Practice Pointer: Dealing with the Unlawful Presence Bars

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Every application for a legal permanent residence or an immigrant visa requires in-depth knowledge and understanding of the inadmissibility bars under sections 212(a)(9)(B) and 212(a)(9)(C). This practice pointer is intended to assist the immigration practitioners with understanding the effect of the Ninth Circuit's recent decision in *Carrillo de Palacios v. Holder* and INA §245(i) on the bars.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created new statutory grounds for the exclusion of aliens unlawfully present in the United States.[1] As of April 1, 1997, aliens unlawfully present in the United States for more than 180 days, but less than one year, who voluntarily depart the United States, are inadmissible for three years.[2] Aliens unlawfully present in the United States for more than one year, who voluntarily depart or are removed, are inadmissible for ten years.[3]

INA §212(a)(9)(C) provides a "permanent" bar to admission for aliens who have accrued an aggregate period of unlawful presence, or have been ordered removed and have entered or attempted to reenter the United States at any time. An exception exists for aliens granted advance permission to reenter more than ten years following the last departure from the United States[4] and a waiver for Violence Against Women Act [5] self-petitioners who can demonstrate a connection between the battering or cruelty and their removal, departure from the United States, attempted reentries or reentries into the United States.[6]

INA § 212(a)(9)(B)(iii) provides for certain exceptions to the timeframe that would otherwise be counted toward the accrual of unlawful presence, including: time spent in the United States when the alien is 18 years of age or younger; time when a bona fide asylum application is pending, unless the individual engages in unauthorized employment; time when the alien is a beneficiary

[1] Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.
[2] INA §212(a)(9)(B)(i)(I).
[3] INA §212(a)(9)(B)(i)(II).
[4] INA §212(a)(9)(C)(ii).
[5] INA §204(a)(1)(A)(iii)-(v); §204(a)(1)(B)(ii)-(iv).
[6] INA §212(a)(9)(C)(iii).

of family unity protection under Section 301 of the Immigration Act of 1990; and time spent in violation of nonimmigrant status by battered woman and children, provided the alien can demonstrate a substantial connection between the battery and the unlawful presence.

Effect of Recent 9th Circuit Decision (*Carrillo de Palacios*)

On June 21, 2011, the Ninth Circuit issued its decision in *Carrillo de Palacios v. Holder*,[7] essentially changing everything practitioners know regarding "unlawful presence" and INA §212(a)(9)(C)(i)(I). Previously, practitioners understood that since the effective date of INA §212(a)(9)(B) was April 1, 1997, aliens did not accrue "unlawful presence" until that date, and thus those aliens would not be subject to the three and ten year bars until September 1997 (180 days after April 1) and April 1, 1998 (one year after April 1, 1997). Likewise, an individual who had accrued more than one year of unlawful presence prior to April 1, 1998 and departed prior to April 1, 1998 but returned without being admitted would not be inadmissible under INA § 212(a)(9)(C)(i)(I).

In *Carrillo de Palacios*, the Ninth changed the landscape, holding that an alien who accrued more than one year of unlawful presence prior to April 1, 1997* and who departed prior to April 1, 1997 but reentered EWI after April 1, 1997 is inadmissible under § 212(a)(9)(C)(i)(I). The court held that "[t]he statutory text is straightforward: an alien is inadmissible if she has been unlawfully present in the United States for an aggregate period of more than 1 year and subsequently enters the United States without being admitted."[8]

The Petitioner argued that such analysis impermissibly applied the statute retroactively. The court disagreed, however, finding that the conduct the statute addresses is not the actual unlawful presence, but the unlawful entry after April 1, 1997. The court determined that under the statute, "it is the alien's present or future reentry that triggers § [212](a)(9)(C)(i)(I), not her past unlawful presence,"[9] and "[a] law that applies to conduct occurring 'after the effective date of the new law' may 'look[ ] back to a past act' without being impermissibly retroactive.[10]

On December 1, 2011, the Ninth withdrew its opinion and reissued a new one.[11] In its new opinion, the court removed the language permitting the accrual of pre-IIRIRA unlawful presence under INA §212(a)(9)(C)(i)(I), and denied relief under INA §212(a)(9)(C)(i)(II). The court declined to address the BIA's analysis of unlawful presence pre April 1997. Thus remains the issue regarding the BIA's new analysis of unlawful presence pre-IIRIRA. Those practitioners with clients who accrued unlawful presence before IIRIRA and reentered without being admitted post IIRIRA should be cautioned.

Does §245(i) Help?

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[7] 651 F.3d 969 (9th Cir. 2011).
[8] *Id*. At 973.
[9] *Id*. At 977
[10] Id. At 976 (citing Fernandez-Vargas v. Gonzales, 548 U.S. 30, 44 (2006).
[11] *Carrillo de Palacios v. Holder*, 662 F.3d 1128 (9th Cir. 2011).

It is important to remember that the three and ten year bars under INA§212(a)(9)(B) are only triggered upon departure of the alien from the United States. What if the alien can adjust status in the United States, thus not having to depart?

In December 2000, Congress enacted the Legal Immigration Family Equity Act (LIFE Act). The LIFE Act amended 245(i) (8 U.S.C. §1255) to allow certain individuals who are ineligible for adjustment in the United States because they entered without inspection (EWI) or otherwise violated their immigration status to seek adjustment nonetheless, if they pay a $1000 penalty. Moreover, to be eligible for adjustment pursuant to 245(i), the individual must be a beneficiary of an immigrant visa petition filed before April 30, 2001. Specifically, the provision states:

> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –
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> (A) who –
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> (i) entered the United States without inspection; or
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> (ii) is within one of the classes enumerated in subsection (c) of this section;
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> (B) who is the beneficiary (including the spouse or child of the principal alien, if eligible to receive a visa under section 203(d) [8 U.S.C. § 1153 (d)] of –
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> (i) a petition for classification under section 204 [8 U.S.C. § 1154] that was filed with the Attorney General on or before April 30, 2001; or
>
> (ii) an application for labor certification under section 212(a)(5)(A) [8 U.S.C. §1182(a)(5)(A)] that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and
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> (C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 [December 21, 2000];
>
> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The attorney General may accept such application only if the alien remits with such application a fee of $1000 as of the date of receipt of the application . . .[12]

But, can §245(i) help if an alien accrued unlawful presence, departed, and reentered the United States without inspection? Under new law, the answer is likely "no." In 2005 and 2006, the Ninth and Tenth Circuits were holding that §245(i) trumped § 212(a)(9)(C)(i)(I).[13] In 2007, the BIA issued its decision in *Matter of Briones*,[14] holding that an alien who was inadmissible under INA§ 212(a)(9)(C)(i)(I) is ineligible for adjustment of status under §245(i). The Tenth Circuit

[12] INA §245(i)

[13] *See Acosta v. Gonzales*, 439 F.3d 1158(9th Cir. 2006), *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 *amended on reh'g by* 453 F.3d 1237 (10th Cir. 2006).

[14] 24 I&N Dec. 355 (BIA 2007)

has now held that that the BIA's determination in *Matter of Briones*, was a reasonable interpretation of ambiguous statutory provisions to which the court owed *Chevron* deference.[15]

Can Time Spent in the U.S. Count Towards Satisfying the INA §212(a)(9)(B)(i) and/or §212(a)(9)(C) Unlawful Presence Bars?

Since the INA §212(a)(9)(B) effective date was April 1, 1997, persons unlawfully present in the U.S. first became subject to the 3-year bar in late September 1997 (180 days after April 1) and to the 10-year bar on April 1, 1998. Accordingly, since over ten years have now lapsed since the latter date, a key issue which now arises frequently is whether an alien may comply with the 3 or 10-year inadmissibility periods while in the United States, as opposed to spending the required time period abroad.

First and foremost, while the statute and relevant legal authority make clear that §212(a)(9)(B) inadmissibility is triggered by the alien's departure from the United States,[16] the statute is silent as to whether the period of inadmissibility must be "served" outside the U.S., as are other key sources of authority including both the Department of State Foreign Affairs Manual (FAM) and USCIS Adjudicator's Field Manual (AFM).[17] However, as discussed below, USCIS has stated that persons who have been subsequently admitted as a nonimmigrant pursuant to §212(d)(3) waiver authority or who have been paroled, and have had no intervening periods of unlawful entry *or unauthorized presence*, may cure the inadmissibility period while in the U.S., whereas the Administrative Appeals Office (AAO) has offered a similar and seemingly more generous interpretation.

For purposes of this analysis, please consider the following three scenarios (Note – this advisory does not attempt to analyze every possible factual scenario, rather, it hopefully gets the practitioner thinking in the right direction on these often-complex questions of law):

1. Alien, a citizen of Mexico, is in possession of a B-2 visa or border crosser card issued in 1996 and facially valid for ten years. He entered the U.S. on January 1, 1997 and was admitted for six months until July 1, 1997, but overstayed until December 20, 2000, when he returned to Mexico for the holidays. He then returned to U.S. on February 1, 2001 as a B-2 visitor using the same B-2 visa and was admitted for a six-month period. He did not request or receive a §212(d)(3) waiver prior to this admission and has remained in the U.S. to present. He subsequently marries a U.S. citizen and applies for adjustment of status on February 15, 2012.

2. Alien, a citizen of El Salvador, entered the U.S. without inspection on January 1, 1997. In late 2001 he was granted Temporary Protected Status (TPS) and on January 1, 2002 he was issued an Advance Parole document based on his TPS. He traveled briefly to El Salvador to visit his family, thus triggering the 10-year unlawful

[15] *Padilla-Caldera v. Holder*, 673 F.3d 1140 (10th Cir. 2011).
[16] *See Matter of Rodarte*, 23 I&N Dec. 905, 909 (BIA 2006).
[17] *See* Laura L. Lichter and Mark R. Barr's 2009 Practice Advisory: Unlawful Presence and INA §§ 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I): A summary of the May 6, 2009 Interoffice Memorandum from Donald Neufeld, Lori Scialabba and Pearl Chang revising the Adjudicator's Field Manual, posted at AILA InfoNet as Doc. No. 09091869.

presence bar, and was paroled into the U.S. on February 1, 2002 to resume his TPS, which he has maintained to present. He subsequently marries a U.S. citizen and applies for adjustment of status on February 15, 2012.

3. Alien, a citizen of Colombia, entered the U.S. with a B-2 visa on January 1, 1997 and was admitted for six months. While in the U.S., he started a successful business. On January 1, 2000 he departed the U.S. and returned to Colombia, where he applied for an E-2 Treaty Investor Visa at the U.S. Embassy, including a §212(d)(3)(A) waiver to address the unlawful presence bar. His visa and waiver were approved and he was admitted to the U.S. on June 1, 2000 in E-2 status, which he has maintained to present. He then marries a U.S. citizen and applies for adjustment of status on February 15, 2012.

Scenarios 2 and 3 are directly and favorably addressed by current USCIS policy and related authority. In 2006 and 2009, USCIS Chief Counsel issued opinion letters specifically stating that the §212(a)(9)(B) inadmissibility period will "continue to run" for an alien present in the U.S. subsequent to the departure that triggered the period of inadmissibility where: 1) He is paroled or lawfully admitted as a nonimmigrant under §212(d)(3); and 2) He has not (subsequent to the departure) returned to or remained in the U.S. unlawfully since his parole or 212(d)(3) admission.[18] Further, in an even more expansive opinion, the AAO has ruled that an applicant for adjustment of status can satisfy the unlawful presence bar to admission through time spent outside or inside the U.S. *See In re Salles-Vaz* (AAO, Feb. 22, 2005). In that case, the alien departed the U.S. during the pendency of an adjustment of status application filed with USCIS after he accrued more than 180 days of unlawful presence, thus triggering the 3-year bar, but was "readmitted" with advance parole to continue the adjustment application. Since over three years had lapsed since the departure by the time the appeal was adjudicated, the AAO held that he was no longer barred under §212(a)(9)(B)(i)(II) since "The passage of time has created a new circumstance which renders the applicant free from any bar to admissibility based upon his unlawful presence." Notably, unlike the USCIS General Counsel opinion letters referenced above, the AAO did not require that any additional conditions be met such as maintenance of lawful status, issuance of a 212(d)(3) waiver, etc.

Accordingly, the answer to Scenario 1 – where the alien was readmitted to the U.S. as a nonimmigrant *without* first receiving 212(d)(3) authorization and/or has failed to maintain lawful status since the admission - remains somewhat uncertain due to the tension between the USCIS General Counsel opinion letters and the AAO's *Salles-Vaz* decision. To that end, practitioners report that some USCIS offices require the applicant to have received a waiver and maintained status, whereas others do not (with some field offices issuing conflicting internal decisions on this same issue).

However, there is a strong basis to argue that admission pursuant to a 212(d)(3) waiver, coupled with maintenance of status, is <u>not</u> required for several reasons (provided the alien was inspected/ admitted or paroled). First, as noted above, both the AAO's *Salles-Vaz* decision and the BIA's *Rodarte* decision refer exclusively to the plain statutory language of §212(a)(9)(B): the period of

[18] *See* Letter from Lynden Melmed to Daniel Horne, January 26, 2009, and from Robert Divine to David Berry, July 14, 2009, posted at AILA InfoNet as Doc. No. 09012874.

inadmissibility is triggered by the alien's departure from the U.S. and the statute imposes no other requirements as to how/where this period is to be met. In that regard, the General Counsel opinion letters, which essentially require "maintenance of status" for the time to run while the alien is present in the U.S., appear misguided, as such a requirement is really more akin to a §245(c) adjustment of status eligibility requirement that really has no relationship whatsoever to §212(a)(9)(B).

Second, while §212(a)(9)(B) is silent about any such requirement, INA §§212(a)(9)(A) and (C) each contain specific "exception" subsections that directly state that the inadmissibility shall not apply to aliens who "seek admission…*prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from foreign contiguous territory*…" where the Attorney General has consented to the alien's applying for readmission (emphasis added). Since Congress included no similar language in §212(a)(9)(B), this leads directly to the conclusion, based on basic rules of statutory construction, that an alien may "serve" the three or ten-year "sentence" within the U.S., provided he was inspected/ admitted or paroled at the time of last entry, even if he did not first receive a §212(d)(3) waiver or a similar form of advance permission to reapply for admission. In that regard, please note that while 8 C.F.R. §212.2(a), the regulatory counterpart to INA §212(a)(9)(A), specifically states that an alien who has been deported or removed is inadmissible unless he has remained outside the United States for five consecutive years since the date of deportation or removal., there is no similar regulation applying this same requirement to §212(a)(9)(B).[19]

How Permanent is the "Permanent" Bar?

INA §212(a)(9)(C)(ii) specifically allows an alien subject to the "permanent" bar to apply for a waiver (advance permission to reapply), subject to the conditions discussed above, once ten years have lapsed from the date of the alien's last departure. Accordingly, based on the specific statutory language, and stated USCIS General Counsel policy on the issue, it is unlikely that an alien can overcome §212(a)(9)(C) ineligibility based on time spent in the United States unless he has first received advance permission to reapply from the Attorney General (Secretary of Homeland Security). This is particularly true for persons subject to §212(a)(9)(C)(i)(II) (permanent bar for EWI or attempted EWI following removal) given the 8 CFR §212.2.(a) requirement noted above (alien must remain outside U.S. for a continuous period) and related statutes such as INA §276. However, assuming advance permission to reapply is received prior to the alien's (re)admission from outside the U.S., there appears to be no reason why he should not be able to serve all or part of the ten-year period in the United States.

Nevertheless, persons who are subject to the permanent bar still have some options available to help relieve the inherent hardships that result from this problematic statute. First, the statute includes a specific waiver exception for persons with approved VAWA petitions provided they can show a connection between the abuse and the removal, departure, reentry, or attempted reentry that caused the permanent bar to be invoked. Second, all other immigrant visa applicants may apply for a waiver (advance permission to reapply for admission) once ten years have lapsed from the date of the departure that triggered the bar (assuming they remain otherwise

[19] Despite the fact that §212(a)(9)(B) was enacted over 15 years ago, the Department of Homeland Security has yet to issue regulations for this important section of law.

eligible to apply for an immigrant visa and have not picked up any new ground of permanent ineligibility that cannot be waived).

Third, persons subject to the permanent bar based on EWI or attempted EWI following more that one year of unlawful presence should be able to apply for a nonimmigrant visa, coupled with §212(d)(3) authorization. For obvious reasons, it is highly unlikely that a visa/waiver will be issued to any NIV applicant for a category to which INA §212(b) strictly applies, however, persons applying as H-1B or L-1 nonimmigrants (who are statutorily exempt from 214(b)), or under the E-1, E-2, O-1, or related visa categories (to which 214(b) is typically applied more softly), may have a more realistic chance of success, especially if it can be shown that significant benefit to the U.S. will result from their employment (preservation of jobs for U.S. workers, introduction of important new technologies, etc.). Fourth, persons subject to the permanent bar may also request humanitarian parole pursuant to INA §212(d)(3)(5)(A). While such cases are normally approved only where urgent humanitarian circumstances or significant public issues are at stake, this should be considered as a potential option in cases involving significant medical or related situations, particularly if a United States citizen family member is directly impacted.

Finally, persons subject to §212(a)(9)(C)(i)(I) (permanent bar for EWI or attempted EWI following more than one year of unlawful presence), who have resided in the U.S. continuously for at least ten years (and whose departure from the U.S. that triggered the bar did not exceed 90 days), may be eligible to apply for cancellation of removal pursuant to INA §240A(b) if they have a qualifying U.S. citizen of LPR relative, have been persons of good moral character for at least ten years, and do not have a disqualifying criminal conviction. In fact, it may be possible to convince an Immigration Judge that the existence of this (and other possible permanent bars such as certain false claims to U.S. citizenship) actually strengthens the alien's hardship case since the bar prohibits the alien from qualifying for an immigrant visa as a matter of law.