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USCIS ON THE PARADOXES OF UNLAWFUL PRESENCE

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by
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The concept of unlawful presence, and the penalties accompanying those who step into "unlawful presence" territory, was introduced in the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

The United States Citizenship and Immigration Services (USCIS) issued on May 6, 2009, a voluminous Memo consolidating all of its prior scattered guidance since IIRIRA's enactment on the complex issue of unlawful presence. Written by senior USCIS officials Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, this omnibus memo endeavors to provide a comprehensive overview of what constitutes unlawful presence, its exemptions, the esoteric distinctions between one who is not in lawful status but who is not yet accruing unlawful presence and the devilish dance between the 3 year, 10 year and permanent bars of inadmissibility.

In summary, IIRIRA introduced three grounds of inadmissibility. Section 212(a)(9)(B)(i)(I) imposes a three year bar to a non-citizen who is unlawfully present for a period of 180 days and less than 1 year after departing the United States, although interestingly if such a person leaves under voluntary departure from an Immigration Judge, the 3 year bar pleasantly vanishes. Its companion, section 212(a)(9)(B)(i)(II) imposes a more draconian 10 year bar to a non-citizen who is unlawfully present for a period of more than one year and departs the U.S. Finally, the most dreaded of all is section 212(a)(9)(C)(i), which imposes a permanent bar to one who has been unlawfully present for an aggregate

period of more than 1 year, or who has been ordered removed, and who attempts to reenter the United States without being admitted.

The memo confirms that one generally starts accruing unlawful presence after overstaying a date on the Form I-94 document, the document issued to an individual at the port of entry based on the underlying nonimmigrant visa. The non-citizen, according to Section 212(a)(9)(B)(ii), is deemed to be unlawfully present after the expiration of a period of stay authorized by the Attorney General or who is present in the US without being admitted or paroled. Thus, one who is in violation of status, such as an H-1B worker who has been terminated from the job but has not left, and is within the date she is required to remain in the US on the I-94, has still not begun to accrue unlawful presence for purposes of triggering the bars, but is still out of status and imminently deportable. If she remains in the US more than 180 days after the expiration of the I-94 and departs, she will trigger the 3 year bar. If she remains in the US for over 1 year and leaves the US, she will trigger the 10 year bar.

Similarly, a student in F-1 status who has dropped out of school will never accrue unlawful presence as his I-94 will indicated a term known as "Duration of Status" or "D/S." But this fellow will accrue unlawful presence, if say the USCIS has made an adverse determination on his status. This might happen if he attempts to change to another status in an untimely manner - i.e., after he fell out of student status he took his chance to change to H-1B status and hoped to be excused but the USCIS did not oblige him. If this school dropout remains in the US after the date of the denial making an adverse finding of his F-1 status, he will start accruing unlawful presence. Likewise, a Canadian citizen who enters the US as a visitor will likely not accrue unlawful presence even past 6 months unless the government makes an adverse finding on his status.

The Memo does make a few startling departures, though, from what the legal community earlier understood. For example, a minor does not start to accrue unlawful presence until after her 18th birthday. If she leaves the US prior to her 18th birthday, she will not trigger the 3 year bar. This kid, who say sneaks across the border from Mexico as a 14 year old, and leaves the US at the age of 16, will not trigger the 10 year bar as she was a minor all this while. However, if she enters the US again illegally, at the age of 17, and remains in this country, and then at 21, marries a US citizen, she will not be able to adjust status in the US even though she might be subject to a special provision, section 245(i), which allows certain people who entered without inspection to apply for a

green card in the US. Briefly, section 245(i) was enacted under the LIFE Act of 2000, which allowed persons who were in violation of their status if they were beneficiaries (directly or derivatively) of either a labor certification or an immigrant visa petition filed on or before April 30, 2001. Such persons were grandfathered under 245(i), even though the provision sunset on April 30, 2001, and they are protected under 245(i) even if their parent was sponsored for a green card while they were minors. She will be subject to the worst bar of all, section 212(a)(9)(C), the permanent bar to inadmissibility. The Memo argues that even though she was exempt as a minor from accruing unlawful presence, she only avoided the 3 and 10 year bars, but not the permanent bar. She will not be able to adjust in the US unless she lives outside the US for 10 years, and then applies for special permission to be admitted back into the US.

Another major departure is the ability of certain people protected under 245(i) to be able to trump the permanent 212(a)(9)(C) bar in certain regions of the US. Both the Ninth and Tenth Circuits in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2008) and *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2005) respectively held that an adjustment application filed under 245(i) trumps the permanent bar under 212(a)(9)(C). Thus, our kid in the above hypothetical would be able to adjust status in the US under section 245(i) if she lived in either Colorado (10th Circuit) or California (9th Circuit). The Memo now advises USCIS to disregard these decisions, and instead follow lower administrative precedents, *see Matter of Brionis*, 24 I&N Dec. 355 (BIA 2007), that have held the opposite, that the permanent bar under 212(a)(9)(C) trumps the ability to adjust status under section 245(i). The USCIS derives such chutzpah from a Supreme Court decision, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which allows agencies to offer an interpretation of a statute that may be different from a published circuit court precedent, but this may be done only where the underlying statute is ambiguous.

This overview does not attempt to cover all the vignettes of unlawful presence, as discussed in this weighty USCIS memo, and readers are urged to carefully read the various labyrinthine formulations on unlawful presence in its entirety. One may stumble across other subtle paradoxes where the USCIS treats one who may be in a period of stay authorized by the Attorney General, and thus not accruing unlawful presence, as not maintaining lawful status and subject to being arrested and thrown into removal proceedings. The example in the Memo is one who while on a B-2 tourist visa, and who lawfully entered the

country in that status, marries a US citizen, and files an application to adjust status. The filing of an adjustment of status application allows her to remain in the US, apply for temporary work and travel permission, even though the underlying B-2 visa has expired (and cannot even theoretically be extended once an adjustment application is filed). Intuitively, one would think that such a person, while waiting for her adjustment of status interview, which would result in the grant of permanent residency, would not in any way be vulnerable to an enforcement action. Wrong, according to the Memo. Such a person could still be placed in removal proceedings. Even though she is in a period of stay authorized by the Attorney General, she is no longer in lawful status!

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