



96act.026  
HQIRT 50/5.12

<b>Subject</b> Implementation of section 212(a)(6)(A) and 212(a)(9) grounds of inadmissibility	<b>Date</b>  MAR 31 1997
--	--------------------------------

<b>To</b> Management Team Regional Directors District Directors (Including Foreign) Chief Patrol Agents Officers in Charge (Including Foreign) Chief, ODET, Glynco, GA Chief Patrol Agent, BPA, Glynco, GA Asylum Office Directors Service Center Directors Regional Counsel District Counsel	<b>From</b> Office of Programs (HQPGM)
---	---

This memorandum provides interim guidelines to the field for implementing the new grounds of inadmissibility found in sections 212(a)(6)(A) and 212(a)(9) of the Immigration and Nationality Act ("the Act"), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The effective date for each of these sections is April 1, 1997. Sections 212(a)(6)(A) and 212(a)(9) do not apply to applications for admission or adjustment of status adjudicated by an immigration judge in deportation or exclusion proceedings commenced prior to April 1, 1997. Except as otherwise required by law, these grounds of inadmissibility apply at the time of any other administrative determination regarding admissibility, including but not limited to the issuance of a visa, inspection of an alien at a port of entry, disposition of an application for admission by an inspector or an immigration judge or adjudication of an application for adjustment of status. Further guidance will be released and proposed regulations published in the Federal Register at a later date.

This memorandum is divided into sections addressing the general implementation of the sections of law, the manner in which time "unlawfully present" in the United States is measured and the effect of these grounds of inadmissibility on applications for adjustment of status. A chart is also attached to assist with determinations about whether aliens are subject to the 212(a)(9) grounds of inadmissibility.

#### I. General Implementation Issues

As a preliminary matter it is noted that the section 212(a)(6)(A) ground of inadmissibility applies to any alien present in the United States without having been admitted or paroled, but the

212(a)(9) grounds of inadmissibility only apply to aliens who have previously physically departed the United States and are now either seeking admission or have entered or attempted to enter the United States without being inspected. Therefore, section 212(a)(6)(A) does not apply to visa applicants outside of the United States, but section 212(a)(9)(B) does apply to visa applicants outside of the United States who previously did accrue sufficient unlawful presence in the United States. Likewise, section 212(a)(9) does not apply to aliens seeking adjustment of status in the United States who have not previously departed the United States. Aliens will not be able to avoid the consequences of unlawful presence by claiming that their re-entry after their previous physical departure was brief, casual and innocent.

Section 212(a)(6)(A) of the Act provides that "an alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." Written into the section is an exception for battered spouses and children. The battered spouse exception will be applied to both women and men.

Section 212(a)(9)(A)(i) of the Act provides that aliens who have been ordered removed from the United States through expedited removal proceedings or removal proceedings initiated on the alien's arrival in the United States and who have actually been removed (or departed after such an order) are inadmissible for 5 years. Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under sections 242 or 217 of the Act or ordered excluded under section 236 of the Act and who have actually been removed (or departed after such an order) are inadmissible for 10 years. Aliens who have been removed more than once are inadmissible for 20 years and aliens who have been convicted of aggravated felonies are permanently inadmissible. The provision holding aliens inadmissible for 10 years after the issuance of an exclusion or deportation order applies to such orders rendered both before and after April 1, 1997. In this context, it should be noted that pursuant to section 101(a)(13)(C) of the Act, permanent residents often are not regarded as seeking admission upon return to the United States. The statute does include an exception to the 212(a)(9)(A) ground of inadmissibility for those who have, prior to their return to the United States, obtained consent from the Attorney General to reapply for admission. The Service is considering a regulation or policy that would grant this exception to aliens excluded or deported prior to April 1, 1997, who had either been subsequently lawfully admitted to the United States or granted an immigrant or nonimmigrant visa prior to the effective date of the new, lengthier prohibitions against readmission. In the interim, applicants who have already remained outside of the United States for the one or five years required under pre-IRIRA law, in the absence of other adverse discretionary factors, should be granted advance consent to reapply for admission. Those who have been convicted of an aggravated felony are eligible to apply to the Attorney General for consent to reapply for admission but remain subject to all other applicable grounds of inadmissibility. All requests for such a waiver should be filed on Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal.

Pursuant to section 212(a)(9)(B)(i)(I) of the Act; aliens "unlawfully present" in the United States for more than 180 days but less than one year who subsequently depart from the United

States voluntarily prior to the initiation of removal proceedings under section 235(b)(1) or section 240 are inadmissible for a period of 3 years. For purposes of this section, "voluntarily departed" includes any departure by an alien from the United States prior to the initiation of removal proceedings, whether or not pursuant to an order of voluntary departure issued by the Service. Pursuant to section 212(a)(9)(B)(i)(II) of the Act, those aliens "unlawfully present" in the United States for one year or more, who depart or are removed and then seek admission are inadmissible for 10 years. The Attorney General may waive inadmissibility under section 212(a)(9)(B) in the case of an immigrant who can show that refusal of admission would result in extreme hardship to the alien's spouse or parent who is a citizen or lawful permanent resident. The Service will retain authority to grant the extreme hardship waiver in consular cases (with no administrative appeal available); however, those seeking admission at a Port-of-Entry who seek such a waiver will be referred to an immigration judge (with administrative appeal to the Board of Immigration Appeals, as part of an appeal of a removal order). Form I-724, Application to Waive Inadmissibility Grounds and Permission to Reapply is being designed to accommodate this provision.

Pursuant to section 212(a)(9)(C) of the Act, aliens who were unlawfully present in the United States for an aggregate period of more than one year and subsequently departed or who were previously ordered removed (and actually left the United States) and have subsequently either entered the United States without inspection or sought to enter the United States without inspection are permanently inadmissible. The statute makes an exception for aliens who seek admission more than 10 years after their last departure who have obtained advance consent from the Attorney General to reapply for admission. This ground of inadmissibility applies only to aliens who have attempted to re-enter or actually have re-entered the United States without being inspected and admitted or paroled.

## II. Measuring Time "Unlawfully Present"

When determining whether sections 212(a)(9)(B) & (C) of the Act are applicable in a particular case, Service officers will be required to determine the length of time that an alien spent "unlawfully present" in the United States prior to their initial departure. A number of factors are relevant to this calculation.

### When is an alien unlawfully present?

The first question in every case will be whether an alien has been previously "unlawfully present" in the United States. By statute, "an alien is deemed to be unlawfully present in the United States if 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." See Section 212(a)(9)(B)(ii) of the Act. The Service interprets time "unlawfully present" to include any time spent in the United States by aliens after they have violated the terms and conditions of any form of non-immigrant status, because time spent in violation of status is not authorized.

For purposes of section 212(a)(9)(B), time in "unlawful presence" begins to accrue on April 1, 1997. For example, although an alien may have been in the United States illegally for

one year prior to April 1, 1997, as of April 2, 1997, the same alien has accrued only one day of "unlawful presence" for purposes of section 212(a)(9)(B). For purposes of section 212(a)(9)(C), time in "unlawful presence" may accrue prior to April 1, 1997. Thus, the same alien who would only have one day of unlawful presence for purposes of section 212(a)(9)(B) on April 2, 1997, would have one year and one day of "unlawful presence" for purposes of section 212(a)(9)(C). In addition, when measuring time spent "unlawfully present" in the United States, the time is measured cumulatively for purposes of section 212(a)(9)(C), but not for purposes of section 212(a)(9)(B). For example, an alien who was "unlawfully present" in the United States for 5 months, departed the United States, returned, and was "unlawfully present" for 2 more months would have accrued 7 months of "unlawful presence" for purposes of section 212(a)(9)(C), but not for purposes of section 212(a)(9)(B).

Unlawful presence may be triggered either by overstaying the time authorized or by entering into an activity that violates the terms or conditions of status. For example, an alien present on a visitor visa begins to accrue unlawful presence on the day that he or she enters into unauthorized employment. Unlawful presence is also triggered by the commission of a criminal offense that renders an alien inadmissible or removable.

#### When does an alien stop being unlawfully present?

Once an alien goes out of status, he or she is "unlawfully present" until the Service restores status or he or she leaves the United States. Service policy governing restoration of status will be disseminated under separate cover.

Section 212(a)(9)(B)(iii) enumerates instances in which an alien does not accrue "unlawful presence" for purposes of section 212(a)(9)(B):

1. Time in which an alien is under 18 years of age
2. Time during which an alien has a bona fide application for asylum pending (unless the alien was employed without authorization at any time during the period that the application was pending)
3. Time during which an alien is a beneficiary of family unity protection
4. For those admitted or paroled -- time during the pendency of a non-frivolous application for change or extension of status (up to a maximum of 120 days)
5. Those who qualify as a battered spouse or child as provided in section 212(a)(9)(B)(iii)(IV) of the Act.

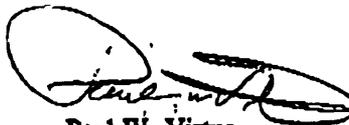
These exceptions are not applicable when considering "unlawful presence" for purposes of section 212(a)(9)(C).

The exception for up to 120 days during the pendency of an application for change or extension of status only applies when the application is submitted prior to the expiration of status by a person who has been lawfully admitted or paroled into the United States, and includes not only time during the pendency of an application for "change or extension" of status but also time during applications for "adjustment" of status.

An alien who is "unlawfully present" continues to accrue time as such while in removal proceedings. See 8 CFR section 239.3. Likewise, the grant of voluntary departure by the Service or an immigration judge will not stop the running of time "unlawfully present." However, time in certain forms of Attorney General "sanctioned" status will not count in measuring time unlawfully present. By proposed regulation, this will include refugees admitted under section 207 of the Act, aliens granted asylum under section 208 of the Act and aliens granted cancellation pending adjustment of status. The proposed regulation addressing these groups will be specific in nature and not leave "sanctioned" status open to broader interpretation. Aliens with pending change or extension of status applications after the 120-day period and aliens present but not yet removed after a final removal order will not be considered to be in a period of stay "authorized by the Attorney General."

### III. Impact of these Grounds of Inadmissibility on Applications for Adjustment of Status

Aliens inadmissible pursuant to 212(a)(6)(A) of the Act are eligible to apply for adjustment of status under section 245(l) of the Act. However, aliens inadmissible pursuant to section 212(a)(9) of the Act are ineligible for adjustment of status under section 245 of the Act, subject to the waiver and exception provisions of those grounds of inadmissibility.



Paul W. Virtue  
Acting Executive Associate Commissioner

Attachment

cc: Official File Copy  
Department of State (Attn: Stephen Fischel)

**HOW LONG IS AN ALIEN INADMISSIBLE PURSUANT TO SECTION 212(A)(9) OF THE ACT AFTER BEING PREVIOUSLY UNLAWFULLY PRESENT IN THE UNITED STATES?**

**Three factors to consider in every case where an alien may be inadmissible pursuant to section 212(a)(9) of the Act:**

1. Means of current application for admission
2. Means of prior departure
3. Length of time unlawfully present before prior departure

Current Application:	Means of Prior Departure:	Time Spent Previously Unlawfully Present in the United States:		
		0-180 Days	181-364 Days	365 Days + 366 + Days
Seeking Visa, Admission, Adjustment:	Any Kind of Voluntary Departure Prior to Proceedings:	Not Applicable	3 Yrs [212(a)(9)(B)]	10 Yrs [212(a)(9)(B)]
	Voluntary Departure In Proceedings:	Not Applicable	Not Applicable	10 Yrs [212(a)(9)(B)]
	Returned or Departed After Ordered Returned in 286(a)(1) Proceedings:	3 Yrs [212(a)(9)(B)]	3 Yrs [212(a)(9)(B)]	10 Yrs [212(a)(9)(B)]
	Returned or Departed After Ordered Returned in 240 Proceedings as an Arriving Alien:	3 Yrs [212(a)(9)(B)]	3 Yrs [212(a)(9)(B)]	18 Yrs [212(a)(9)(B)]
	Returned or Departed After Ordered Returned/Departed/Excluded Other Than Above:	18 Yrs [212(a)(9)(B)]	18 Yrs [212(a)(9)(B)]	10 Yrs [212(a)(9)(B)] & 10 Yrs [212(a)(9)(B)]
	Returned or Departed After Ordered Returned/Departed/Excluded Twice:	20 Yrs [212(a)(9)(B)]	20 Yrs [212(a)(9)(B)]	20 Yrs [212(a)(9)(B)] & 10 Yrs [212(a)(9)(B)]
	Returned or Departed After Ordered Returned/Excluded and Aggravated Felony:	Permanent [212(a)(9)(B)]	Permanent [212(a)(9)(B)]	Permanent [212(a)(9)(B)] & 10 Yrs [212(a)(9)(B)]
In Proceedings or Seeking Adjustment (EW or Abandoned EW cases):	Ordered Returned/Excluded/Departed and Attempted to re-Enter EW:	Permanent [212(a)(9)(B)]	Permanent [212(a)(9)(B)]	Permanent [212(a)(9)(B)] & 10 Yrs [212(a)(9)(B)]
	Any Voluntary Departure Prior to Proceedings and Attempted to re-Enter EW:	Not Applicable	3 Yrs [212(a)(9)(B)]	10 Yrs [212(a)(9)(B)] & Permanent [212(a)(9)(B)]
	Voluntary Departure in Proceedings and Attempted to re-Enter EW:	Not Applicable	Not Applicable	18 Yrs [212(a)(9)(B)] & Permanent [212(a)(9)(B)]

**Waivers available for selected grounds of inadmissibility:**

- 212(a)(9)(A): Advance consent of Attorney General
- 212(a)(9)(B): Extreme hardship waiver (extreme hardship to LPR or citizen spouse or parent)
- 212(a)(9)(C): Advance consent of Attorney General more than 10 years after last departure

**For purposes of section 212(e)(9)(B), time in the following status does not count as time unlawfully present:**

1. Time while alien is under 18 years of age
2. Time while alien has bona fide asylum application pending
3. Time while a beneficiary of family unity
4. Those who qualify for the battered spouse or child exception found in section 212(a)(9)(A)(ii) of the Act.
5. Up to 120 days while noninvoluntary application for extension/change/adjustment of status pending if filed by lawfully admitted/parolee alien prior to expiration of status