

9 FAM 40.92

ALIENS UNLAWFULLY PRESENT

(CT:VISA-1341; 10-09-2009)
(Office of Origin: CA/VO/L/R)

9 FAM 40.92 RELATED STATUTORY PROVISIONS

(CT:VISA-1341; 10-09-2009)

See INA 212(a)(9)(B) (8 U.S.C. 1182(a)(9)(B)).

INA 212(a)(9)(B)(i)

- (9) Aliens *Previously Removed*
- (B) Aliens *Unlawfully Present*
- (i) In *General*

Any alien (other than an alien lawfully admitted for permanent residence) who—

- (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) of this title) prior to the commencement of proceedings under section 235(b)(1) of this title or section 240 of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or
- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

INA 212(a)(9)(B)(ii)

- (ii) Construction of *Unlawful Presence*

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is

present in the United States without being admitted or paroled.

INA 212(a)(9)(B)(iii)

(iii) Exceptions

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees

No period of time in which an alien has a bona fide application for asylum pending under section 208 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family *Unity*

No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered *Women* and *Children*

Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(V) Victims of a *Severe Form* of *Trafficking* in *Persons*

Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in 22 U.S.C. 7102) was at least one central reason for the alien's unlawful presence in the United States.

INA 212(a)(9)(B)(iv)

(iv) Tolling for *Good Cause*

In the case of an alien who—

- (I) has been lawfully admitted or paroled into the United States,
- (II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and
- (III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

INA 212(a)(9)(B)(v)

- (v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

9 FAM 40.92 RELATED REGULATORY PROVISIONS

(CT:VISA-1341; 10-09-2009)

See 22 CFR 40.92.

Section 40.92 Aliens unlawfully present.

- (a) *3-year bar.* An alien described in INA 212(a)(9)(B)(i)(I) shall be ineligible for a visa for 3 years following departure from the United States.
- (b) *10-year bar.* An alien described in INA 212(a)(9)(B)(i)(II) shall be ineligible for a visa for 10 years following departure from the United States.
- (c) *Waiver.* If a visa applicant is inadmissible under paragraph (a) or (b) of

this section but appears to the consular officer to meet the prerequisites for seeking the benefits of INA 212(a)(9)(B)(v), the alien shall be informed of the procedure for applying to DHS for relief under that provision of law.

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