs or is removed (whichever applies) and continues *without interruption* from that date until 3 or 10 years after such departure or removal.”<sup>11</sup> Accordingly, pursuant to the new policy, entering without inspection or remaining in the United States past a period of authorized stay will no longer stop the 3- or 10-year bar from running. USCIS has also updated its policy manual to reflect the new guidance.<sup>12</sup> However, it is important to note that other grounds of inadmissibility may apply to people who reenter the United States unlawfully, including the so-called “permanent bar” at INA § 212(a)(9)(C), which is discussed in further detail below.

For applications that were pending at the time of USCIS’s policy announcement, no further action is required. In the *Velasco* litigation, USCIS explained that it had previously placed a nationwide hold on applications that implicated the 3- or 10-year bar.<sup>13</sup> USCIS will now affirmatively apply its new policy to adjudicate those pending applications. Any applicant who

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applications were granted without a finding of inadmissibility, most applicants were either required to file a waiver for the ground of inadmissibility or denied if the applicant was unable to demonstrate eligibility for the waiver.

<sup>8</sup> See INA § 212(a)(9)(B)(i)(I)–(II) (rendering a noncitizen inadmissible for a period “within [3 or 10] years of the date of [the noncitizen’s] departure or removal” from the United States).

<sup>9</sup> NWIRP’s case followed other district court decisions holding that the agency’s interpretation was unlawful, see *Neto v. Thompson*, 506 F. Supp. 3d 239 (D.N.J. 2020); *Kanai v. Dep’t of Homeland Sec.*, No. 20-05345, 2020 WL 6162805 (C.D. Cal. Aug. 20, 2020), as well as multiple cases filed by NWIRP challenging the policy where USCIS subsequently granted the application at issue, see *Reis v. USCIS*, No. 5:21-cv-03077 (N.D. Cal. filed Apr. 27, 2021); *Ordaz v. USCIS*, No. 3:21-cv-04079 (N.D. Cal. filed Mar. 28, 2021).

<sup>10</sup> PA-2022-15, at 1 (internal footnote omitted).

<sup>11</sup> *Id.* at 2 (emphasis added).

<sup>12</sup> See USCIS Policy Manual, vol. 8, pt. O, chap. 6 (last updated June 24, 2022), *supra* note 2.

<sup>13</sup> Joint Status Report at 3, *Velasco v. USCIS*, No. 22-cv-00368, Dkt. 33 (W.D. Wash. June 27, 2022).

received a request for evidence or other notice stating that they may need to apply for a waiver of inadmissibility to address the unlawful presence bar at INA § 212(a)(9)(B) should simply refer to the new policy, noting that a waiver is not required.

## **B. Motions to Reopen for Certain Applications Denied Under USCIS's Old Policy**

USCIS has agreed to reopen and re-adjudicate the 79 cases of plaintiffs and putative class members identified by plaintiffs' counsel in *Velasco v. USCIS*.<sup>14</sup> If you or your attorney contacted NWIRP before August 8, 2022, providing case information for an application that was denied based solely on this policy, you will receive an email from us confirming that your case is being reopened and re-adjudicated. The list of 79 cases were also filed as an exhibit to the parties' stipulation to dismissal.<sup>15</sup>

For all other individuals whose applications were rejected under USCIS's prior interpretation of the statute, the new policy provides a separate opportunity for relief. USCIS has announced that individuals whose applications were rejected on or after April 4, 2016, may file a motion to reopen their application on Form I-290B, Notice of Appeal or Motion, by **December 27, 2022**. Typically, such motions are due within thirty days of USCIS's decision on an application.<sup>16</sup> However, USCIS is waiving this requirement for all applications that were rejected under the previous policy during the six years prior to when NWIRP filed the *Velasco* litigation.<sup>17</sup> This opportunity applies only to those individuals whose applications were denied based *solely* upon a finding of inadmissibility under INA § 212(a)(9)(B). As a result, if an individual's decision contains additional reasons for denial, the individual will not be eligible for reopening. Practitioners should be sure to check USCIS's website and follow its filing instructions, as they contain specific language that practitioners should include in their motions to ensure proper identification and consideration.<sup>18</sup>

The inadmissibility problems present under INA § 212(a)(9)(B) generally arise in the context of applications for adjustment of status. However, it is possible that a separate application, like an N-400, may have been denied based upon USCIS's prior interpretation of that statute. Any corresponding motion is due by December 27, 2022. Otherwise, new applications will likely need to be filed.

## **C. Limits of the New Policy: The Removal Bar and the Permanent Bar**

Practitioners should also be mindful that USCIS's new policy covers only the ground of inadmissibility at INA § 212(a)(9)(B). Significantly, many individuals subject to § 212(a)(9)(B) may also be inadmissible because of the bars at § 212(a)(9)(A) and (C). Practitioners should

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<sup>14</sup> Stipulation to Dismissal at 2, *Velasco v. USCIS*, No. 22-cv-00368, Dkt. 37 (W.D. Wash. Aug. 10, 2022).

<sup>15</sup> *Id.*, Ex. A, Dkt. 37-1.

<sup>16</sup> 8 C.F.R. § 103.5(a)(1)(i).

<sup>17</sup> The general six-year statute of limitations for civil actions against the United States, 28 U.S.C. § 2401(a), applies to legal challenges brought under the Administrative Procedure Act, which provided the cause of action in the *Velasco* litigation.

<sup>18</sup> See USCIS, *Unlawful Presence and Inadmissibility*, <https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility> (June 24, 2022) (outlining requirements for "Untimely Motions to Reopen for Certain USCIS Denials").

therefore take care to ensure that these additional grounds also do not apply before filing a motion to reopen under the new policy.

The bar under INA § 212(a)(9)(A) renders inadmissible persons who were ordered removed and who sought to be readmitted within the specified time period (generally 5 years for an initial expedited removal order, 10 years for an initial removal order in INA § 240 proceedings, and 20 years from any second or subsequent removal order).

Even more common, and yet more onerous, is the “permanent bar” at INA § 212(a)(9)(C). This bar permanently renders inadmissible any noncitizen who reenters or attempts to reenter the United States without being admitted after either (1) having been unlawfully present in the United States for a year or more (in the aggregate after April 1, 1997)<sup>19</sup>, or (2) having been ordered removed. The permanent bar commonly applies to individuals subject to the bar under INA § 212(a)(9)(B). A typical scenario could involve someone who originally entered on a tourist visa or without inspection, accrued a year or more of unlawful presence, departed, and then later reentered or attempted to reenter the United States without being admitted. Another common scenario involves any person who was “ordered removed,” was removed or departed, and then later reentered or attempted to reenter without admission. Notably, the statute specifies that a person may apply for a waiver of the permanent bar, but only if ten years have elapsed after the “last departure” and the person obtains “consent[] to . . . reapply[] for admission” before their “reembarkation at a place outside of the United States or attempt to be readmitted from a foreign contiguous territory.” INA § 212(a)(9)(C)(iii).

Notwithstanding the potential overlap with the permanent bar, many individuals will be subject to only the 3- or 10-year bar at INA § 212(a)(9)(B). For example, individuals may have accrued six months or even a year or more of unlawful presence after entering on a tourist visa or border crossing card. Those same individuals may later depart—triggering the 3- or 10-year bar—and subsequently reenter on the same visa or card. The second entry would not trigger the permanent bar because they were inspected and admitted.<sup>20</sup> Similarly, other individuals might reenter after being waved through at an inspection point. In such situations, the individual would be subject to the unlawful presence bar at INA § 212(a)(9)(B), but not the permanent bar at § 212(a)(9)(C).

Moreover, individuals who reentered *without* inspection and admission may benefit from the new policy if they accrued less than a year of unlawful presence (but more than six months) prior to the reentry. Such individuals would be subject to only the 3-year unlawful presence bar at § 212(a)(9)(B)(i)(I), but not the permanent bar at § 212(a)(9)(C). Similarly, any individual who

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<sup>19</sup> Mem. From Donald Neufeld, Consolidation of Guidance Concerning Unlawful Presence, *supra* note 3, at 14. Note, however, that USCIS may seek to apply the permanent bar under INA § 212(a)(9)(C) retroactively to those who unlawfully reentered the United States *before* April 1, 1997, even though the agency’s policy states otherwise, as a recent Ninth Circuit case demonstrates. *See Rivera Vega v. Garland*, 39 F.4th 1146, 1150, 1153 (9th Cir. 2022). In *Rivera Vega*, the Ninth Circuit affirmed USCIS’s denial of an adjustment application, holding that the permanent bar under “[INA § 212(a)(9)(C)(i)(II)] applies retroactively to unlawful reentries made *before* April 1, 1997, provided the [noncitizen] failed to apply for adjustment of status before that date.” *Id.* at 1156 (emphasis added) (footnote omitted). USCIS should not apply this holding to applications outside of the Ninth Circuit.

<sup>20</sup> If the applicant made a willful misrepresentation at the time of their admission, they may be subject to a separate ground of inadmissibility requiring a waiver. *See* INA § 212(a)(6)(C)(i), 212(i)(1).

was unlawfully present prior to the enactment of IIRIRA, began to accrue unlawful presence on its effective date, and then departed the United States between September 29, 1997 and March 31, 1998, would only be subject to the 3-year bar at § 212(a)(9)(B)(i)(I), but not the permanent bar at § 212(a)(9)(C). However, practitioners should be aware that any individual who reentered without inspection must still demonstrate that they meet the statutory requirements for adjustment of status under § 245.