U.S. Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

Interoffice Memorandum

To: Field Leadership

From: Donald Neufeld /s/
Acting Associate Director
Domestic Operations Directorate

From: Lori Scialabba /s/
Associate Director
Refugee, Asylum and International Operations Directorate

From: Pearl Chang /s/
Acting Chief
Office of Policy and Strategy

Date: May 6, 2009

Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act

Revision to and Re-designation of *Adjudicator's Field Manual* (*AFM*) Chapter 30.1(d) as Chapter 40.9 (*AFM* Update AD 08-03)

1. Purpose

Chapter 30.1(d) of the *Adjudicator's Field Manual* consolidates USCIS guidance to adjudicators for determining when an alien accrues unlawful presence, for purposes of inadmissibility under section 212(a)(9)(B) or (C) of the Immigration and Nationality Act. This memorandum re-designates Chapter 30.1(d) of the *AFM* as chapter 40.9 of the *AFM*. This memorandum also revises newly re-designated Chapter 40.9 to clarify the available guidance, and to incorporate into Chapter 40.9 prior guidance that was issued after adoption of former Chapter 30.1(d) but not incorporated into former Chapter 30.1(d).

USCIS intends *AFM* Chapter 40.9 to provide comprehensive guidance to adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility. Since Chapter 40.9 provides comprehensive guidance, the following prior memoranda are rescinded in their entirety:

Date	**Subject**
September 19, 1997	Section 212(a)(9)(B) Relating to Unlawful Presence
March 3, 2000	Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act) (AD 00-07)
June 12, 2002	Unlawful Presence
April 2, 2003	Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in Determining "Unlawful Presence" under Section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (Act)

Also, the following memoranda are rescinded, insofar as they dealt with inadmissibility under section 212(a)(9)(B) or (C) of the Act.

Date	**Subject**
March 31, 1997	Implementation of section 212(a)(6)(A) and 212(9) grounds of Inadmissibility
June 17, 1997	Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)

Also rescinded is any other USCIS memorandum (or legacy INS memorandum) that addresses inadmissibility under section 212(a)(9)(B) or (C) of the Act, to the extent that any other such memorandum is inconsistent with *AFM* Chapter 40.9.

2. Background

The three- and ten-year bars to admissibility of section 212(a)(9)(B)(i) of the Act and the permanent bar to admissibility of section 212(a)(9)(C)(i)(I) of the Act were added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208 (September 30, 1996)) (IIRIRA). The amendments enacting sections 212(a)(9)(B) and (C) became effective on April 1, 1997.

Section 212(a)(9)(B)(i)(I) of the Act renders inadmissible those aliens who were unlawfully present for more than 180 days but less than one (1) year, who voluntarily departed the United States prior to the initiation of removal proceedings and who seek admission within three (3) years of the date of such departure or removal from the United States. Section 212(a)(9)(B)(i)(II) of the Act renders inadmissible those aliens unlawfully present for one (1) year or more, and who seek admission within ten (10) years of the date of the alien's departure or removal from the United States. Finally, section 212(a)(9)(C)(i)(I) of the Act renders inadmissible any alien who

has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted.

Section 212(a)(9)(B)(ii) of the Act specifies that "unlawful presence" can accrue during any period in which an alien, other than a Legal Permanent Resident, is present in the United States without having been admitted or paroled, or after the expiration of the period of stay authorized by the Secretary of Homeland Security. As discussed in *AFM* Chapter 40.9.2, there are other situations in which an alien who is actually in an unlawful immigration status is, nevertheless, protected from the accrual of unlawful presence.

Over the last ten (10) years, the determination of what constitutes "unlawful presence" has been the subject of various interpretations, in part because of legislation amending the rights of aliens seeking immigration benefits. Legacy Immigration and Naturalization Service (INS) and the United States Citizenship and Immigration Services (USCIS) have issued several memoranda on this issue; however, sometimes, the *AFM* was not updated. Therefore, this revised and re-designated section 40.9.2 in the *AFM* consolidates the information contained in these memoranda and updates the *AFM*.

In general, the consequences of accruing unlawful presence depend on the immigration status of an individual, the particular type of benefit or relief sought, and whether the denial of the benefit is subject to administrative and judicial review. The details are set forth in the field guidance below.

3. Field Guidance and *AFM* Update

The adjudicator is directed to comply with the guidance provided in the *AFM* as amended by this memorandum. Additionally, overseas adjudication officers can also find guidance on this issue, tailored to the overseas context, in the International Operations "Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers" dated July 30, 2008 or subsequent revisions.

The *AFM* is updated as follows:

1. Chapter 30.1(d) of the *AFM* entitled "Unlawful Presence Under Section 212(a)(9) of the Act" is re-designated as Chapter 40.9 and
2. Chapter 40.9 and is amended as follows:

40.9 Aliens Previously Removed and Unlawfully Present (Section 212(a)(9) of the Act)

Section 212(a)(9) of the Act renders certain aliens inadmissible based on prior violations of U.S. immigration law. Section 212(a)(9) of the Act has three major subsections.

Under Section 212(a)(9)(A) of the Act, an alien, who was deported, excluded or removed under any provision of law, is inadmissible if the alien seeks admission to the

United States during the period specified in section 212(a)(9)(A) of the Act, unless the alien obtains consent to reapply for admission during this period.

Under section 212(a)(9)(B) of the Act, an alien is inadmissible if the alien has accrued a specified period of unlawful presence, leaves the United States after accruing the unlawful presence, and then seeks admission during the period specified in section 212(a)(9)(B)(i) (either 3 years or 10 years after the departure, depending on the duration of the accrued unlawful presence).

Under Section 212(a)(9)(C)(i) of the Act, an alien is inadmissible if the alien enters or attempts to enter the United States without admission after having been removed or after having accrued more than one year (in the aggregate) of unlawful presence.

AFM Chapter 40.9.2 provides an overview of USCIS' policy concerning the accrual of unlawful presence and the resulting inadmissibility under section 212(a)(9)(B) or section 212(a)(9)(C)(i)(I) of the Act.

40.9.1 Inadmissibility Based on Prior Removal (Section 212(a)(9)(A) of the Act) or Based on Unlawful Return after Prior Removal (Section 212(a)(9)(C)(i)(II) of the Act)) [Reserved]

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(a) General Overview

If an alien, other than an alien lawfully admitted for permanent residence, accrues unlawful presence in the United States, he or she may be inadmissible pursuant to section 212(a)(9)(B)(i)(Three-year and Ten-year bars) or 212(a)(9)(C)(i)(I) of the Act (Permanent bar).

(1) **Outline of Section 212(a)(9)(B)(i) and Section 212(a)(9)(C)(i)(I) of the Act**

(A) **Section 212(a)(9)(B)(i) of the Act - The 3-Year and the 10-Year Bars**. Section 212(a)(9)(B)(i) is broken into two (2) sub-groups:

- Section 212(a)(9)(B)(i)(I) of the Act (3-year bar). This provision renders inadmissible for three (3) years those aliens, who were unlawfully present for more than 180 days but less than one (1) year, and who departed from the United States voluntarily prior to the initiation of removal proceedings.
- Section 212(a)(9)(B)(i)(II) of the Act (10-year bar). This provision renders inadmissible an alien, who was unlawfully present for one (1) year or more, and who seeks again admission within ten (10) years of the date of the alien's departure or removal from the United States.

Both bars can be waived pursuant to section 212(a)(9)(B)(v) of the Act.

(B) **Section 212(a)(9)(C)(i)(I) of the Act - The Permanent Bar**. This provision renders an individual inadmissible, if he or she has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted. An alien, who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is permanently inadmissible; however, after having been outside the United States for at least ten (10) years, he or she may seek consent to reapply for admission pursuant to section 212(a)(9)(C)(ii) of the Act and 8 CFR 212.2. A waiver is also available for certain Violence Against Women Act (VAWA) self-petitioners under section 212(a)(9)(C)(iii) of the Act. The 10-year absence requirement does not apply to a VAWA self-petitioner who is seeking a waiver under section 212(a)(9)(C)(iii) of the Act, rather than seeking consent to reapply under section 212(a)(9)(C)(ii) of the Act.

A DHS regulation at 8 CFR 212.2 addresses the filing and adjudication of an application for consent to reapply (filed on Form I-212). As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), however, the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal. A USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212

that is filed by an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act. That is, because of the 10-year absence requirement for consent to reapply, section 212(a)(9)(C)(i)(I) of the Act is a permanent bar for which neither the retroactive nor the prospective grant of consent to reapply is possible. The regulatory language at 8 CFR 212.2(i) and (j) is not applicable, *see Torres-Garcia*, at 875, and the alien has to be physically outside the United States for a period of at least ten years since his or her last departure before being eligible to be granted consent to reapply. *See id.*, at 876. Finally, the regulatory language referring to the 5-year and the 20-year limitation on consent to reapply does not apply to section 212(a)(9)(C) of the Act; these limitations refer to former sections 212(a)(6)(A) and (B), the predecessors of current section 212(a)(9)(A) of the Act. *See id.* at 874 (for a historical analysis).

Also, an adjudicator should pay special attention to the possibility that an alien who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act (because the alien entered or attempted to enter without admission after having been removed) may be subject to the reinstatement provision of section 241(a)(5) of the Act (reinstatement of removal orders).

(2) **Distinction Between "Unlawful Status" and "Unlawful Presence"**

To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same.

As discussed in chapters 40.9.2(b)(2) and (3), there are situations in which an alien who is present in an unlawful status nevertheless does not accrue unlawful presence. As a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien's remaining can be said to be "authorized." However, the fact that the alien does not accrue unlawful presence does *not* mean that the alien's presence in the United States is actually lawful.

> **Example 1:** An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. The alien remains in the United States after the Form I-94 expires. The alien's status becomes unlawful, and she begins to accrue unlawful presence, on January 2, 2009. On May 10, 2009, the alien properly files an application for adjustment of status. The filing of the adjustment application stops the accrual of unlawful presence. But it does not "restore" the alien to a substantively lawful immigration status. She is still amenable to removal as a deportable alien under section 237(a)(1)(C) of the Act because she has remained after the expiration of her nonimmigrant admission.

> **Example 2:** An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. On October 5, 2008, he properly files an application for adjustment of status. He does not, however, file any application to extend his nonimmigrant stay, which expires on January 1, 2009. The adjustment of status application is still pending on January 2, 2009. On January 2, 2009, he becomes subject to removal as a deportable alien under section 237(a)(1)(C) of the Act because he has remained after the expiration of his nonimmigrant admission. For purposes of future inadmissibility, however, the pending adjustment application protects him from the accrual of unlawful presence.

The application of section 245(k) of the Act is a good example of the importance of clearly distinguishing unlawful *status* from the accrual of unlawful presence. Guidance concerning section 245(k) may be found in chapter 23.5(d) of the *AFM*. If the requirements of section 245(k) are met, this provision relieves certain employment-based immigrants of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act for adjustment of status. For example, an alien who failed to maintain a lawful status after any entry is, ordinarily, ineligible for adjustment of status under section 245(c)(2) of the Act. Departure from the United States and return does, ordinarily, not relieve the alien of this provision. 8 CFR 245.1(d)(3). For an alien who is eligible for the benefit of section 245(k) of the Act, however, only a failure to maintain status since the *last lawful admission* is considered in determining whether the alien is subject to section 245(c)(2), (c)(7) or (c)(8) of the Act. AFM Chapter 23.5(d)(4). Unless the alien, since the last lawful admission failed to maintain lawful status for at least 181 days, section 245(k) of the Act relieves the alien of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act.

As stated in chapters 40.9.2(b)(2) and (3), some aliens who are actually present in an unlawful *status*, are, nevertheless, protected from accruing unlawful presence. But if their unlawful status continues for more than 180 days, in the aggregate, they would be ineligible for the benefit of section 245(k) of the Act, *even if they have accrued no unlawful presence for purposes of section 212(a)(9)(B)* of the Act.

> **Example 3:** An alien is admitted for "duration of status" as an F-1 nonimmigrant student. One year later, the alien drops out of school, and remains in the United States for one year after dropping out. The alien's status became unlawful when she dropped out of school. Neither USCIS nor an IJ ever makes a finding that the alien was out of status; therefore, she never accrues any unlawful presence for purposes of section 212(a)(9)(B) of the Act. Chapter 40.9.2(b)(1)(E)(ii). The alien eventually leaves the United States and returns lawfully as a nonimmigrant. While in nonimmigrant status, a Form I-140 is approved and the alien applies for adjustment of status. Because the alien failed to maintain a lawful status for more than 180 days during her prior sojourn, she is ineligible for adjustment under section 245(c)(2) of the Act, and section 245(k) of the Act does not relieve her of this ineligibility. Under section 245(k) of the Act, the alien is still eligible for adjustment, since the prior failure to maintain status does not apply to make the alien ineligible under section 245(c) of the Act. Also, the alien did not accrue

unlawful *presence* despite the prior unlawful *status*, and so the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Example 4: The alien is admitted as a lawful nonimmigrant, and, while still in status, applies for adjustment of status on the basis of an approved I-140. While the Form I-485 is pending, the alien's EAD expires, and the alien fails to apply for a new EAD. Nevertheless, the alien continues to work after the EAD expires. The period of unauthorized employment exceeds 180 days. The alien would not be inadmissible under section 212(a)(9)(B) of the Act, since the pendency of the I-485 stopped the accrual of unlawful presence. Also, there has been no "departure" to trigger section 212(a)(9)(B) of the Act. Section 245(k) of the Act does not relieve the alien of ineligibility under section 245(c)(2) of the Act since the alien engaged in unauthorized employment for more than 180 days..

An alien who is present in a lawful status will not accrue unlawful presence as long as that lawful status is maintained.

(3) **Definition of Unlawful Presence and Explanation of Related Terms**

(A) **Unlawful Presence**. Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is:

- present after the expiration of the period of stay authorized by the Secretary of Homeland Security; or
- present without being admitted or paroled.

(B) **Period of Stay Authorized (Authorized Stay)**. When nonimmigrants are admitted into the United States, the period of stay authorized is generally noted on Form I-94, Admission/Departure Record. Additionally, by policy, USCIS has designated other statuses - including some that are not actually lawful - as "periods of stay authorized." Please see the more detailed analysis in sections (b) and (c), below.

(C) **Admission**. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996)) amended section 101(a)(13) of the Act by removing the definition of the term "entry," and by replacing it with a definition of the terms "admission" and "admitted." Section 101(a)(13)(A) of the Act now defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* section 101(a)(13)(A) of the Act. Section 101(a)(13)(B) of the Act furthermore clarifies that parole is not admission, and that an alien crewman, who is permitted to land temporarily in the United States, shall not be considered to have been admitted. *See* section 101(a)(13)(B) of the Act.

(D) **Parole**. Parole is the discretionary decision, under section 212(d)(5)(A) of the Act, to permit an inadmissible alien to leave the inspection facility free of official custody, so that, although the alien is not admitted, the alien is permitted to be physically present in the United States. By statutory definition, parole is not admission. *See* section 101(a)(13)(B) of the Act. An alien, who has been paroled under section 212(d)(5)(A) of the Act "[is] still in theory of law at the boundary line and [has] gained no foothold in the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

Parole may be granted on a case-by-case basis for urgent humanitarian reasons (humanitarian parole) or for significant public benefit. *See* section 212(d)(5)(A) of the Act and 8 CFR 212.5. Deferred inspection and advance parole are parole, as are individual port of entry paroles and paroles authorized while a person is overseas. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of unlawful presence, the reason for the grant of parole is irrelevant. For more information on parole pursuant to section 212(d)(5) of the Act, *see* chapter 54 of the *AFM*.

Only parole under section 212(d)(5)(A) of the Act qualifies as parole for purposes of section 212(a)(9) of the Act. In an April 1999 memorandum and an August 1998 legal opinion (Legal Opinion No. 98-10, August 21, 1998), former INS suggested that a release under section 236 of the Act (conditional parole) could also be considered "parole" for purposes of adjustment of status under the Cuban Adjustment Act. The Board of Immigration Appeals (BIA) has rejected this interpretation in at least one unpublished decision. *See Matter of Ortega-Cervantes,* 2005 WL 649116 (BIA, January 6, 2005). The Ninth Circuit confirmed the BIA's decision and held that release under section 236 of the Act was not "parole" for purposes of adjustment of status. *See Ortega-Cervantes v. Gonzales*, 501 F.3d 1111 (9th Cir. 2007). DHS/Office of the General Counsel reconsidered that aspect of the 1999 memorandum, and the related 1998 legal opinion. On September 28, 2007, it issued a memorandum stating that release under section 236 of the Act is not deemed to be a form of parole under section 212(d)(5) of the Act. *See* September 28, 2007 Memorandum, Office of the General Counsel of the Department of Homeland Security, *Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act*. As of the release of this *AFM* chapter, the Ninth Circuit is the only circuit that has decided this issue, although several circuits have cases outstanding. If the adjudicator encounters the issue, he or she is advised to inquire with the USCIS Office of the Chief Counsel (Adjudications Law Division) about the status of any pending litigation or further developments.

(4) General Considerations when Counting Unlawful Presence Time Under Sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act

(A) **Unlawful Presence for Purposes of the 3-Year and 10-Year Bars Is Not Counted in the Aggregate**. Section 212(a)(9)(B)(i) of the Act only applies to an alien, who has accrued the required amount of unlawful presence during any single stay in the United States; the length of the alien's accrued unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays in the United States. If, during any single stay, an alien has more than one (1) period during which the alien accrues unlawful presence, the length of each period of unlawful presence is added together to determine the total period of unlawful presence time accrued during that single stay.

Reminder: The statutory provisions of the 3-year and the 10-year bars became effective on or after April 1, 1997. An alien, who was unlawfully present in the United States prior to April 1, 1997, started to accrue unlawful presence on April 1, 1997, if he or she remained present in the United States at that time. An alien, who was unlawfully present in the United States prior to April 1, 1997, but departed prior to April 1, 1997, did not accrue any unlawful presence for purposes of section 212(a)(9)(B) of the Act.

Example 1: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004 (150 days after April 1, 2004), the alien files an adjustment of status application. The alien does not accrue unlawful presence while the adjustment application is pending. *See* section (b)(3)(A) of this *AFM* chapter. The adjustment application is denied on October 15, 2006 (administratively final decision). After the denial, the alien continues to remain in the United States unlawfully; the accrual of unlawful presence resumes on October 16, 2006, a day after the application is denied. The alien leaves the United States on January 1, 2007. At that time, the individual had accrued unlawful presence from April 1, 2004 to September 1, 2004, and again from October 16, 2006 to January 1, 2007. The total period of unlawful presence time accrued during this single unlawful stay exceeds 180 days. By departing the United States on January 1, 2007, the alien triggered the three-year bar and is inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

Example 2: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004, the alien leaves the United States. The alien returns unlawfully on October 15, 2006. He departs the United States again on January 1, 2007. Although the alien has been unlawfully present in the United States for more than 180 days in the aggregate, the unlawful presence was accrued during two (2) separate stays in the United States; during each of these stays, the alien accrued less than 180 days of unlawful presence. Thus, the alien is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

(B) **Unlawful Presence for Purposes of the Permanent Bar Is Counted in the Aggregate**. Under section 212(a)(9)(C)(i)(I) of the Act, the alien's unlawful presence is counted in the aggregate, i.e. the total amount of unlawful presence time is determined by adding together all periods of time during which an alien was unlawfully present in the United States on or after April 1, 1997. Therefore, if an alien accrues a total of more than one (1) year of unlawful presence time, whether accrued during a single stay or during multiple stays, departs the United States, and subsequently reenters or attempts to reenter without admission, he or she is subject to the permanent bar of section 212(a)(9)(C)(i)(I) of the Act.

> **Example**: An alien enters the United States unlawfully on April 1, 2004, and leaves on September 1, 2004. The alien has accrued about 150 days of unlawful presence at this time. She reenters the United States unlawfully on January 1, 2005 and stays until November 1, 2005. This time, the alien has accrued 300 days of unlawful presence. Although neither period of unlawful presence exceeds one (1) year, the aggregate period of unlawful presence does exceed one (1) year by totaling 450 days of unlawful presence, which the alien accrued during both stays. If the alien ever returns or attempts to return to the United States without being admitted, he or she will be inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

(C) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(I) of the Act (The 3-Year Bar)**. For the three-year bar to apply, the individual must have accrued at least 180 days but less than one (1) year of unlawful presence, and thereafter, must have departed voluntarily prior to the commencement of removal proceedings. Any period of unlawful presence accrued prior to April 1, 1997, does not count for purposes of section 212(a)(9)(B)(i)(I) of the Act.

The alien does not need a formal grant of voluntary departure by DHS for his or her departure to be considered voluntary. However, if DHS grants voluntary departure, the departure is still voluntary because removal proceedings have not yet commenced.

The statutory language of section 212(a)(9)(B)(i)(I) of the Act specifically requires that the alien must have departed the United States prior to the commencement of removal proceedings. Removal proceedings commence with the filing of the Notice to Appear (NTA) with the immigration court following service of the NTA on the alien. *See* 8 CFR 1003.14. An alien, who departs the United States after the NTA has been filed with the immigration court, therefore, is not subject to the three-year bar according to the statutory language. To avoid future inadmissibility, however, the alien must leave before he or she has accrued more than one year of unlawful presence, and becomes inadmissible under section 212(a)(9)(B)(i)(II) of the Act, rather than section 212(a)(9)(A)(i)(I) of the Act. This provision provides the alien with an incentive to end his or her unlawful presence by leaving the United States, rather that contesting removal.

The burden is on the applicant to establish that the NTA had already been filed by the time the applicant had departed. The record of proceedings before the immigration court will generally indicate when the NTA was actually filed, and the filing date shown in the court's record will be controlling.

Even if the applicant is not subject to the three-year or the ten-year bar, there may be other grounds of inadmissibility that apply based on the fact that the removal proceedings were initiated and the alien departed the United States during the proceedings. For example, a conviction that made the alien subject to removal as a deportable alien may also make the alien inadmissible.

(D) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act (The 10-Year Bar)**. An alien, who voluntarily departs the United States or who was removed from the United States after having been unlawfully present for more than one (1) year, triggers the 10-year bar to admission under section 212(a)(9)(B)(i)(II) of the Act. Any period of unlawful presence accrued prior to April 1, 1997 does not count for purposes of section 212(a)(9)(B)(i)(II) of the Act.

Unlike the 3-year bar, the 10-year bar applies even if the alien leaves after removal proceedings have commenced; the individual will be inadmissible, even if he or she leaves after the NTA has been filed with the immigration court. Moreover, filing the NTA does not stop the accrual of unlawful presence. 8 CFR 239.3.

(E) **Specific Requirements for Inadmissibility under Section 212(a)(9)(C)(i)(I) of the Act (The Permanent Bar)**

(i) General Requirements. To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must then have entered or attempted to reenter the United States without being admitted. Any unlawful presence accrued prior to April 1, 1997, or any unlawful entry or attempted reentry into the United States prior to April 1, 1997, does not count for purposes of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

(ii) Special Note On the Effect of An Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence

Is an alien, who had accrued more than one (1) year of unlawful presence, and who is paroled into the United States but not admitted, subject to section 212(a)(9)(C)(i)(I) of the Act?

An alien's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act is fixed at the time of the alien's unlawful entry or attempted reentry.

An alien who had accrued more than one (1) year of unlawful presence, and who has *never* returned or attempted to return without admission after that unlawful presence, and who is paroled into the United States pursuant to section 212(d)(5) of the Act, but not admitted, is not subject to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. It is the Department of Homeland Security's (DHS) policy that for purposes of section 212(a)(9)(C)(i)(I) inadmissibility, an alien's parole is not deemed to be an "entry or attempted reentry without being admitted," even though parole is not considered admission. *See* section 101(a)(13)(B) and section 212(d)(5)(A) of the Act. This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v.Tod*, 267 U.S. 228 (1925).

As noted, however, an alien's inadmissibility for returning unlawfully after accruing sufficient unlawful presence is fixed at the time of the alien's unlawful return or attempt to return. Paroling an alien who is already inadmissible does not relieve the alien of inadmissibility. For example, if an alien who is already present in the United States without being admitted because he or she entered without inspection, and who, in the past, had accumulated unlawful presence in excess of one (1) year, is taken into custody, and then later paroled pursuant to section 212(d)(5) of the Act, the alien's parole would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

For a more detailed explanation and examples, please see (a)(6)(B) of this subsection, below.

(5) **Triggering the Bar by Departing the United States**

An alien must leave the United States after accruing more than 180 days or one (1) year of unlawful presence in order to trigger the 3-year or 10-year bar to admission under section 212(a)(9)(B) of the Act. This includes departures made while traveling after having approved advance parole or with a valid refugee travel document. *See* section (a)(6) of this chapter.

Note: By granting advance parole or a refugee travel document, USCIS does not authorize the alien's departure from the United States; it merely provides a means for the alien to return to the United States, regardless of admissibility. Therefore, even if the alien has an advance parole document, the alien's actual departure from the United States will still trigger the bar to inadmissibility under section 212(a)(9)(B) of the Act.

Section 212(a)(9)(C)(i)(I) of the Act does not explicitly mention "departure" as a prerequisite for the bar to apply. However, according to the wording of the statute, an alien with the requisite period of unlawful presence must "enter or attempt to enter without admission" in order to incur inadmissibility. Thus, the alien cannot violate the provision unless the alien leaves the United States and then returns or attempts to

return. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905 (BIA 2006)(Departure triggers the bars; the IJ erred when denying adjustment of status because of the individual's accrual of unlawful presence in excess of one (1) year without departure.).

(6) **Triggering the 3-Year and the 10-Year Bars But Not the Permanent Bar When Departing with Advance Parole or with a Refugee Travel Document**

(A) **Travel on Advance Parole Issued to Applicants for Adjustment of Status on Form I-512, Authorization For Parole Of An Alien Into The United States, pursuant to 8 CFR 212.5(f) and 8 CFR 245.2(a)(4)**. An alien with a pending adjustment of status application, who has accrued more than 180 days of unlawful presence time, will trigger the bars to admission, if he or she travels outside the United States subsequent to the issuance of an advance parole document. When the alien presents the advance parole document at a port of entry, he or she may be permitted to return to the United States as a parolee because aliens who request parole into the United States are not required to establish admissibility under section 212(a) of the Act. However, the fact that the alien is permitted to return to the United States as a parolee does not confer a waiver of inadmissibility under section 212(a)(9)(B)(i)(I) and (II) of the Act. Consequently, a waiver under section 212(a)(9)(B)(v) of the Act would be required when determining the alien's eligibility to adjust status to lawful permanent residence.

(B) **A Special Note on the Effect on Section 212(a)(9)(C) of the Act of an Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence**. Parole is not admission. *See* section 101(a)(13)(B) of the Act. An individual is subject to section 212(a)(9)(C)(i)(I) of the Act, if he or she has accrued more than one (1) year of unlawful presence in the United States during a single stay or during multiple stays, who departs, and subsequently enters or attempts to reenter "without being admitted." The statutory language omits the word "parole" and makes it unclear whether an alien, who enters on parole, triggers the bar to inadmissibility under section 212(a)(9)(C) of the Act. Therefore, if an alien is paroled into the United States pursuant to section 212(d)(5)(A) of the Act after having accrued more than one (1) year of unlawful presence, is he or she inadmissible under section 212(a)(9)(C)(i)(I) of the Act because the alien was not "admitted"? The answer is "no" for the following reason:

An alien's inadmissibility pursuant to section 212(a)(9)(C)(i)(I) of the Act is fixed as of the date of the alien's entry or attempted reentry without being admitted. If an alien, who has accrued unlawful presence in excess of one (1) year, came to a port of entry and applied for admission to the United States or asked to be paroled into the United States, the alien will not be deemed to have attempted to enter the United States without "being admitted," if DHS actually paroles the alien. The significant point is that the alien will have arrived at a port of entry and presented himself or herself for inspection. If the alien is paroled, the alien will continue to be considered an applicant for admission, and so cannot be said to have entered or attempted to enter without admission. Thus, if DHS paroles the alien under section 212(d)(5) of the Act, the alien's departure and subsequent return as a parolee does not trigger the section 212(a)(9)(C)(i)(I)-bar for

purposes of a subsequent admissibility determination by DHS (such as at the time of the adjustment of status adjudication). This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

> **Example**: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 2, 2000, the individual commences to accrue unlawful presence as having overstayed his or her period of admission The alien applies for adjustment of status on January 1, 2005. The individual is in authorized stay during the pendency of the adjustment of status application and does not accrue unlawful presence. *See* section (b)(3)(A) of this *AFM* chapter. Based on the pending adjustment application, the alien applies for advance parole (Form I-131), which is approved. The alien then leaves the United States on April 1, 2005; at this time, the alien has triggered the 10-year bar to admission to the United States because the alien had accrued unlawful presence in excess of one (1) year (from January 2, 2000, to January 1, 2005). On April 15, 2005, the alien returns to the United States through a port of entry, presents his advance parole document, and is paroled into the United States. The alien will not be considered to have triggered inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Because the alien is currently a parolee, the alien is deemed to still be at the port of entry. At the time of the adjudication of the adjustment of status application, the alien's request for admission (through the adjustment of status application) will be decided. Thus, the individual is a parolee, he or she is not deemed to have "entered or attempted to reenter without being admitted." (Note: The alien still may be inadmissible under section 212(a)(9)(B) of the Act at the time of the adjustment of status application.)

By contrast, the parole of an alien after the alien had already become inadmissible under section 212(a)(9)(C)(i) would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

> **Example**: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 1, 2000, the alien commences to accrue unlawful presence for having overstayed his or her period of admission. The alien applies for adjustment of status on January 1, 2005. The alien departs the United States and returns illegally by crossing the border 30 miles west of the nearest port of entry on April 15, 2005. The alien is now inadmissible under section 212(a)(9)(C)(i)(I) of the Act. (An additional consequence, unrelated to the illegal entry, is that the alien also abandoned his or her adjustment application). Even if the alien were later taken into custody and paroled under section 212(d)(5) of the Act, or were to *later* travel and return on a grant of advance parole, the alien would remain inadmissible under section 212(a)(9)(C)(i)(I) of the Act since the

alien did, in fact, enter without admission after having accrued the requisite period of unlawful presence.

The instructions to Form I-131, Application for Travel Document, and Form I-485, Application to Register Permanent Residence or Adjust Status, as well as the standard Form I-512, Authorization for Parole of an Alien into the United States, include language warning the alien that traveling abroad and returning to the United States by using Form I-512 may make the alien inadmissible under section 212(a)(9)(B) of the Act.

(C) **Travel on a Valid Refugee Travel Document Issued pursuant to Section 208(c)(1)(C) of the Act and 8 CFR 223**. An asylee who had accrued more than 180 days of unlawful presence time prior to having filed the bona fide asylum application, will trigger the bar to admission, if he or she departs the United States while traveling on a valid refugee travel document. When the asylee presents the travel document at a port of entry, he or she can be permitted to reenter the United States to resume status as an asylee; however, the asylee will be inadmissible when he or she applies to adjust status to lawful permanent resident, and a waiver would be required at that time.

(7) **Multiple Grounds of Inadmissibility and the Relationship Between Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act**

Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act establish different grounds of inadmissibility based on prior unlawful presence. Whether a specific ground applies to an alien depends on an analysis of the facts of the person's case in light of that specific ground.

It is possible that the alien's immigration history makes the alien inadmissible under *both* section 212(a)(9)(B) of the Act and section 212(a)(9)(C)(i)(I) of the Act.

> **Example**: An alien with more than one (1) year of unlawful presence leaves the United States, thus triggering the 10-year bar to admissibility under section 212(a)(9)(B)(i)(II) of the Act. Three (3) years after the alien's last departure, the alien returns to the United States and enters illegally, thus without having been admitted. The alien is now inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act.

Also, an alien with sufficient unlawful presence who is removed from the United States, may be inadmissible under section 212(a)(9)(A), as well as section 212(a)(9)(B)(i)(II) and/or section 212(a)(9)(C)(i) of the Act depending on the circumstances of the individual case.

(8) **Benefits That May Be Available Despite Inadmissibility under Section 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act**

Section (c) of this chapter specifies forms of relief from inadmissibility under sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act ("Waivers"). Even without a grant of a waiver, aliens who are subject to these grounds of inadmissibility, may still obtain certain benefits as outlined below in (b)(2) and (b)(3), if otherwise eligible.

(A) **Under Section 212(a)(9)(B)(i)(I) or (II) of the Act**. An alien, who is inadmissible under section 212(a)(9)(B)(i) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act;
- Adjustment of status under section 202 of NACARA;
- Adjustment of status under section 902 of HRIFA;
- Adjustment of status under section 245(h)(2)(A) of the Act;
- Change to V nonimmigrant status under 8 CFR 214.15 (but the alien may need a waiver to obtain adjustment of status to LPR after having acquired V nonimmigrant status);
- LPR status pursuant to the LIFE Legalization Provision: A Legalization applicant under section 1104 of the LIFE Act may travel with authorization during the pendency of the application without triggering inadmissibility under section 212(a)(9)(B) of the Act. *See* 8 CFR 245a.13(e)(5).

(B) **Under Section 212(a)(9)(C)(i)(I) of the Act**. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act.

(C) **Special Concerns Regarding Section 245(i) - Applications**. The USCIS position is that inadmissibility under section 212(a)(9)(B) or (C) of the Act makes an alien ineligible for adjustment of status under section 245 of the Act, regardless of whether the alien applies under section 245(a) or section 245(i) of the Act. The BIA has endorsed this view. In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), the Board held that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is not eligible for adjustment under section 245(i) of the Act. An alien who is inadmissible under section 212(a)(9)(B) of the Act is also ineligible for section 245(i) adjustment. *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007).

USCIS adjudicators will follow *Matter of Briones* and *Matter of Lemus* in all cases, regardless of the decisions of the 9th Circuit in *Acosta v. Gonzales,* 439 F.3d 550 (9th Cir. 2006) or of the 10th Circuit in *Padilla-Caldera v. Gonzales,* 453 F.3d 1237 (10th Cir. 2005). Following these Board cases, rather than *Acosta* and *Padilla-Caldera*, will allow the Board to reexamine the continued validity of these court decisions.

USCIS adjudicators should also be aware that the 9th Circuit has held that the Board's decision in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) is entitled to judicial

deference, and that the decision in *Perez-Gonzales v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004), is no longer good law. *Gonzales v. Department of Homeland Security,* 508 F.3d 1227 (9th Cir. 2007).

(9) **Effective Date of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

(A) **Effective Date**. Only periods of unlawful presence spent in the United States after the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996))(IIRIRA), count towards unlawful presence for purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act.

For purposes of section 212(a)(9)(C)(i)(I) of the Act, one (1) full year of unlawful presence must have accrued. Therefore, the earliest an individual could have been subjected to this ground of inadmissibility was April 2, 1998.

(B) **The Child Status Protection Act and Its Influence on Unlawful Presence**. On August 6, 2002, the Child Status Protection Act (CSPA) (PL 107-208, August 6, 2002) was enacted to provide relief to certain children, who "aged-out" during the processing of certain applications. The CSPA applies to derivative children of asylum and refugee applicants, children of United States citizens, children of Lawful Permanent Residents (LPRs), and derivative beneficiaries of family-based, employment-based, and diversity visas. The CSPA changes how a child's age should be calculated for purposes of eligibility for certain immigration benefits; it does not change the definition of "child" pursuant to section 101(b)(1) of the Act.

The CSPA was effective on August 6, 2002. In general, its provisions are not retroactive: Any qualified petition or application that was pending on the effective date is subject to the provisions of the CSPA. For detailed information, please consult the policy memorandum, Domestic Operations, April 30, 2008, Revised Guidance for the Child Status Protection Act (AD07-04), or AFM Chapter 21.2(e).

Calculation of Unlawful Presence, if the CSPA Is Applicable: Any derivative beneficiary child who is in a "period of stay authorized" because of a pending application or petition, does not accrue unlawful presence merely because of his or her "aging-out," if the requirements and conditions of the CSPA are met. For more information about the applicability of the CSPA, *see AFM* sections describing individual types of immigration benefits and Chapter 21.2(e).

The CSPA applies only to those benefits expressly specified by the statute. Nothing in the CSPA provides protection for nonimmigrant visa holders (such as K or V nonimmigrants), or to NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile Applicants, and/or derivatives. However, there may be

limited coverage for K-2 and K-4 individuals. *See* Chapter 21.2(e). This list is not exhaustive.

(b) Determining When an Alien Accrues Unlawful Presence

(1) Aliens Present in Lawful Status or as Parolees

An alien does not accrue unlawful presence, if he or she is present in the United States under a period of stay authorized by the Secretary of Homeland Security, or if he or she has been inspected and paroled into the United States and the parole is still in effect.

An alien who is present in the United States without inspection accrues unlawful presence from the date of the unlawful arrival, unless the alien is protected from the accrual of unlawful presence as described in this *AFM* chapter. Note that an alien, who arrived at a port of entry and obtained permission to come into the United States by making a knowingly false claim to be a citizen, is present in the United States without having been inspected and admitted. *See Matter of S--*, 9 I&N Dec. 599 (BIA 1962).

(A) **Lawful Permanent Residents (LPRs).** An alien lawfully admitted for permanent residence will not accrue unlawful presence unless the alien becomes subject to an administratively final order of removal by the IJ or the BIA (which means that during the course of proceedings, the alien was found to have lost his or her LPR status), or if he or she is otherwise protected from the accrual of unlawful presence. Unlawful presence will start to accrue the day after the order becomes administratively final, and not on the date of the event that made the alien subject to removal.

(B) **Lawful Temporary Residents (Section 245A(b) of the Act and 8 CFR 245a)**. A lawful temporary resident must file an application to adjust from temporary to permanent resident status before the beginning of the 43rd month from the date he or she was granted lawful temporary resident status. *See* 8 CFR 245a.3(a)(2). However, unlike conditional permanent residents, the status of a lawful temporary resident does not automatically terminate, if the alien fails to file a timely application, and the DHS needs to advise the alien of its intent to terminate his or her Temporary Residence Status. *See* section 245A(b)(2) of the Act, and 8 CFR 245a.2(u)(2). The same procedures apply, if the alien's status is terminated for the reasons specified in section 245A(b)(2) of the Act. Lawful Temporary Resident status also terminates upon the entry of a final order of deportation, exclusion, or removal. *See* 8 CFR 245.2(u)(2).

If the DHS advises the alien of its intent to terminate lawful temporary resident status, the alien continues to be a lawful temporary resident and does not accrue unlawful presence until a notice of termination is issued. If the termination is appealed, the period of authorized stay continues through the administrative appeals process. The termination of an alien's lawful temporary resident status cannot be reviewed in removal proceedings before an immigration judge. The alien would accrue unlawful presence

time during removal proceedings or while a petition for review is pending in Federal court.

(C) **Conditional Permanent Residents under Sections 216 and 216A of the Act**

(i) Termination upon the Entry of an Administratively Final Order of Removal. As is the case with other LPRs, an alien lawfully admitted for permanent residence on a conditional basis under section 216 or 216A of the Act begins to accrue unlawful presence upon the entry of an administratively final order of removal. A conditional LPR will also accrue unlawful presence before the entry of an administratively final removal order, if USCIS terminates the alien's conditional LPR status, as described below.

(ii) Automatic Termination. Pursuant to section 216 or section 216A of the Act, an alien, who was granted conditional permanent resident status must properly file a petition to remove the conditions placed on his or her status within the 90-day period immediately preceding the second anniversary of the date on which lawful permanent resident status on a conditional basis was granted. *See* Sections 216(c)(1) and 216A(c)(1) of the Act. The petition is filed on Form I-751, Petition to Remove Conditions of Residence, or on Form I-829, Petition by Entrepreneur to Remove Conditions. *See* 8 CFR 216.4 and 8 CFR 216.6. Failure to do so results in the automatic termination of conditional resident status and the initiation of removal proceedings at the expiration of the 90-day period, unless the parties can establish good cause for failure to file the petition. *See* section 216(c)(2) and 8 CFR 216.4(a)(6); section 216A(c)(2) and 8 CFR 216.6(a)(5); section 216(c)(4) and 8 CFR 216.5. The alien begins to accrue unlawful presence as of the date of the second anniversary of the alien's lawful admission for permanent residence. *See id.* Also, failure to appear for the personal interview that may be required by USCIS in relation to the I-751 or I-829 petition results in the automatic termination of the conditional legal permanent resident status, unless the parties establish good cause for the failure to appear. *See* section 216(c)(2)(A) of the Act and 8 CFR 216.4(b)(3); section 216A(c)(2)(A) of the Act and 8 CFR 216.6(b)(3).

(iii) Late Filings of the Petition to Remove the Conditional Basis Of LPR Status by the Alien. Current regulations at 8 CFR 216.4(a)(6) and 8 CFR 216.6(a)(5) allow a conditional resident to submit a late filing to USCIS, if jurisdiction has not yet vested with the immigration judge, and if certain requirements are met. If the late filed petition is accepted and approved, no unlawful presence time will be deemed to have accrued. If jurisdiction has already vested with the immigration judge, the judge may terminate removal proceedings upon joint motion by the alien and DHS. Consequently, if a late filing is accepted and approved while the alien is in proceedings, the alien will not accrue unlawful presence time. If, however, the late filing is rejected, the alien begins to accrue unlawful presence time on the date his or her status as a conditional resident automatically terminated.

(iv) Termination on Notice. If the DHS advises the alien of its intent to terminate conditional permanent resident status, the alien continues to be a conditional permanent resident and does not accrue unlawful presence until a notice of termination is issued. The alien begins to accrue unlawful presence on the day after the notice of termination is issued, unless the alien seeks review of the termination in removal proceedings. *See* 8 CFR 216.3.

(v) Review in Removal Proceedings. If the alien seeks review of the termination in removal proceedings, DHS bears the burden of proving that the termination was proper. Thus, the alien will be deemed not to accrue unlawful presence unless the immigration judge affirms the termination. *See* 8 CFR 216.3. If the immigration judge affirms the termination, the alien will begin to accrue unlawful presence on the day after the immigration judge's removal order becomes administratively final.

(D) **Aliens Granted Cancellation of Removal or Suspension of Deportation**. Section 240A of the Act provides for two (2) different types of cancellation of removal: cancellation of removal for an alien who has been admitted for permanent residence (section 240A(a) of the Act), and cancellation of removal and adjustment of status for certain aliens who have been present in the United States for a period of not less than ten (10) years (section 240A(b) of the Act). Therefore, the effect of a grant of cancellation of removal on the accrual of unlawful presence (or of suspension of deportation under former section 244 of the Act) depends on the alien's status immediately before relief was granted, and as outlined below:

- If an alien who has already acquired LPR status becomes subject to removal but applies for and receives a grant of cancellation of removal under section 240A(a) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien retains his or her LPR status. No period of unlawful presence will have accrued because the grant of cancellation or suspension prevents the loss of LPR status.

- If an alien who is not already an LPR obtains a grant of cancellation of removal under section 240A(b) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien becomes an alien lawfully admitted for permanent residence as of the date of the final decision granting relief. As such, the alien will no longer accrue unlawful presence after cancellation of removal or suspension of deportation is granted. Moreover, given the special nature of these forms of relief, any unlawful presence that may have accrued before the grant of cancellation of removal or suspension of deportation will be eliminated for purposes of any future application for admission.

  Example: An alien had accrued ten (10) years of unlawful presence in the United States, and is subsequently granted cancellation of removal. The

alien is now an LPR. If, after becoming an LPR, the alien travels abroad and returns to the United States through a port of entry, none of the pre-grant unlawful presence will be considered in determining the alien's admissibility. Section 212(a)(9)(B)(i) of the Act does not apply to LPRs.

(E) **Lawful Nonimmigrants**. The period of authorized stay for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted until a Specific Date (Date Certain). Nonimmigrants admitted until a specific date will generally begin to accrue unlawful presence the day following the date the authorized period of admission expires, as noted on Form I-94, Arrival/Departure Record. If USCIS finds, during the adjudication of a request for immigration benefit, that the alien has violated his or her nonimmigrant status, unlawful presence will begin to accrue either the day after Form I-94 expires or the day after USCIS denies the request, whichever is earlier. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order or the day after the Form I-94 expired, whichever is earlier. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. Removal proceedings have no impact on whether an individual is accruing unlawful presence. *See* 8 CFR 239.3.

> **Example**: An individual is admitted in H-1B status until September 20, 2007, as evidenced on Form I-94, Arrival/Departure Record. On January 1, 2007, an NTA is issued and the individual is placed in removal proceedings. The individual will not start to accrue unlawful presence unless the immigration judge holds that the alien had violated his or her nonimmigrant status, or until his or her Form I-94 expires, whichever is earlier.

(ii) Nonimmigrants Admitted for Duration of Status (D/S). If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. *See* 8 CFR 239.3.

(iii) Non-controlled Nonimmigrants (e.g. Canadian B-1/B-2). Nonimmigrants, who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

(i) Aliens in Refugee Status. In general, the period of authorized stay begins on the date the alien is admitted to the United States in refugee status. If refugee status is terminated, unlawful presence will start to accrue the day after the refugee status is terminated.

If the individual is a derivative refugee, either by accompanying or by following to join the principal, the alien will commence to accrue unlawful presence as follows:

- If the derivative refugee is outside the United States: The period of stay authorized begins on the date the alien either enters as an accompanying or following-to-join refugee pursuant to section 207(c)(2) of the Act and 8 CFR 207.7.

- If the derivative refugee is inside the United States: The accrual of unlawful presence ceases when USCIS accepts the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730) on the individual's behalf. USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide Form I-730 petition is filed on behalf of the individual, the individual will be protected from the accrual of unlawful presence. No period of time during which the bona fide petition is pending shall be taken into account in determining the period of unlawful presence. If the petition is subsequently denied, the individual will again begin to accrue unlawful presence, if the individual has previously accrued unlawful presence.

- Because filing a Form I-730 stops the accrual of unlawful presence, but does not cure any unlawful presence that has already accrued, an individual who departs the United States during the pendency of the petition, with or without advance parole, will trigger the 3-year or the 10-year bar. In this case and because an individual seeking refugee status has to be admissible as an immigrant pursuant to section 207 of the Act, the individual will be required to file Form I-602, Application by Refugee For Waiver of Grounds of Excludability, to overcome the bars to admissibility before the Asylee/Refugee Relative Petition can be approved. If the alien is not permitted to reenter the United States, the individual will have to seek the waiver through the U.S. consulate where the approved I-730 is processed.

(ii) Aliens Granted Asylum. The period of authorized stay begins on the date the alien files a bona fide application for asylum. *See* section 212(a)(9)(B)(iii)(II) of the Act; *see also* section (b)(2)(B) of this chapter. This includes aliens, who entered the United States illegally but who were subsequently granted asylum. If asylum status is terminated, unlawful presence starts to accrue the day after the date of termination. A grant of asylum does not eliminate any prior periods of unlawful presence.

An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal

applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide). However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the derivative beneficiary, the individual is in a period of stay authorized until the determination is made that the application by the principal was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

Finally, a derivative beneficiary, who is physically present in the United States, but who was not included on the asylum application, is protected from the accrual of unlawful presence once the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries, who obtain their status through an Asylee/Refugee Relative Petition.

(iii) Aliens Granted Temporary Protected Status (TPS) pursuant to Section 244 of the Act. If an alien's TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant. *See* section 244(f) of the Act. Please *see* (b)(3)(G) of this section of this *AFM* chapter for the effect of a violation of TPS status on the accrual of unlawful presence, and for the effect of a pending TPS application on the accrual of unlawful presence.

If an alien is granted TPS, he or she is, while the grant is in effect, deemed to be in lawful nonimmigrant status for purposes of adjustment of status and change of status according to section 244(f) of the Act.

A grant of TPS does not, however, cure any unlawful presence that may have accrued before the grant of TPS. If the alien was present without inspection and admission or parole, the alien remains an alien who has not been inspected and admitted or paroled, despite the grant of TPS. *See* INS General Counsel Opinion, 91-27, March 4, 1991. Therefore, if before TPS is granted, the applicant had previously accrued unlawful presence sufficient to trigger the bars, and the applicant travels outside the United States after having obtained advance parole, his or her departure triggers the bars for purposes of an adjustment of change of status application; that is, the individual may be ineligible to adjust despite the wording of section 244(f) of the Act, and depending on the basis upon which the alien seeks adjustment. Also, if a waiver was granted for inadmissibility under section 212(a)(9)(B) or (C) of the Act for purposes of the TPS application, the alien is still inadmissible for purposes of adjustment of status because the standard of the waiver granted for TPS status is different than the one granted in relation to an immigrant benefits application (although both are filed on Form I-601, Application for Waiver of Grounds of Inadmissibility).

(G) **Aliens Present as Parolees**. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of the accrual of unlawful presence, the specific type of parole and the reasons for the grant of parole do not matter; however, conditional parole pursuant to section 236 of the Act cannot be considered parole for purposes of section 212(a)(9)(B)(ii) of the Act. *See* section 40.9.1(a)(3)(D) of this *AFM* chapter.

An alien, who has been paroled into the United States does, however, begin to accrue unlawful presence as follows:

When a parolee remains in the United States beyond the period of parole authorization, unlawful presence begins to accrue the day following the expiration of the parole authorization.

> **Example**: The alien's parole expires January 1, 2007, and the alien does not depart. January 2, 2007 will be the alien's first day of unlawful presence.

If the parole authorization is revoked or terminated prior to its expiration date, unlawful presence begins to accrue the day after the revocation or termination.

An alien paroled for the purpose of removal proceedings will begin to accrue unlawful presence the day after the date the removal order becomes administratively final, or unless the alien is otherwise protected from the accrual of unlawful presence.

(2) **Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)**

As noted in section (a)(2) of this *AFM* chapter, an alien must be in the United States in an unlawful status in order to accrue unlawful presence; however, there are some situations in which unlawful presence does not accrue despite unlawful status. The alien may be protected from accruing unlawful presence by section 212(a)(9)(B) of the Act itself, or by USCIS policy. This section (b)(2) deals with individuals, who are actually in unlawful status but who, by statute, do not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act.

The exceptions listed in this section (b)(2) apply *only* to grounds of inadmissibility listed in section 212(a)(9)(B) of the Act, and *do not* apply for purposes of inadmissibility under section 212(a)(9)(C) of the Act. There are two reasons for this conclusion: 1) The terms of sections 212(a)(9)(B)(iii) and (iv) of the Act refer *only* to specific subsections of section 212(a)(9)(B)(i) of the Act; and 2) Inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rests on a more serious immigration violation than simple unlawful presence: To be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, the alien must not only have accrued sufficient unlawful presence but also returned or attempted to return to

the United States without admission. Since the precise language of sections 212(a)(9)(B)(iii) and (iv) of the Act clearly make them apply only to inadmissibility under section 212(a)(9)(B) of the Act and not to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, and because violations of section 212(a)(9)(C)(i)(I) of the Act are more culpable than mere unlawful presence, USCIS has concluded that these statutory exceptions do not apply to section 212(a)(9)(C)(i)(I) cases. *See* June 17, 1997, Office of Programs memorandum – *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*; *see also* Section (b)(3) below for the same remark.

(A) **Minors Who Are under 18 Years of Age**. An alien whose unlawful status begins before his or her 18th birthday does not begin to accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act until the day after his or her 18th birthday pursuant to section 212(a)(9)(B)(iii)(I) of the Act.

(B) **Aliens with Pending Asylum Applications (Including Children Aging Out and Dependents of Asylum Applicants)**

(i) Principal Applicant. An alien, whose bona fide application for asylum is pending, is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act unless the alien is employed without authorization while the application is pending. *See* section 212(a)(9)(B)(iii)(II) of the Act. It does not matter whether the application is or was filed affirmatively or defensively.

DHS has interpreted the phrase "bona fide asylum application" to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous. If this is the case, unlawful presence does not accrue while the application is pending unless the alien engages in unauthorized employment. DHS considers the application for asylum to be pending during any administrative or judicial review (including review in Federal court).

A denial of an asylum claim is not determinative of whether the claim was bona fide for purposes of section 212(a)(9)(B)(iii)(II) of the Act. Similarly, the abandonment of an application for asylum does not mean that the application was not bona fide. The Asylum Division within the Refugee, Asylum, and International Operations Directorate at USCIS' HQ can provide guidance regarding whether a filing of an asylum application can be deemed "bona fide" based on the specific facts of the case and should be contacted, if there are any questions as to the determination.

(ii) Dependents in General.
An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide).

However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the dependent, the individual is in a period of stay authorized, for example until the determination is made that the application was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

A dependent's asylum case is no longer considered pending if the principal asylum applicant notifies USCIS that the dependent is no longer part of the principal's application, or if USCIS determines that the dependent relationship no longer exists (for example because of divorce, or if the individual is no longer considered a "child"). In such cases, USCIS will remove the individual from the pending asylum application; the individual must file his or her own asylum application as a principal applicant within a reasonable amount of time. The individual will commence to accrue unlawful presence from the time USCIS has removed the dependent from the principal's application. Individuals, who do file a bona fide application within a reasonable period of time, will be deemed to have a pending application and they do not accrue unlawful presence from the time the new bona fide application is pending.

Finally, a derivative beneficiary, who is physically present in the United States but who was not included on the asylum application, is in a period of stay authorized at the time the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries who obtain their status through an Asylee/Refugee Relative petition.

Adjudicators should keep in mind that if the principal asylum applicant's dependent is not yet 18 years old, then the dependent will be protected from accrual of unlawful presence under section 212(a)(9)(B)(iii)(I) of the Act.

(iii) Children Who Age Out and The Child Status Protection Act (CSPA). The CSPA amended section 208(b)(3)(B) of the Act to allow continued classification as a child for an unmarried son or daughter, who was under 21 years of age on the date the parent filed for asylum, provided that the son or daughter turned 21 years of age while the application remained pending. Therefore, if the requirements of the CSPA are met (the alien is present in the United States, named in the asylum application of his or her parent, and the application was pending on or after August 6, 2002) the individual may continue to be classified as a "child" and can be considered to have a pending application. Thus, unlawful presence does not accrue in such cases.

Example: Form I-589, Application for Asylum and for Withholding of Removal, was filed on February 7, 2000, listing a 20-year old derivative son in the United States. The son turned 21 on October 1, 2000. The application remained pending through August 6, 2002, and continues to be pending. For purposes of the asylum application, the son

continues to be a "child" because the application was filed prior to his 21st birthday. The son will not start to accrue unlawful presence until and unless the application is denied.

(C) **Aliens Physically Present in the United States with pending Forms I-730**
Accrual of unlawful presence stops upon the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730). USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide petition is properly filed on behalf of the individual, the individual will no longer accrue unlawful presence.

If the alien was already accruing unlawful presence when the Form I-730 was filed, and the Form I-730 is subsequently denied, the individual will again begin to accrue unlawful presence on the day after the denial of the petition. If, at the time of the filing of the Form I-730, the alien was protected from the accrual of unlawful presence (for example, was in lawful status or had another application pending), but the other basis for protection expired while the Form I-730 was pending, then the alien will begin to accrue unlawful presence on the day after the denial of the Form I-730.

No period during which the bona fide Form I-730 was pending will be counted in determining the accrual of unlawful presence. Since the filing of a Form I-730 does not cure any unlawful presence that has already accrued, if the individual departs during the pendency of the petition, the individual will trigger the 3-year and the 10-year bar, if, prior to the filing of the petition, the individual has already accrued sufficient unlawful presence. Because a refugee has to be admissible as an immigrant pursuant to section 207 of the Act, the individual, upon his return to the United States, will be required to file Form I-602, Application By Refugee For Wavier of Grounds of Excludability, to overcome the bars to admissibility before Form I-730 can be granted to confer derivative refugee status. If the alien departs without advance parole, the individual will have to seek the waiver through the U.S. consulate where the approved Asylee/Refugee Relative Petition will be processed.

(D) **Beneficiary of Family Unity Protection (FUP) Granted pursuant to Section 301 of the Immigration Act of 1990; 8 CFR 236.15**. No period of time in which an alien is a beneficiary of FUP shall be taken into account in determining the period of unlawful presence in the United States, for purposes of section 212(a)(9)(B) of the Act. If the FUP application (Form I-817) is approved, the accrual of unlawful presence will be deemed to have stopped as of the date of the filing of Form I-817, Application for Family Unity Benefits, and will continue through the period the alien retains FUP protection. The grant of FUP protection does not, however, erase prior unlawful presence.

The filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

Section 212(a)(9)(B)(iii)(III) of the Act, by its terms, applies only to Family Unity Program benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence. See *AFM* chapter 40.9.2(b)(3)(F), below.

(E) **Certain Battered Spouses, Parents, and Children**. An approved VAWA self-petitioner and his or her child(ren) can claim an exception from inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can establish a substantial connection between the abuse suffered, the unlawful presence, and his or her departure from the United States. He or she claims this exception by submitting evidence of such substantial connection with his or her adjustment application. If the exception is granted, the individual is deemed to not be inadmissible under section 212(a)(9)(B)(i) of the Act for purposes of future immigration benefits. This exception does not apply to inadmissibility under section 212(a)(9)(C)(i) of the Act, which has its own VAWA waiver in section 212(a)(9)(C)(iii) of the Act.

(F) **Victims of Severe Form of Trafficking in Persons**. Section 212(a)(9)(B)(i) of the Act does not apply to certain victims of severe forms of trafficking. *See* section 212(a)(9)(B)(iii)(V) of the Act. Similar to the battered spouses, a victim of a severe form of trafficking in persons may claim an exception to inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can demonstrate that the severe form of trafficking (as that term is defined in section 7102 of Title 22 U.S.C.) was at least one central reason for the alien's unlawful presence in the United States. An individual can claim the exception by submitting evidence of the central reason with Form I-914, Application for T Nonimmigrant Status, or, at the time of the adjustment, when filing Form I-485, Application to Register Permanent Residence or Adjust Status. 8 CFR 214.11; 8 CFR 245.23 If the exception is granted by USCIS, the individual will be deemed to have never accrued any unlawful presence for purposes of the current nonimmigrant benefits application or any future benefits application.

If the exception is not granted, the individual may apply for a discretionary waiver of the ground of inadmissibility. If seeking T nonimmigrant status, the alien would apply under section 212(d)(3)(A) or 212(d)(13) of the Act by filing Form I-192, Advance Permission to Enter as Nonimmigrant. See 8 CFR 212.16. If the alien is already a T nonimmigrant, and is seeking adjustment of status, the alien would file Form I-601, Application for Waiver Grounds of Inadmissibility. See 8 CFR 212.18.

(G) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS)("Tolling")**. Pursuant to section 212(a)(9)(B)(iv) of the Act, a nonimmigrant, who has filed a timely request for extension of nonimmigrant status (EOS) or change of nonimmigrant status (COS), is protected from accruing unlawful presence during the pendency of the application for up to 120 days (the accrual of unlawful presence is "tolled"). Section 212(a)(9)(B)(iv) of the Act is only applicable to the three-year bar of section 212(a)(9)(B)(i)(I) of the Act, and is also referred to as the

"tolling-provision." However, unlawful presence for purposes of the 3-year bar will only be tolled, if

1) the alien has been lawfully admitted or paroled into the United States, and
2) the application for EOS or COS is timely filed, and not frivolous, and
3) the alien does not engage and/or has not been engaging in unauthorized employment. *See* section 212(a)(9)(B)(iv) of the Act.

By policy, USCIS has extended the 120-day statutory tolling period to cover the entire period during which an application for EOS or COS is pending; this extension is valid for the 3-year and the 10-year bars. For a more detailed description of this extension and guidance concerning whether unlawful presence accrues after the 120-day period specified by the statute, please *see* section 3(C) below.

(3) **Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

As noted in section (a)(2) of this *AFM* chapter, there are some circumstances in which an alien whose status is actually unlawful is, nevertheless, protected from the accrual of unlawful presence. As a matter of policy, USCIS has determined that an alien whose status is actually unlawful does not accrue unlawful presence in the situations described in this subsection. These exceptions are based on policy, unlike the statutory exceptions listed in sections 212(a)(9)(B)(iii) and (iv) of the Act that were discussed in section (b)(2) of this *AFM* chapter. It is USCIS' policy that these exceptions apply to unlawful presence accrued for purposes of sections 212(a)(9)(B) and (C)(i)(I) of the Act unless otherwise noted in this section.

(A) **Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry (Sections 209, 245, and 245(i) of the Act, sections 202 of Public Law 99-603 (Cuban-Haitian Adjustment), section 202(b) of NACARA, section 902 of HRIFA, and aliens with properly filed, pending Registry applications under section 249 of the Act)**. Accrual of unlawful presence stops on the date the application is properly filed pursuant to 8 CFR 103 and the regulatory filing requirements governing the particular type of benefit sought. Note that, if the application is properly filed according to the regulatory requirements, the applicant will not accrue unlawful presence, even if it is ultimately determined that the applicant was not eligible for the benefit in the first place. The accrual of unlawful presence is tolled until the application is denied.

> **Example**: An alien, who has been unlawfully in the United States for 90 days, and who had worked without authorization during the 90 days, applies for adjustment of status based on an approved I-130, Petition for Alien Relative. The

application for adjustment of status is properly filed, that is, the application is fully executed, signed, and the applicant pays the proper fee. *See* 8 CFR 103.2(a)(7). Also, with the application package, the alien provides a copy of Form I-797, Notice of Approval for the Alien Relative Petition, and a copy of the newest Visa Bulletin, demonstrating that a visa number is immediately available in his or her preference category. *See* 8 CFR 245.2. Therefore, USCIS accepts the application and stamps it as received and properly filed as of January 1, 2007. What is not readily apparent from the initial review of the application is that the alien had previously worked without authorization, and therefore, he or she is not eligible to apply for adjustment of status pursuant to section 245(c) of the Act. However, because the application was accepted by USCIS as (technically) properly filed, the applicant is now in authorized stay and does not accrue any unlawful presence during the pendency of the properly filed application for adjustment of status.

At the time of the interview, on April 1, 2007, the applicant's adjustment of status application is denied based on section 245(c) of the Act, for having been employed without authorization. On April 2, 2007, the alien's accrual of unlawful presence resumes because he or she no longer has a pending application for adjustment of status. The alien departs the United States on May 1, 2007, after having secured an immigrant visa interview at the US Embassy/consular section in his or her home country. In assessing the alien's inadmissibility under section 212(a)(9) of the Act, the consular officer will count the alien's 90 days of unlawful presence that accrued prior to the filing of the adjustment of status application, and the 30 days of unlawful presence that accrued after the adjustment of status application was denied. However, the consular officer will not count the time period during which the adjustment of status application was pending because the individual was in a period of stay authorized and did not accrue unlawful presence during the pendency of the adjustment application. In total, the alien had accrued 120 days of unlawful presence in the United States; the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Except in the case of a NACARA or HRIFA application, the application must have been filed affirmatively (with USCIS) rather than defensively (before the immigration judge as a form of relief from removal) for it to toll the accrual of unlawful presence; that is, an alien, who files an application for adjustment of status after being served with a Notice to Appear (NTA) in removal proceedings, is not protected from the accrual of unlawful presence. Accrual of unlawful presence resumes the day after the application is denied. However, if the application that was filed with USCIS is denied, and the alien has a legal basis upon which to renew the application in proceedings before an immigration judge, the protection against the accrual of unlawful presence will continue through the administrative appeal. *See* for example for adjustment of status applications under section 245 of the Act: 8 CFR 245.2(a)(5)(ii) and 8 CFR 1245.2(a)(5)(ii).

(B) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS)("Tolling")**. As noted in 40.9.2(b)(2)(G) of this AFM chapter, by statute, an alien does not accrue unlawful presence for up to 120 days while a non-frivolous EOS or COS application is pending, provided that the alien does not work and/or has not worked unlawfully. This is referred to as "tolling:" while the application is pending after having been properly filed, the alien will not accrue unlawful presence. The above described statutory exception applies to section 212(a)(9)(B)(i)(I) of the Act; it does not apply to section 212(a)(9)(B)(i)(II) or (C)(i)(I) of the Act.

However, according to USCIS policy, an alien does not accrue unlawful presence (the accrual of unlawful presence is tolled), and is considered in a period of stay authorized for purposes of sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act during the entire period a properly filed EOS or COS application is pending, if the EOS or COS application meets the following requirements:

- the non-frivolous request for EOS or COS was filed timely. To be considered timely, the application must have been filed with USCIS, i.e. be physically received (unless specified otherwise, such as mailing or posting date) before the previously authorized stay expired. *See* 8 CFR 103.2(a)(7); 8 CFR 214.1(c)(4); 8 CFR 248.1(b). An untimely request may be excused in USCIS' discretion pursuant to 8 CFR 214.1(c)(4) and 8 CFR 248.1(b); and
- the alien did not work without authorization before the application for EOS or COS was filed or while the application is pending; and
- the alien has not failed to maintain his or her status prior to the filing of the request for EOS or COS.

If these requirements are met, the period of authorized stay covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act and extends to the date a decision is issued on the request for EOS or COS.

A request for EOS or COS may be filed on Form I-539, Application to Extend/Change Nonimmigrant Status, or may be included in the filing of Form I-129, Petition for a Nonimmigrant Worker.

Please *see* Section 40.9.2(b)(2)(G) of this *AFM* chapter for a detailed description of the statutory tolling provision under section 212(a)(9)(B)(iv) of the Act, covering *only* inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

(C) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) Who Depart the United States During the Pendency**. Departure from the United States while a request for EOS or COS is pending, does not subject an alien to the 3-year, 10-year, or permanent bar, if he or she departs after the expiration of Form I-94, Arrival/Departure Record unless the application was frivolous,

untimely, or the individual had worked without authorization. D/S nonimmigrants, who depart the United States while an application for COS or EOS is pending, generally do not trigger the 3-year, 10-year, or permanent bar under sections 212(a)(9)(B)(i) or 212(a)(9)(C)(i)(I) of the Act.

- Evidentiary Considerations: If the applicant subsequently applies for a nonimmigrant visa abroad, the individual has to establish to the satisfaction of the consular officer that the application was timely filed and not frivolous. The requirement that the application was timely may be established through the submission of evidence of the date the previously authorized stay expired, together with a copy of a dated filing receipt, a canceled check payable to USCIS for the EOS or COS application, or other credible evidence of a timely filing.

- Determination by a Consular Officer that the Application Was Non-Frivolous: To be considered non-frivolous, the application must have an arguable basis in law and fact, and must not have been filed for an improper purpose (such as to prolong one's stay to pursue activities inconsistent with one's status). In determining whether an EOS or COS application was non-frivolous, DOS has instructed consular posts that it is not necessary to make a determination that USCIS would have ultimately ruled in favor of the alien. *See* 9 Foreign Affairs Manual (*FAM*) 40.92 Notes, Note 5c.

(D) **Nonimmigrants - Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence**. The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests. If a request for EOS or COS is approved, the alien will be granted a new period of authorized stay, retroactive to the date the previous period of authorized stay expired. This applies to aliens admitted until a specific date and aliens admitted for D/S.

(ii) Denials Based on Frivolous Filings or Unauthorized Employment. If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, any and all time after the expiration date marked on Form I-94, Arrival/Departure Record, will be considered unlawful presence time, if the alien was admitted until a specific date. However, if the alien was admitted for D/S, unlawful presence begins to accrue on the date the request is denied.

(iii) Denials of Untimely Applications. If a request for EOS or COS is denied because it was not timely filed, unlawful presence begins to accrue on the date Form I-94 expired. If, however, the alien was admitted for D/S, unlawful presence begins to accrue the day after the request is denied.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS. If a timely filed, non-frivolous request for EOS or COS is denied for cause, unlawful presence begins to accrue the day after the request is denied.

(v) Motion to Reopen/Reconsider. The filing of a motion to reopen or reconsider does not stop the accrual of unlawful presence. *See* 8 CFR 103.5(a)(iv) (Effect of motion or subsequent application or petition). However, if the motion is successful and the benefit granted, the grant is effective retroactively. The alien will be deemed to not have accrued unlawful presence. If DHS reopens proceedings, but ultimately denies the petition or application again, the petition or application will be considered to have been pending since the initial filing date. Thus, unlawful presence will accrue as specified in paragraphs (ii), (iii) or (iv). In the case of a timely, non-frivolous application, unlawful presence will accrue from the date of the last denial of the petition or application, not from the earlier, reopened decision.

(vi) Appeal to the Administrative Appeals Office (AAO) of the Underlying Petition Upon Which an EOS or COS Is Based. If an individual applies for an EOS or COS as part of an I-129, Petition for Nonimmigrant Worker, the adjudicator has to adjudicate two requests: The petition seeking a particular classification, and the request for an EOS or COS.

The denial of an EOS or COS cannot be appealed. *See* 8 CFR 214.1(c)(5) and 248.3(g). However, the denial of the underlying petition for the status classification can, in general, be appealed. The filing of an appeal to the AAO for the denial of the underlying petition, however, has no influence on the accrual of unlawful presence. Unlawful presence starts to accrue on the day of the denial of the request for EOS or COS regardless of whether the applicant or the petitioner appeals the denial of the petition to the AAO. However, if the denial of the underlying petition is reversed on appeal, and the EOS or COS subsequently granted, the individual is not deemed to have accrued any unlawful presence between the denial of the petition and request for EOS or COS, and the subsequent grant of the EOS or COS.

(vii) Nonimmigrants - Multiple Requests for EOS Or COS ("Bridge Filings") and Its Effect on Unlawful Presence. The terms "authorized status" (authorized period of admission or lawful status) and "period of stay authorized by the Secretary of Homeland Security" are not interchangeable. They do not carry the same legal implications. *See* Section (a)(2) of this *AFM* chapter. An alien may be in a period of stay authorized by the Secretary of Homeland Security but not in an authorized status.

An alien whose authorized status expires while a timely filed request for EOS or COS is pending, is in a period of stay authorized by the Secretary of Homeland Security. The alien does not accrue unlawful presence as long as the timely filed request is pending. However, the filing of a request for EOS or COS does not put an individual into valid

and authorized nonimmigrant status, i.e. he or she is not in authorized status. Therefore, if an individual has filed an initial application for EOS or COS and subsequently files additional (untimely) requests for EOS or COS, the subsequently filed request will not stop the individual from accruing unlawful presence, if the initial request is denied.

(E) **Aliens with Pending Legalization Applications, Special Agricultural Worker (SAW) Applications, and LIFE Legalization Applications**. An alien who properly filed an application under section 245A of the Act (including an applicant for Legalization under any Legalization-related Class Settlement Agreements), section 210 of the Act, or section 1104 of the LIFE Act, is in a period of authorized stay as long as the application remains pending. Accrual of unlawful presence stops on the date the application is filed and resumes the day after the application is denied. However, if the denial is appealed, the period of authorized stay continues through the administrative appeals process. Denied applications cannot be renewed before an immigration judge. Therefore, the period of authorized stay does not continue through removal proceedings or while a petition for review is pending in Federal court.

(F) **Aliens granted Family Unity Program Benefits under section 1504 of the LIFE Act Amendments of 2000**

Section 212(a)(9)(B)(III)(iii) of the Act, by its terms, applies only to Family Unity Program (FUP) benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence.

As with section 301 FUP cases, if the Form I-817 is approved, then the alien will be deemed not to accrue unlawful presence from the Form I-817 filing date throughout the period of the FUP grant.

A grant of FUP benefits under section 1504 does not, however, erase any unlawful presence accrued before the grant of FUP benefits under section 1504 of the LIFE Act Amendments of 2000.

Also, as with section 301 FUP cases, the filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

(G) **Aliens with Pending Applications for Temporary Protected Status (TPS) pursuant to Section 244 of the Act**. The period of authorized stay begins on the date a prima facie application for TPS is filed, provided the application is ultimately approved. If the application is approved, the period of authorized stay continues until TPS status is terminated. If the application is denied, or if prima facie eligibility is not established, unlawful presence accrues as of the date the alien's previous period of authorized stay

expired. The application for TPS can be renewed in removal proceedings pursuant to 8 CFR 244.11 and 8 CFR 1244.11, and the period of authorized stay continues through removal proceedings.

(H) **Aliens Granted Voluntary Departure pursuant to Section 240B of the Act**
Voluntary departure is a discretionary relief that allows certain favored aliens to leave the country willingly. Voluntary departure can either be granted by DHS, by the immigration judge, or the Board of Immigration Appeals (BIA). The length of the voluntary departure period that can be granted depends on the stages of proceedings the alien is in. If the alien is not in removal proceedings, DHS can grant voluntary departure for up to 120 days. *See* section 240B(a) and 8 CFR 240.25. The denial of voluntary departure at this stage, cannot be appealed; however, the denial is without prejudice to the alien for a later application of voluntary departure in removal proceedings. See 8 CFR 240.25(e).

If the alien is in removal proceedings but these proceedings are not yet completed, or if the alien's proceedings are at the conclusion, the immigration judge or the judge at the BIA, may grant voluntary departure. *See* section 240B(a) or (b) of the Act; 8 CFR 1240.26. If the IJ denies voluntary departure, the denial can be appealed to the BIA. 8 CFR 1240.26(g). The time period granted can be up to 120 days if granted prior to completion, or up to 60 days if granted at the conclusion of proceedings. See 8 CFR 1240.26(e). Under certain circumstances, the voluntary departure period can be extended, or voluntary departure reinstated. Voluntary departure is always granted in lieu of removal proceedings or a final order of removal. Therefore, if an alien timely departs according to the voluntary departure period, the alien is not subject to a final order of removal. However, if the alien fails to depart, and there was an alternate order of removal, the alternate order will be become effective upon the alien's failure to depart. *See* 8 CFR 1240.26(d).

On December 18, 2008, the Department of Justice amended the voluntary departure rule; the changes became effective on January 20, 2009 and apply prospectively only. 73 FR 76927 (December 18, 2008). The new rules clarified the relationship between voluntary departure and the filing of a motion to reopen/reconsider or petition for review. It also clarified the impact of the failure to post bond on voluntary departure and the alternate order of removal.

General Rule for the Accrual of Unlawful Presence in Connection With A Grant of Voluntary Departure: Accrual of unlawful presence stops on the date an alien is granted voluntary departure and resumes on the day after voluntary departure expires, if the alien has not departed the United States according to the terms of the grant of voluntary departure.

(i) Voluntary Departure Granted by DHS pursuant to 8 CFR 240.25 (Including Extension of Voluntary Departure). If DHS grants voluntary departure before initiation of removal

proceedings, time spent in voluntary departure does not add to an alien's unlawful presence. A grant of voluntary departure prior to the initiation of removal proceedings may not exceed 120 days. *See* section 240B(a)(2) of the Act. Pursuant to 8 CFR 240.25, voluntary departure may be extended at the discretion of the Field Office Director, except that the total period allowed, including any extensions, may not exceed the 120-day limit. Courts may not extend voluntary departure but they may reinstate voluntary departure.

(ii) Voluntary Departure Granted Pursuant to Section 240B of the Act after the Initiation of Removal Proceedings. If a person is granted voluntary departure after commencement of removal proceedings, unlawful presence ceases to accrue with the grant, and resumes after the expiration of the voluntary departure period. Voluntary departure after the initiation of removal proceedings is governed by section 240B(b) of the Act and 8 CFR 1240.26.

If the immigration judge grants voluntary departure, the alien is not subject to the 3-year bar because of the wording of section 212(a)(9)(B)(i)(I) of the Act. However, the fact that proceedings commenced does not stop the accrual of unlawful presence time for purposes of the 10-year and the permanent bar. *See* 8 CFR 239.3.

(iii) Reversal of a Denial of Voluntary Departure. If the denial of voluntary departure by the Immigration Judge is reversed on appeal by the BIA, the time from the denial to the reversal will be considered authorized stay in the United States (Remember: A denial of voluntary departure by USCIS cannot be appealed.)

(iv) Reinstatement of Voluntary Departure by the Board Of Immigration Appeals (BIA) or the Immigration Judge. An immigration judge or the BIA may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure, and if reopening was granted prior to the expiration of the original period of voluntary departure. *See* 8 CFR 1240.26(h). In no event can the reinstatement of voluntary departure result in a total period of time, including any reinstatement, exceeding the 60 or the 120 days of voluntary departure stated in section 240B of the Act. If voluntary departure is reinstated by the BIA or by the immigration judge, the time from the expiration of the grant of voluntary departure to the grant of reinstatement is not considered authorized stay. However, the time of the reinstated voluntary departure to the ending period of this voluntary departure, is considered authorized stay. Reinstatement of voluntary departure is regulated at 8 CFR 1240.26(h).

(v) Effect of a Petition for Review. In a case involving a grant of voluntary departure before January 20, 2009, if a Federal court with jurisdiction to review the removal order stays the running of the voluntary departure period while the case is pending, the alien will continue to be considered to be under a grant of voluntary departure and will not accrue unlawful presence.

For any EOIR grant of voluntary departure on or after January 20, 2009, however, the filing of a petition for review terminates a grant of voluntary departure and makes the alternate removal order immediately effective. 8 CFR 1240.26(i). If the alien files a petition for review, therefore, the alien will no longer be protected from the accrual of unlawful presence based on the voluntary departure grant. If the alien remains in the United States while the petition is pending, the accrual of unlawful presence will begin the day after the petition for review is filed. This regulation, however, gives the alien 30 days after filing the petition for review in order to leave the United States voluntarily. If the alien leaves within this 30-day period, the alien will continue to be protected from the accrual of unlawful presence up to the date of the alien's actual departure.

(vi) Voluntary Departure and the Filing of A Motion to Reopen To the Board of Immigration Appeals (BIA)

A motion to reopen is a form of procedural relief that asks the BIA to change its decision in light of newly discovered evidence or a change in circumstances since the hearing. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2315 (2008). In general, a motion to reopen has to be filed within 90 days. *See* 240(c)(7) of the Act. Therefore, an alien granted voluntary departure for a period of up to 60 days is either faced with the choice of departing according to the voluntary departure order, or to make use of his or her statutory right to file the motion to reopen and to await the result of the adjudication of the motion.

In 2008, the Supreme Court addressed the issue and held that to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally and without regards to the underlying merits of the motion to reopen, a voluntary departure request before expiration of the departure period. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2320 (2008). As a result, the alien has the option either to abide by the terms and receive the agreed upon benefits of voluntary departure; or, alternatively, to forego those benefits and remain in the United States to pursue an administrative motion.

Therefore, if an alien was initially granted voluntary departure by the immigration judge or the Board of Immigration Appeals before January 20, 2009, but the alien later requests withdrawal of the voluntary departure order, the alien will commence to accrue unlawful presence at the time of the administratively final order of removal unless the alien is otherwise protected from the accrual of unlawful presence (such as the grant of a stay of removal by the BIA). The motion to reopen does not toll voluntary departure. If the alien requests a withdrawal of the voluntary departure order, the alien will accrue unlawful presence as if voluntary departure had never been granted even if the request for withdrawal is made, for example, on the last day of the voluntary departure period.

The *Dada* decision does not apply, however, to any EOIR grant of voluntary departure that is made on or after January 20, 2009. Under 8 CFR 1240.26(b)(3)(iii), filing a

motion to reopen or reconsider during the voluntary departure period automatically terminates the grant of voluntary departure, and makes the alternative removal order effective immediately. Thus, for a grant of voluntary departure on or after January 20, 2009, the alien will no longer be protected from the accrual of unlawful presence beginning the day after the date the alien files a motion to reopen or to reconsider.

(I) **Aliens Granted Stay of Removal**. A stay of removal is an administrative or judicial remedy of temporary relief from removal. The grant of a stay of removal can be automatic or discretionary. *See* sections 240(b)(5) and 241(c)(2) of the Act; 8 CFR 241.6, 8 CFR 1241.6, 8 CFR 1003.6, and 8 CFR 1003.23(b)(1)(v). During a grant of stay of removal, DHS is prevented from executing any outstanding order of removal, deportation, or exclusion. Therefore, an alien granted stay of removal does not accrue unlawful presence during the period of the grant of stay of removal. A stay of removal does not erase any previously accrued unlawful presence.

If an individual is ordered removed in absentia pursuant to section 240(b)(5)(A) of the Act, and he or she challenges the order in a motion to rescind the in absentia order pursuant to section 240(b)(5)(C) of the Act, the alien's removal order will be stayed automatically until the motion is decided. *See* section 240(b)(5)(C) of the Act. The order will be stayed through a possible appeal to the Board of Immigration Appeals (BIA) or Federal court. *See Matter of Rivera-Claros*, 21 I&N Dec. 232 (BIA 1996). For purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act, an individual, who filed a motion to rescind an in absentia order of removal pursuant to section 240(b)(5)(C) of the Act, will not accrue unlawful presence during the pendency of the motion, including any stages of appeal before the BIA or Federal court.

(J) **Aliens Granted Deferred Action**. A DHS field office director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice in determining, as a matter of prosecutorial discretion, to give some cases lower enforcement priority. Deferred action is, in no way, an entitlement, and does not make the alien's status lawful. Deferred action simply recognizes that DHS has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws. There is no specific authority for deferred action codified in law or regulation although certain types of benefits refer to a grant of deferred action. For more information on Deferred Action, please *see* Detention and Removal Operations Policy and Procedure Manual (DROPPM), Chapter 20.8.

Accrual of unlawful presence stops on the date an alien is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not eliminate any prior periods of unlawful presence.

(K) **Aliens Granted Withholding of Removal under Section 241(b)(3) of the Act or Deportation under Former Section 243 of the Act**. Accrual of unlawful presence

stops on the date that withholding is granted and continuous through the period of the grant.

(L) **Aliens Granted Withholding of Removal or Deferral of Removal under the United Nations Convention Against Torture Pursuant to 8 CFR 208.16 and 8 CFR 208.17**. Accrual of unlawful presence stops on the date that withholding or deferral is granted and continuous through the period of the grant.

(M) **Aliens Granted Deferred Enforced Departure (DED)**. The period of authorized stay begins on the date specified in the Executive Order or other Presidential directive and ends when DED is no longer in effect.

(N) **Aliens Granted Satisfactory Departure under 8 CFR 217.3**. Under 8 CFR 217.3(a), a Visa Waiver Program (VWP) alien, who obtains a grant of satisfactory departure from U.S. Immigration and Customs Enforcement, and who leaves during the satisfactory departure period, is deemed to not have violated his or her VWP admission. Thus, unlawful presence will not accrue during the satisfactory departure period, if the alien departs as required. If the alien remains in the United States after the expiration of the grant of satisfactory departure, unlawful presence will begin to accrue the day after the satisfactory departure period expires unless some other provision or policy determination protects the person from accrual of unlawful presence. *See* section (b) of this *AFM* chapter.

(4) **Effect of the Protection from the Accrual of Unlawful Presence on Previously Accrued Unlawful Presence: Protection from the Accrual of Unlawful Presence Does Not Cure Previously Accrued Unlawful Presence**

Unless stated otherwise, protection from the accrual of unlawful presence under any section of this *AFM* chapter does *not* cure any unlawful presence that the alien may have already accrued before the alien came to be protected.

> **Example**: An alien accrues 181 days of unlawful presence. He or she then applies for adjustment of status. Although the alien had accrued 181 days of unlawful presence before he or she applied for adjustment of status, the alien stops to accrue unlawful presence once the adjustment of status application is properly filed. However, the already accrued unlawful presence of 181 days continues to apply to the alien. If the alien departs after having obtained a grant of advance parole, the individual will be subject to the 3-year bar under section 212(a)(9)(B)(i)(I) of the Act.

(5) **Effect of Removal Proceedings on Unlawful Presence**

(A) **Initiation of Removal Proceedings**. The initiation of removal proceeding has no effect, neither to the alien's benefit nor to the alien's detriment, on the accrual of unlawful presence. *See* 8 CFR 239.3. If the alien is already accruing unlawful presence

when removal proceedings are initiated, the alien will continue to accrue unlawful presence unless the alien is protected from the accrual of unlawful presence (as described in these *AFM* chapters). If the alien is not accruing unlawful presence when removal proceedings begin, the alien will continue to be protected from the accrual of unlawful presence until the immigration judge determines that the individual has violated his or her status, or until Form I-94, Arrival/Departure Record expires, whichever is earlier (and regardless of whether the decision is subsequently appealed).

Example 1: An alien, who is present without inspection, is placed in proceedings. The alien was already accruing unlawful presence when placed in proceedings, and will continue to do so while in proceedings unless a provision described in this A*FM* chapter stops the accrual of unlawful presence.

Example 2: An alien, admitted as an LPR, is placed in removal proceedings because of a criminal conviction. As an LPR, the alien does not accrue unlawful presence. The alien will not begin to do so unless the alien becomes subject to a final order of removal, that is, when LPR status is terminated.

Example 3: An alien, admitted as a nonimmigrant for duration of status, is placed in removal proceedings. The alien does not accrue unlawful presence while the proceedings are pending. If the immigration judge rules in the alien's favor on the removal charge, no unlawful presence applies to the alien. If the immigration judge sustains the removal charge, unlawful presence begins to accrue the day after the immigration judge's decision becomes administratively final.

Example 4: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge sustains the removal charge, and the alien appeals. The Board of Immigration Appeals affirms the decision. Once the removal order becomes administratively final, the alien will accrue unlawful presence from May 2, 2010, the day after the immigration judge's order.

Example 5: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge rules in the alien's favor and dismisses the removal charge. The alien will not be deemed to have accrued any unlawful presence.

Example 6: An alien in unlawful status properly files with USCIS an adjustment of status application. USCIS denies the application and places the alien in proceedings. The alien renews the application before the Immigration Judge. Because the alien is renewing an affirmative application that had stopped the

accrual of unlawful presence, the alien does not accrue unlawful presence while the adjustment application is pending before the IJ.

Example 7: An alien whose nonimmigrant admission ended on November 6, 2008, is placed in removal proceedings. On February 6, 2009, the alien files an adjustment application with the immigration judge. The alien had never filed with USCIS. Because the application is not the "renewal" of an affirmative application, filing the application with the immigration judge does not stop the accrual of unlawful presence.

Example 8: Same facts as in Example 7, except that the alien's application is under NACARA or HRIFA. In this situation, filing the application *does* stop the accrual of unlawful presence.

Example 9: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. Removal proceedings are still pending on January 11, 2011. Regardless of the outcome of the proceedings, the alien will accrue unlawful presence the day after the I-94 expires, that is, on January 11, 2011.

The result in Example 9 is consistent with *Matter of Halabi,* 15 I&N Dec.105 (BIA 1974), where the Board of Immigration Appeals (BIA) held that the expiration of the alien's authorized period of stay rendered the alien subject to removal without the need to resolve the original charge listed in the Notice to Appear (in *Halabi*, the individual was originally charged with having violated his status). The BIA indicated that being able to charge the alien as a visa overstay from the date the alien's period of authorized stay expired, although while in removal proceedings, did not "punish" the alien for contesting the original removal charge. *See Halabi,* at 106; *see also Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 491 (1999) (Removal of an alien, who has remained longer than authorized, is not punishment but simply a matter of the alien's "being held to the terms under which he was admitted."); *cf. Westover v. Reno,* 202 F.3d 475 (1st Cir. 2000) (dicta), and *Halabi* at 107-08 (Roberts, Board Chair, dissenting). The alien may avoid any accrual of unlawful presence, for example, by offering to settle the removal proceeding by agreeing to leave the United States no later than the date his or her status expires in return for dismissal of the charge of having violated his or her status before that date. *See* 8 CFR 239.2(a)(4) (notice to appear may be cancelled, if alien has left the United States). Leaving at the expiration of the period of authorized stay and the resulting dismissal of removal proceedings would also avoid the risk of a ruling against the alien on the original charge of having violated his or her status before it expired.

(B) **Effect of Filing an Appeal or Petition for Review on Unlawful Presence**. As noted, the initiation of removal proceedings does not affect the accrual of unlawful presence. *See* 8 CFR 239.3. Thus, the fact that an alien or DHS files an appeal to the Board of Immigration Appeals (BIA) or seeks judicial review of a removal order or the relief granted, does *not* affect the alien's position in relation to the accrual of unlawful presence. If the Board or a Federal court vacates the removal order, however, the alien will not be deemed to have accrued unlawful presence solely on the basis of the vacated removal order. If the Board or the Federal court affirms the removal order, the alien will be deemed to have accrued unlawful presence from the date of the immigration judge's order, unless the alien was already accruing unlawful presence on that date.

(6) **Effect of an Order of Supervision pursuant to 8 CFR 241.5 on Unlawful Presence**

Unless protected by some other provision included in this *AFM* chapter, an alien present in an unlawful status continues to accrue unlawful presence despite the fact that the alien is subject to an order of supervision under 8 CFR 241.5.

(c) Relief from Inadmissibility under Section 212(a)(9)(B)(i)(I) and (II), and Section 212(a)(9)(C)(i)(I) of the Act

(1) Waiver of the 3-Year Bar or the 10-Year Bar under Section 212(a)(9)(B)(i) of the Act

(A) **Nonimmigrants**. If a nonimmigrant is inadmissible, the nonimmigrant may apply for advance permission to enter as a nonimmigrant despite his or her inadmissibility pursuant to section 212(d)(3) of the Act, which is granted in the discretion of the Secretary of Homeland Security. If the alien is an applicant for a nonimmigrant visa at the American consulate, the alien will have to apply for this type of temporary permission through the consulate. The application is adjudicated by the United States Customs and Border Protection (CBP), Admissibility Review Office (ARO) pursuant to section 212(d)(3)(A)(i) of the Act. If the alien is an applicant at the U.S. border for admission because he or she is not required to apply for a visa (other than visa waiver applicants), the application is filed with a CBP designated port of entry or designated Preclearance office. See section 212(d)(3)(A)(ii) and 8 CFR 212.4.

If the nonimmigrant status applicant is an applicant for T or U visa status, the applicant has to file Form I-192 with USCIS at the Vermont Service Center (VSC).

(B) **Immigrants and Adjustment of Status Applicants Who Are the Spouses, Sons, or Daughters of U.S. Citizens or LPRs, and Fiancé(e)s of U.S. Citizens**. DHS has discretion to waive an alien's inadmissibility under section 212(a)(9)(B) of the Act if the alien is applying for an immigrant visa or adjustment of status and the alien is the spouse, son, or daughter of a U.S. citizen or LPR, or the fiancé(e) of a U.S. citizen (in

relation to a K-1/K-2 visa). The alien must establish that denying the alien's admission to the United States, or removing the alien from the United States would result in extreme hardship to the alien's U.S. citizen or LPR spouse, parent, or the K visa petitioner. *See* section 212(a)(9)(B)(v) of the Act; *see* 8 CFR 212.7(a). The application is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with the respective fee as stated in 8 CFR 103.7(b). There is no judicial review available, if the waiver is denied but the denial can be appealed to the Administrative Appeals Office of USCIS pursuant to 8 CFR 103.

If the alien seeks a waiver in relation to an application for a K-1 or K-2 visa, approval of the waiver is conditioned on the K-1's marrying the citizen who filed the K nonimmigrant visa petition within the statutory time of three (3) months from the day of the K-1 nonimmigrant's admission. The reason for this condition is that, at the time of the issuance of the K-1 or K-2 nonimmigrant visa, the K-1 and K-2 nonimmigrants are not yet legally related to the petitioner in the manner required by section 212(a)(9)(B)(v) of the Act. If the K-1 nonimmigrant does not marry the petitioner, and the K-1 and K-2 nonimmigrants do not acquire LPR status on that basis, USCIS may ultimately deny the Form I-601.

There is no waiver available to an alien parent if only his or her U.S. citizen or LPR child experiences extreme hardship on account of the mother's or father's removal.

(C) **Asylees and Refugees Seeking Adjustment of Status**. Section 212(a)(9)(B) grounds of inadmissibility can be waived for Asylees and Refugees seeking adjustment of status pursuant to section 209(c) of the Act. Such aliens must file Form I-602, Application by Refugee For Waiver of Grounds of Excludability. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. *See AFM* chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM* Update 05-33*).*

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. *See* 8 CFR 207.3(b). However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. *See AFM* Chapter 23.6 (Asylee and Refugee Adjustment).

(D) **TPS Applicants**. Section 212(a)(9)(B) of the Act may be waived for humanitarian purposes, to assure family unity, or when it would be in the public interest to grant the waiver. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. *See* section 244 of the Act; 8 CFR 244.3.

Granting a waiver to a TPS applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have a ground of inadmissibility waived is generally an "extreme hardship"- standard for section 212(a)(9)(B) of the Act (3-year and 10-year bars), and not the lesser standard for TPS, i.e. the standard that the waiver may be granted for "humanitarian purposes, to assure family unity, or public interest."

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the alien is not inadmissible under section 212(a)(9)(B) of the Act for purposes of the adjustment of status application. Rather, the adjudicator should direct the applicant to file a new Form I-601 to overcome the specific grounds of inadmissibility for adjustment of status purposes.

(E) **Legalization under Section 245A of the Act and Any Legalization-related Class Settlement Agreements, and Legalization Applicants pursuant to 8 CFR 245a.2(k) and 8 CFR 245a.18**. The waiver can be granted for humanitarian purposes, to ensure family unity, or when the granting of such a waiver is otherwise in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Inadmissibility pursuant to Section 245A or 210 of the Immigration and Naturalization Act.

(2) **Waiver of the Permanent Bar under Section 212(a)(9)(C)(i)(I) of the Act**

Generally, there is no "waiver" of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Rather, an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act must, generally, obtain consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act. *See AFM* chapter 43 concerning Consent to Reapply, which is sought by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of the provisions in section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal; a USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212. A Form I-212 cannot be approved for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act unless the alien has been abroad for at least 10 years. *Matter of Torres-Garcia, supra*. This rule applies in the 9th Circuit as well as in other circuits. *Gonzales v. Department of Homeland Security,* 508 F.3d 1227 (9th Cir. 2007).

There are, however, some waivers that are also available to certain categories of aliens, who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act. If an alien is eligible for one of these waivers, and the waiver is granted, it is not necessary for the alien to obtain approval of a Form I-212.

(A) **HRIFA and NACARA Applicants**. A waiver can be granted at the discretion of USCIS. The waiver is sought by filing Form I-601, Application for Waiver of Grounds of Inadmissibility. *See* 8 CFR 245.13(c)(2) and 8 CFR 245.15(e)(3). However, the standard that applies to the adjudication is the same standard as if the alien had filed Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. *See* February 14, 2001 Office of Field Operations Memorandum, *Changes to Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), based Upon the Provisions of and Amendments to the Legal Immigration Family Equity Act (LIFE).*

(B) **Legalization, SAW, LIFE Act Legalization, and Legalization Class Settlement Agreement Applicants**. A waiver can be granted to such an applicant, if the applicant establishes that a waiver should be granted based on humanitarian reasons, to ensure family unity, or because granting the waiver would be in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Excludability under Section 245A or 210 of the Act. *See* 8 CFR 210.3(e), 8 CFR 245a.2(k), and 8 CFR 245a.18(c).

(C) **TPS Applicants**. TPS applicants may obtain waivers for certain grounds of inadmissibility, including inadmissibility under section 212(a)(9)(C) of the Act. *See* section 244(c)(2) of the Act. The permanent bar may be waived for humanitarian purposes, to assure family unity, or when the granting of the waiver is in the public interest. *See* 8 CFR 244.3. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. *See id.*

Granting a waiver to an applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have waived inadmissibility is different from the one used for TPS applicants. In order to overcome the permanent bar to admissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant for an immigrant visa has to file Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, rather than Form I-601, and no earlier than ten (10) years after the alien's last departure. *See* section 212(a)(9)(C)(ii) of the Act.

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the person is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act for purposes of the adjustment of status application. Any

Form I-212 that is filed by a TPS applicant would be adjudicated according to same principles that apply generally to aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act, including the requirement that the alien may not obtain consent to reapply under section 212(a)(9)(C)(ii) unless the alien satisfies the 10-year absence requirement in the statute.

(D) **Certain Battered Spouses, Parents, and Children**. An approved VAWA self-petitioner and his or her child(ren) can apply for a waiver from inadmissibility under section 212(a)(9)(C)(i) of the Act, if he or she can establish a "connection" between the abuse suffered, the unlawful presence and departure, or his or her removal, and the alien's subsequent unlawful entry/entries or attempted reentry/reentries. *See* section 212(a)(9)(C)(iii) of the Act. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with fee. If the waiver is granted, the ground of inadmissibility and any relating unlawful presence is deemed to be erased for purposes of any future immigration benefits applications.

(E) **Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act.** Asylee and Refugee applicants for adjustment of status may obtain a waiver of inadmissibility in lieu of consent to reapply. The waiver is filed on Form I-602, Application by Refugee for Waiver of Grounds of Excludability. *See* 8 CFR 209.1 and 8 CFR 209.2(b); see also AFM chapter 41.6. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. See *AFM* chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM* Update 05-33*).*

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. *See* 8 CFR 207.3. However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. *See AFM* chapter 23.6 (Asylee and Refugee Adjustment).

Note that the 10-year waiting period normally imposed on applicants for consent to reapply under this ground of inadmissibility (*see* section 212(a)(9)(C)(ii) of the Act) does not apply to refugee and asylee adjustment applicants.

(F) **Nonimmigrants.** An alien who is inadmissible under section 212(a)(9)(C)(i)(I) may, as a matter of discretion, be admitted as a nonimmigrant under section 212(d)(3) of the Act. The alien may make the application when applying for the nonimmigrant visa with the Department of State or, if eligible, file Form I-192 to seek this benefit. Obtaining relief under section 212(d)(3) does not relieve the alien of the need to obtain consent to reapply under section 212(a)(9)(C)(ii) of the Act if the alien seeks to acquire permanent residence.

AD 08-03 [Date signed]	Chapter 40.9.2	This memorandum eliminates chapter 30.1(d) of the *Adjudicator's Field Manual* (*AFM*), and redesignates the section as chapter 40.9.2

4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

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