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US IMMIGRATION & NATIONALITY LAW

CAN ONE SPEND THE 3- AND 10-YEAR BARS IN THE U.S.?

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by
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Since their enactment in 1996, most foreign nationals have become familiar with the dreaded 3- and 10-year bars. Under §212(a)(9)(B)(i) of the Immigration and Nationality Act (INA), an alien who is unlawfully present in the US for a period of 180 days but less than 1 year, and leaves the US prior to the commencement of proceedings is unable to return to the US for 3 years.[1] If an alien is unlawfully present in the US for more than 1 year or more, and leaves the US, he or she cannot seek admission within 10 years of the date of departure or removal from the US.[2]

Unlawful presence is defined as being "present in the United States after the expiration of the period of stay authorized by the Attorney General or...present in the United States without being admitted or paroled."[3]

Both the provisions creating the 3- and 10-year bars do not explicitly state that the 3 or 10 years have to be spent outside the US. Hence, can an alien who has triggered the 3- or 10- year bars spend them within the US? Take the example of an alien who is unlawfully present in the US (for greater than 180 days but less than a year) who has filed an application to adjust status to permanent residence by virtue of marrying a US citizen. She also applies for travel permission which is an incidental benefit given to an adjustment applicant, known as advance parole, and departs the US pursuant to this permission. She will trigger the 3 year bar upon departure. She returns to the US on the advance parole, and the adjustment application is not adjudicated for 3 years. Would it be possible for her to argue that the 3-year bar has been fulfilled in

the US and that she is no longer inadmissible?

In a *letter* dated July 14, 2006 from Robert Divine, former Chief Counsel of the USCIS, to attorneys David P. Berry and Ronald Y. Wada, Mr. Divine confirms that the 3-year inadmissibility period continues to run even if the alien subsequently returned to the US on parole under INA §212(d)(5). Mr. Divine states that his agency has also consulted with the Department of State, Visa Office, on this issue and the Visa Office concurs with this interpretation.

Mr. Divine's opinion does have certain caveats, though. He states that "ny alien who is subject to the §212(a)(9) bar who subsequently enters the US unlawfully, or who enters lawfully (such as a parolee or temporary nonimmigrant under Section 212(d)(3)), and remains beyond such authorization, may trigger a new or extend an existing 212(a)(9) inadmissibility bar upon departure."

In other words, an alien who is unlawfully present and leaves the US by triggering either a 3- or 10-year bar, is unable to again enter the US unlawfully and expect that the time will run in the US. This is because under INA §212(a)(9)(C)(i), an alien who is unlawfully present in the US for an aggregate period of 1 year and re-enters without being admitted, is permanently inadmissible. Thus, this individual will be subject to a permanent bar.[4]

While Mr. Divine does not state so in his letter, it could be argued that an alien who does not trigger permanent inadmissibility under §212(a)(9)(C), could still conceivably spend the 3-year bar in the US. INA §212(a)(9)(C) only applies to an alien who had been unlawfully present for more than 1 year, departs the US and who enters or attempts to reenter the US without being admitted. Thus, the permanent bar, §212(a)(9)(C), only applies to someone who has triggered the 10-year bar and not the 3-year bar. Regarding an alien unlawfully present for more than 180 days but less than 1 year, and who reenters unlawfully, it could be argued that he could still spend the 3-year bar in the US because he or she is not subject to §212(a)(9)(C). Thus, if this alien were to apply for any adjustment of status under §245(i)[5] after the re-entry, after spending 3 years in the US, he would argue that he is no longer inadmissible.

Mr. Divine also explains that one who arrives in the US lawfully after triggering the bar could trigger a new bar upon departure if he or she remains beyond the period of authorization. This analysis is correct. Take the example of an alien who has triggered the 3-year bar by departing the US and enters the US

on a new H-1B visa as well as a nonimmigrant waiver under §212(d)(3). This individual spends 6 years in H-1B status, and based on Mr. Divine's letter, he or she has fulfilled the 3-year bar. Suppose this individual subsequently overstays the H-1B status for more than 180 days and departs the US; he or she will now trigger a new 3-year bar.

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[1] *See* §212(a)(9)(B)(i)(I). Under this provision, if an alien is unlawfully present for more than 180 days but less than a year, and leaves after the commencement of proceedings, he or she can escape the 3-year bar.

[2] §212(a)(9)(B)(i)(II). The removal proceedings "escape" clause is not available to an alien who has triggered the 10-year bar.

[3] *See* INA §212(a)(9)(B)(ii). For a detailed understanding of how unlawful presence has been interpreted by legacy INS, *See* Memo, Pearson, Exec. Assoc. Comm. Field Operations (HQDN 70/21.1.24-P, AD 00-07) (MAR. 3, 2000) published on AILA InfoNet at Doc. No. 00030774. For instance, based on the Pearson Memo, an alien who was admitted in F or J status in "D/S" is not considered to be in an unauthorized stay until the government or an Immigration Judge has made a determination that he or she is out of status.

[4] An alien can apply for a waiver of the permanent bar but may only do so "more than 10 years after the date of the alien's last departure from the United States" and must do so before coming back to the USA, INA §212(a)(9)(C)(ii).

[5] Under INA §245(i), an alien who was the subject of a labor certification or immigrant visa petition filed prior to April 30, 2001 can still adjust status in the US even if he or she entered without inspection or is not in status. If the labor certification on petition was filed after January 14, 1998, the alien must have been physically present in the US on December 21, 2000. The requirement of being physically present on December 21, 2000, does not apply to an alien who was the beneficiary of a labor certification or immigrant visa petition filed on or before January 14, 1998.