

Subject: **Section 212(a)(9)(B) Relating to Unlawful Presence**

Date: September 19, 1997

To: All Regional Directors  
All District Directors (Including Foreign)  
All Officers in Charge (Including Foreign)  
All Port Directors  
All Service Center Directors  
All Training Academics (Glynco and Artersia)  
All Regional Counsels  
All District Counsels  
All Asylum Directors

From: Office of Programs

**This memorandum addresses section 212(a)(9)(B) of the Immigration and Nationality Act (Act), as amended by section 301(b) of the Illegal Immigration and Immigrant Responsibility Act (IIRAIRA).** This memorandum modifies the guidance provided in the Service's interim memoranda (96 Act #043, dated June 17, 1997; 96 Act #026 dated March 29, 1997). The modified guidance covers the following issues: (1) whether an alien granted voluntary departure is considered to be in a stay authorized by the Attorney General; (2) what constitutes an authorized period of stay for nonimmigrants; and (3) whether time spent in proceedings counts toward calculating the alien's period(s) of unlawful presence in the United States. This memorandum also provides guidance on unlawful presence with respect to alien spouses and children granted conditional permanent residence under section 216 of the Act, and alien entrepreneurs and their spouses and children granted conditional permanent residence under section 216A of the Act.

**Voluntary Departure.** The Service's March 29 memorandum stated that "the grant of voluntary departure by the Service or an immigration judge will not stop the running of time 'unlawful presence'." The Service's June 17 memorandum further stated that aliens granted voluntary departure prior to, during, or following proceedings are not considered to be in the United States in a period of stay authorized by the Attorney General. The Service has reversed this interpretation of unlawful presence with respect to voluntary departure. Under the revised interpretations, voluntary departure is considered a period of stay authorized by the Attorney General, regardless of whether it is granted by the Service prior to the commencement of proceedings, by an immigration judge at the end of proceedings, or by the Board of Immigration Appeals after an appeal. If the immigration judge grants the alien voluntary departure with an alternate order of removal, and the alien fails to depart by the date specified, unlawful presence accrues as of the date the privilege of voluntary departure expires<sup>[1]</sup> and the order of removal takes effect.

**Authorized Period of Stay for Nonimmigrants.** The Service's March 29, 1997, memorandum stated that time unlawfully present was interpreted "to include any time spent in the United States by aliens after they have violated the terms and conditions of any form of nonimmigrant status, because time spent in violation of status is not authorized." The March 29 memorandum stated that unlawful presence is also triggered by the commission of a criminal offense that renders an alien inadmissible or removable. The Service has modified this position on the interpretation of "unlawful presence" for nonimmigrants, for purposes of applying Section 212(a)(9) of the Act. The discussion below interprets "unlawful presence" only for purposes of that paragraph of the Act. It must be emphasized that an alien may still be considered unlawfully present or in violation under other provisions of the Act (e.g. for purposes of initiating a removal proceeding) even though he or she is not deemed unlawfully present under the technical requirement of Section 212(a)(9)(B)(ii).

Under the modified interpretation, unlawful presence with respect to a nonimmigrant includes only periods of stay in the United States beyond the date noted on Form I-94, Arrival/Departure

Record. Unlawful presence does not begin to run from the date of a status violation (including unauthorized employment). Unlawful presence for a nonimmigrant may begin to accrue before the expiration date noted on the I-94, however, in two circumstances: (1) when an immigration judge makes a determination of a status violation in exclusion, deportation or removal proceedings, or (2) when the Service makes such a determination during the course of adjudicating a benefit application. In cases where the immigration judge finds there was a status violation, unlawful presence begins to accrue as of the date of the order of the immigration judge, whether or not the decision is appealed. (If the judge grants voluntary departure, however, the voluntary departure period is not considered unlawful presence). See the discussion below on Treatment of Time Spent While in Proceedings, Nonimmigrants. A Service determination of status violation may arise for example, during the adjudication of an application for extension of nonimmigrant stay or reinstatement of bona fide nonimmigrant status pursuant to 8 CFR 214; change of nonimmigrant classification pursuant to 8 CFR 248; employment authorization for certain nonimmigrants who are maintaining such status pursuant to 8 CFR 274a.12(c); or adjustment of status pursuant to 8 CFR 245. In the case of a Service determination of a nonimmigrant status violation, unlawful presence will begin as of the date of the decision denying the immigration benefit, whether or not appealed.

Moreover, the mere commission or conviction of a criminal offense does not trigger unlawful presence for a nonimmigrant who has not remained beyond the period of stay authorized on Form I-94. An immigration judge must have found the alien removable during the course of proceedings based on such an offense for the alien to be considered unlawfully present. In such a case, unless the immigration judge grants voluntary departure, unlawful presence will begin to accrue as of the date of the order of the immigration judge, whether or not the decision is appealed.

**Treatment of Time Spent While in Proceedings.** Time spent as an alien in proceedings before an immigration judge or higher appellate authority is not a period of stay authorized by the Attorney General. The following paragraphs provided further details on how this principle is to be applied.

**Entrants Without Inspection:** In the case of EWIs, unlawful presence begins to accrue as of the date the alien entered the United States without admission or parole. Unlawful presence continues to accrue while such an alien is in proceedings.

**Nonimmigrants:** When a nonimmigrant bearing a date-certain Form I-94 remains in the United States beyond the date noted on that form, unlawful presence begins to accrue as of the date the I-94 expired. A nonimmigrant bearing a date-certain Form I-94 who is placed in removal proceedings will not begin to accrue time unlawfully present until the date noted on Form I-94 has been reached or the immigration judge orders the alien to be removed, whichever is earlier.

**Parolees:** When a parolee remains in the United States beyond the period of parole authorized by the Attorney General, unlawful presence begins to accrue as of the date the parole authorization expired. If, however, the parole authorization was revoked or terminated prior to the date it was due to expire, unlawful presence begins to accrue as of the date of revocation or termination. An alien paroled for the purpose of removal proceedings will not accrue time unlawfully present until the immigration judge orders the alien to be removed (whether or not the decision is appealed).

**The Alien Successfully Contests the Ground of Inadmissibility or Removability:** When an alien successfully contests the charges of inadmissibility or removability brought by the Service in a proceeding, the alien will be deemed not to have accrued any periods of unlawfully presence in the United States during the pendency of the proceeding. If the admission period expired during the course of proceedings, unlawful presence begins to accrue as of the date of the order.

**The Service Contests the Relief Granted to the Alien by the Immigration Judge:** When the immigration judge finds the alien inadmissible under section 212 of the Act or removable under section 237 of the Act, but grants the alien a form of relief that has been contested by the Service, for example, cancellation of removal, the period of unlawful presence ceases to accrue, as of the date the relief is granted by the immigration judge. If, however, the Service prevails on appeal, unlawful presence begins to accrue once again, as of the date the decision on appeal was made in favor of the Service.

**Conditional Permanent Residents.** An alien granted status as a conditional permanent resident under section 216 or 216A of the Act who does not timely file a petition (Form I-751 for spouses and children of U.S. citizens and lawful permanent residents, and Form I-829 for alien entrepreneurs and their spouses and children) to remove the conditions placed on that status is unlawfully present in the United States. Failure to make a timely filing results in the automatic termination of the alien's status. 8 CFR Section 216.4(a)(6) and 8 CFR Section 216.6(a)(5). Therefore, an alien who does not properly file Form I-751 or Form I-829 prior to the expiration of conditional permanent resident status has remained in the United States for longer than the period authorized by the Attorney General. Unlawful presence therefore begins to accrue as of the date the conditional status as a lawful permanent resident expires.

There are provisions in the regulations that allow the Service to accept a late Form I-751 or I-829 before jurisdiction vests with the immigration judge, if the alien can establish that failure to make a timely filings was for good cause. Alien entrepreneurs and their dependents who make a late filing must also establish there were extenuating circumstances. In these cases, the Service can approve the petition, restore the alien's status, and cancel any outstanding notice to appear. When jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the alien and the Service. *Id.* Therefore, when a late filing is accepted by the Service or the immigration judge and the alien's status has been restored, the alien will not be considered to have accrued any periods of unlawful presence in the United States. When the late filing is not accepted, however, the period of unlawful presence begins to accrue as of the date the alien's status as a conditional permanent resident expired.

In contrast, when the Service seeks to revoke an alien's conditional status as a lawful permanent resident during the 2-year period for cause, the alien continues to enjoy all the rights and privileges of a lawful permanent resident until such time as that status is formally terminated by the Service. See 8 CFR Section 216.3(a). In such cases, unlawful presence will begin to accrue as of the date the Service actually terminates the alien's status as a lawful permanent resident.

If there are any additional questions, contact Joanna London, Assistant General Counsel, Office of the General Counsel, 202/514-2895, or Sophia Cox, Adjudication Officer, Headquarters Benefits Division, at 202/514-5014.

Paul W. Virtue  
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Commissioner

**Footnote:**

1. Section 240B(a)(2) of the Act limits to 120 days the period of voluntary departure that may be granted to an alien prior to the completion of proceedings. Section 240B(b)(2) of the Act limits to 60 days the period of voluntary departure that may be granted to an alien by an immigration judge at the conclusion of proceedings. There are significant penalties imposed on aliens who fail to depart the United States voluntarily by the date specified. Section 240B(d) provides that an alien who fails to comply with an order permitting voluntary departure: (1) shall be subject to a civil monetary penalty of no less than \$1,000 but not more than \$5,000; and
2. shall be ineligible for any further grant of voluntary departure or relief under sections 240A, 245, 248 and 249 for 10 years.