



USCIS & BIA AFFIRM THREE- AND TEN-YEAR UNLAWFUL PRESENCE BARS CAN RUN IN THE U.S.

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I. Introduction

Under the unlawful presence grounds of inadmissibility, the three- and ten-year bars at INA § 212(a)(9)(B) penalize people who stay too long in unlawful status in the United States, leave, and then apply for admission. In other words, if a noncitizen has accrued a certain amount of unlawful presence in the United States and then leaves the country, they trigger a three- or ten-year bar to admissibility.¹

Once the three or ten years have passed, the person is no longer inadmissible. In recent years, USCIS interpreted the three- and ten-year bars as only able to run if the person is *outside of the United States*. Thus, if the person triggered the three- or ten-year bar and then re-entered the United States before the requisite time bar had passed, they remained inadmissible, regardless of how much time passed while they were in the United States.

New USCIS policy guidance² and a recent BIA case, *Matter of Duarte-Gonzalez*,³ however, now officially acknowledge that the simple passage of time is enough for the three- and ten-year bars to run, regardless of whether the full time period is spent inside or outside the United States.

This practice alert covers the current policy on the three- and ten-year bars as well as who does (and does not) benefit from this policy. For an in-depth discussion of unlawful presence inadmissibility, see ILRC, *Understanding Unlawful Presence under 212(a)(9)(B) and Unlawful Presence Waivers, I-601 and I-601A* (Mar. 28, 2019).⁴

¹ See INA § 212(a)(9)(B). Whether a person is barred for three or ten years depends on the amount of unlawful presence accrued prior to the departure. For more information on the unlawful presence bars, including which time periods count towards the accrual of unlawful presence, see ILRC, *Understanding Unlawful Presence under 212(a)(9)(B) and Unlawful Presence Waivers, I-601 and I-601A* (Mar. 28, 2019), <https://www.ilrc.org/understanding-unlawful-presence-under-%C2%A7-212a9b-and-unlawful-presence-waivers-i-601-and-i-601a>.

² USCIS, *Policy Memorandum: INA 212(a)(9)(B) Policy Manual Guidance* (June 24, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220624-INA212a9B.pdf>. This new guidance has been incorporated in the USCIS Policy Manual (USCIS-PM) at 8 USCIS-PM O.6.

³ 28 I&N Dec. 688 (BIA 2023).

⁴ Available at <https://www.ilrc.org/understanding-unlawful-presence-under-%C2%A7-212a9b-and-unlawful-presence-waivers-i-601-and-i-601a>.

The “Three-Year Bar.” Under INA § 212(a)(9)(B)(i)(I) noncitizens who, beginning on April 1, 1997, (a) are **unlawfully** present in the United States for a continuous period of more than 180 days but less than one year, (b) then voluntarily depart the United States before any immigration proceedings commence, and (c) subsequently apply for admission to the United States, are inadmissible for a period of three years from the date of departure.

The “Ten-Year Bar.” Under INA § 212(a)(9)(B)(i)(II) noncitizens who, beginning on April 1, 1997, (a) are unlawfully **present** in the United States for a continuous period of one year or more, (b) leave the United States voluntarily or by deportation/removal, and (c) then apply for admission to the United States, are inadmissible for a period of ten years from the date of departure or removal.

II. What is the Policy Update?

In new policy guidance, USCIS now formally recognizes that the “three- and ten-year bars” for unlawful presence inadmissibility at INA § 212(a)(9)(B) can run while in the United States.⁵ This guidance went into effect on June 24, 2022 and applies to all inadmissibility determinations by USCIS on or after that date. In a Board of Immigration Appeals (BIA) decision dated February 14, 2023, *Matter of Duarte-Gonzalez*, the BIA also came to the same conclusion.⁶ This means that both USCIS and immigration courts interpret the three- and ten-year bars as able to run in the United States.

Prior to this policy update, USCIS informally took the position that the time bar had to be spent *outside* the United States. Under this interpretation, if a person had triggered an unlawful presence bar at 212(a)(9)(B) by leaving⁷ the United States and then returned before the time bar had run, they remained inadmissible even well after the three or ten years had elapsed.

Example: Janeth came to the U.S. with a Border Crossing Card (BCC) in 2000. In 2007 she briefly left the U.S. to attend her grandmother’s funeral, triggering the ten-year unlawful presence bar. She returned one week later with the same BCC. Under USCIS’s prior interpretation, Janeth would still be inadmissible under this ground, 16 years later, because she did not stay outside the U.S. for 10 years before returning. But under USCIS’s updated

⁵ USCIS, *Policy Memorandum: INA 212(a)(9)(B) Policy Manual Guidance* (June 24, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220624-INA212a9B.pdf>. This new guidance has been incorporated in the USCIS Policy Manual (USCIS-PM) at 8 USCIS-PM O.6.

⁶ See *Matter of Duarte-Gonzalez*, 28 I&N Dec. 688 (BIA 2023).

⁷ In general, inadmissibility under 212(a)(9)(B) must be triggered by a departure or removal. Note, however, that a departure with advance parole or TPS travel authorization post-July 1, 2022 (I-512T) does not count as a “departure” for purposes of triggering 212(a)(9)(B). See *Matter of Arrabally and Yerrabally*, 25 I&N Dec. 771 (BIA 2012) (advance parole departure does not trigger 212(a)(9)(B)); USCIS, *Policy Memorandum: Rescission of Matter of Z-R-Z-C- as an Adopted Decision; agency interpretation of authorized travel by TPS beneficiaries*, 13 n.59 (July 1, 2022) (TPS-authorized departure with I-512T does not trigger 212(a)(9)(B)) <https://www.uscis.gov/sites/default/files/document/memos/PM-602-0188-RescissionofMatterofZ-R-Z-C-.pdf>; see also ILRC, *Understanding Unlawful Presence under 212(a)(9)(B) and Unlawful Presence Waivers, I-601 and I-601A* (Mar. 28, 2019), <https://www.ilrc.org/understanding-unlawful-presence-under-%C2%A7-212a9b-and-unlawful-presence-waivers-i-601-and-i-601a> (explanation of departure requirement to trigger inadmissibility under 212(a)(9)(B)).

guidance Janeth is *no longer inadmissible* under this ground since more than 10 years have passed since she triggered the bar (most of this time while she was in the U.S.).

Previously, a handful of unpublished BIA cases said the three- and ten-year bars at 212(a)(9)(B) could run in the United States,⁸ but with *Duarte-Gonzalez* we now also have a precedential BIA decision taking the same position as USCIS, that the 212(a)(9)(B) time bars can run in the United States based on the plain language of the statute. This means whether an applicant is seeking adjustment of status with USCIS or applying to adjust in immigration court (before EOIR, the Executive Office for Immigration Review), this policy applies to them.

Now, USCIS and EOIR will look at the amount of time that has passed since a person triggered the unlawful presence bar, without regard to where they were physically located during that time. Once the requisite number of years have passed, the ground of inadmissibility no longer applies, and no unlawful presence waiver is needed to adjust status.

NOTE: Seeking a waiver remains an option (if eligible) for those who have a pathway to permanent residence before the time bar has passed.⁹ The new USCIS guidance and recent BIA decision do not make any changes to unlawful presence waivers; rather, the policy update simply clarifies when the three- and ten-year bars have run and therefore a waiver is not needed.

While overall this is a positive policy update, formalizing what many practitioners already knew to be true based on the language of INA § 212(a)(9)(B), the class of people who can benefit is smaller than one might expect, as is discussed below, because of how this ground of inadmissibility interacts with the permanent bar at INA § 212(a)(9)(C).

III. Who Does (and Does Not) Benefit?

A. Those Who Re-Entered Lawfully

Even though USCIS and the BIA now acknowledge that the 212(a)(9)(B) time bars can run while in the United States, keep in mind a person must *leave* the United States to trigger one of these bars. Thus, in order for the time bar to pass in the United States, they must have somehow returned after their departure. *How* they returned is critical. Let's look at the example of "Janeth" again.

Example: Janeth came to the U.S. with her Border Crossing Card (BCC) in 2000. In 2007 she briefly left the United States to attend her grandmother's funeral **and returned one week later using her BCC again**. According to the change discussed in this practice alert, Janeth is *no longer inadmissible* under 212(a)(9)(B), because more than 10 years have passed; the bar lapsed in 2017. She also avoided the permanent bar at 212(a)(9)(C)

⁸ See, e.g., *Matter of Jose Armando Cruz*, 2014 WL 1652413 (BIA Apr. 9, 2014); *Matter of [name and A-number redacted]* (BIA July 11, 2014), AILA Doc. No. 14072147.

⁹ See INA § 212(a)(9)(B)(v). To qualify for a waiver of unlawful presence the applicant must be able to show extreme hardship to a U.S. citizen or lawful permanent resident *spouse or parent* and must warrant a favorable exercise of discretion. U.S. citizen children do *not* count as qualifying relatives for this waiver, making this waiver inaccessible to many people who do not have other family members who could be their qualifying relative.

because even though she accrued more than one year of unlawful presence and then departed the United States, *she did not re-enter or attempt to re-enter unlawfully*, which would have triggered the permanent bar at 212(a)(9)(C).¹⁰ If Janeth has a way to apply for lawful permanent residence, for example through a family petition, she does not need a Form I-601 unlawful presence waiver because the time period during which she was barred under 212(a)(9)(B)—10 years—has passed.

Now let's look at a different scenario involving Janeth. What if Janeth did not have a BCC and re-entered without inspection?

Example: Janeth came to the U.S. without inspection in 2000. In 2007 she briefly left the United States to attend her grandmother's funeral and **returned one week later without inspection**. Though the ten-year bar has passed and Janeth is no longer inadmissible under 212(a)(9)(B), she *is still inadmissible* under the *permanent bar* at 212(a)(9)(C) because she accrued more than one year of unlawful presence, departed the United States, and then re-entered *unlawfully*. Unless and until Janeth stays outside the United States for 10 years first and then files an I-212 to seek consent to reapply,¹¹ she is permanently barred and will never be able to seek permanent residence through a family petition.¹²

Now let's look at another example where the person triggered an unlawful presence bar and re-entered with inspection but may have triggered other inadmissibility grounds.

Example: Carlos entered the U.S. in 1988 without inspection. He lived in Texas for many years and departed in 2000 to return to Mexico, triggering the ten-year unlawful presence bar. In 2003, he returned to the United States on an H-2B visa, and he has resided here since then. He has a 25-year-old U.S. citizen daughter who wants to petition for him. Does Carlos need an unlawful presence waiver?

No, Carlos does not need an unlawful presence waiver because the ten-year bar passed in 2010, and he did not trigger the permanent bar because he re-entered the United States lawfully, with an H-2B visa. However, it is possible that Carlos committed fraud or misrepresentation when applying for his H-2B visa if he claimed to have never lived in the

¹⁰ While the permanent bar is beyond the scope of this practice alert, see ILRC, *Understanding I-212s for Inadmissibility Related to Prior Removal Orders and the Permanent Bar* (Mar. 27, 2020), <https://www.ilrc.org/resources/understanding-i-212s-inadmissibility-related-prior-removal-orders-and-permanent-bar>. This practice advisory discusses the permanent bar at 212(a)(9)(C) and also another ground of inadmissibility, 212(a)(9)(A), as well as the waiver requirements and process for both using Form I-212.

¹¹ For information on waiving the permanent bar at 212(a)(9)(C), see ILRC, *Understanding I-212s for Inadmissibility Related to Prior Removal Orders and the Permanent Bar* (Mar. 27, 2020), <https://www.ilrc.org/resources/understanding-i-212s-inadmissibility-related-prior-removal-orders-and-permanent-bar>.

¹² Note, though, that some forms of relief allow for a waiver of even the permanent bar (e.g., the U visa). Additionally, other forms of relief, for example cancellation of removal, do not require admissibility and therefore the permanent bar would not prevent her from seeking cancellation, if placed in removal proceedings and assuming she meets all the other requirements.

United States. If so, he might be inadmissible under INA § 212(a)(6)(C)(i) and would still need a Form I-601 waiver of inadmissibility.¹³

PRACTICE TIP: If your client is not sure whether they made a misrepresentation about previous time in the United States when applying for a visa, you can file a Freedom of Information Act (FOIA) request to obtain their records. Note that records from visa applications and interviews will generally appear in Department of State (DOS) records, which may take several years to obtain. If your client did not disclose prior time in the United States but was never asked about it, they might not be inadmissible under INA § 212(a)(6)(C)(i). For more on what constitutes a misrepresentation, see *Inadmissibility & Deportability* (ILRC 2021).

B. Those Who Triggered the Three-Year Bar

As the examples above illustrate, this policy does not benefit quite as many people as might have appeared at first blush because many people trigger the permanent bar upon their return, or they may have made a misrepresentation to return lawfully (and thus may still need a waiver, even if not for unlawful presence once the time has passed).

Apart from someone who triggers one of the unlawful presence bars at 212(a)(9)(B) and then returns lawfully, there is one other group of people who can benefit from this policy without having a much bigger permanent bar problem: those who triggered only the three-year bar, regardless of the manner of their re-entry to the United States.

Example: Liliana came to the U.S. without inspection in January 2003. In September 2003 (nine months later), she left the U.S. to visit an ill family member, triggering the three-year bar at INA § 212(a)(9)(B)(i)(I). She returned to the U.S., again without inspection, three weeks later. Liliana is about to submit an adjustment application under INA § 245(i). Because it has now been well over three years since she triggered a three-year bar in September 2003, she is no longer inadmissible under this ground. Additionally, because the permanent bar only applies to those who have accrued *more than one year of unlawful presence*, departed, then re-entered or attempted to re-enter unlawfully, Liliana is not inadmissible under the permanent bar either.

To summarize, two types of people benefit from this policy without also having a permanent bar problem:

- 1) *Those who re-entered the United States lawfully* after a departure triggering the three- or ten-year bars; or
- 2) *Those who only triggered the three-year bar* with their departure (regardless of whether they re-entered the United States lawfully or not).

PRACTICE TIP: If you have a client who may have a pathway to permanent residence and triggered a three- or ten-year unlawful presence bar that has now passed, it is still important to screen for all other grounds of inadmissibility, such as the permanent bar at INA § 212(a)(9)(C) and the fraud and misrepresentation ground at INA § 212(a)(6)(C)(i), before proceeding.

¹³ See INA § 212(i) (waiver provision for INA § 212(a)(6)(C)(i) inadmissibility).

IV. Conclusion

The recent recognition by USCIS and the BIA that the three- and ten-year unlawful presence bars at INA § 212(a)(9)(B) can run both in and outside the United States is a welcome acknowledgement of the statutory language and may benefit individuals who triggered the ten-year bar and then re-entered lawfully, or those who triggered only the three-year bar. However, as described in this practice alert, many people will still have other inadmissibility issues that this policy does not address or eliminate. Thus, it is important to screen carefully when assessing eligibility for permanent residence.



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