UNDERSTANDING UNLAWFUL PRESENCE UNDER INA § 212(A)(9)(B) AND WAIVERS OF UNLAWFUL PRESENCE, I-601 AND I-601A

By ILRC Attorneys

This advisory explains unlawful presence under INA § 212(a)(9)(B) and the differences between the I-601 and I-601A waivers of unlawful presence. It covers who needs a waiver of unlawful presence, what are the requirements for a waiver of unlawful presence, and which waiver process to use depending on the applicant's circumstances.[1]

NOTE: This advisory does *NOT* address § 212(a)(9)(C) unlawful presence, the "permanent bar." Unlawful presence can implicate the grounds of inadmissibility at INA § 212(a)(9)(B), often referred to as the "three- and ten-year bars," as well as § 212(a)(9)(C), referred to as the "permanent bar." **This advisory only discusses waivers of the three- and ten-year bars of unlawful presence** because an individual who has triggered the permanent bar is not eligible for a waiver-type application[2] *until they have remained outside the United States for a minimum of ten years*. In contrast, a waiver of the three- and ten-year bars, if approved, means that the applicant does not have to wait the three or ten years before seeking admission. There is no way to avoid the prerequisite minimum ten years outside the country associated with the permanent bar, and in this situation the "waiver" is a request for permission to reapply for admission, that can only be submitted once the ten years have been fulfilled.[3]

I. Introduction

The three- and ten-year bars at INA § 212(a)(9)(B) penalize people who stay too long in unlawful status in the United States, leave, and then apply for admission. They are only triggered when the person *departs* the United States. These grounds apply to people who originally were admitted or paroled but then stayed past the expiration of their authorization; those who entered without inspection; and those who knowingly made a false claim of citizenship to obtain permission to enter.

A waiver of the three- and ten-year unlawful presence bars is available for people who are the spouses, sons, or daughters of U.S. citizens or lawful permanent residents. There are two different unlawful presence waiver processes—one involves Form I-601 and the other, the provisional waiver process, uses Form I-601A. As will be discussed further in this advisory, the I-601 can be used to waive multiple grounds of inadmissibility, including unlawful presence under 212(a)(9)(B), and in multiple contexts (immigration court, adjustment of status, consular processing).

In contrast, the I-601A provisional waiver process has a much narrower use: the I-601A allows immigrant visa applicants presently within the United States who will be leaving to consular process—thereby triggering unlawful presence *when they depart* to attend their consular interview—to apply for the waiver of unlawful presence before they leave, knowing they will be triggering this bar and need an unlawful presence waiver later on. This allows applicants to wait in the United States while their unlawful presence waiver is pending (otherwise, these applicants who are consular processing must wait outside the United States unless and until their waiver is approved), significantly reducing the time they must be away from family to complete the process for obtaining permanent residency.

The provisional waiver process (I-601A) is *only* for unlawful presence and *only* for those green card applicants who will be consular processing. In addition, the provisional waiver is not a final decision, because it can be rejected by the Department of State if other grounds of inadmissibility are found. A denied provisional waiver cannot be appealed, nor is a motion to reopen possible.[4] For more information specifically on the I-601A eligibility requirements and process, please see ILRC's companion advisory on the I-601A provisional waiver.[5]

II. Determining whether the applicant needs a waiver of unlawful presence under INA § 212(a)(9)(B)

In order to determine whether the applicant needs a waiver of unlawful presence under § 212(a)(9)(B),[6] you must assess the amount of unlawful presence they have accrued, which requires an understanding of what time periods matter for the three- and ten-year bars. In addition, you must look at whether they have triggered or will be triggering unlawful presence inadmissibility, which turns on whether they will be making a "departure" within the meaning of § 212(a)(9)(B).

A. How much unlawful presence has the applicant accrued?

1. How much unlawful presence is too much

Unlawful presence has to do with a period of time in the United States without lawful status. It also requires a *departure* from the United States (see Section B). Here we describe the amount of unlawful presence that may lead to unlawful presence inadmissibility (*if the applicant also departs*, see Section B).

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

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

2. What periods of time count towards unlawful presence

There are a handful of rules for how to count unlawful presence for purposes of § 212(a)(9)(B)—not all time periods count. Many are found in the statute itself, at § 212(a)(9)(B)(iii), although others are based on USCIS policy and thus subject to change.[7]

How to count unlawful presence for the three- and ten-year bars:[8]

- **Start counting on April 1, 1997.** Unlawful presence does not start accumulating until April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which added unlawful presence inadmissibility. For example, a person who had been unlawfully present in the United States for several years but left on or before September 27, 1997 (within 180 days after April 1, 1997) will not be inadmissible under 212(a)(9)(B) for either the three- or ten-year bar.

- **Only count continuous periods.** For purposes of calculating unlawful presence under this provision, the period of unlawful presence must be continuous. Thus, a person who is unlawfully present for four months, leaves the country, and comes back to being without status for five months has not spent six months or longer in continuous unlawful presence (during a single stay) and so does not come within the three- or ten-year bar.[9] If, however, a

person accrues several periods of unlawful presence during one single stay, interspersed with other periods of lawful presence, USCIS will add the multiple periods together.[10]

- **Do not count time that the noncitizen is under age 18.** Unlawful presence does not accrue for purposes of the three- and ten-year bars during time the noncitizen is under age 18.[11]

  > **Example:** Carlos came to the U.S. one year ago by crossing the border without inspection. He turned 18 years old last week. He is undocumented but qualifies for a visa through his stepmother. Will Carlos need a waiver for unlawful presence?
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  > No. Carlos does not need a waiver for unlawful presence because he did not start accruing unlawful presence until he turned 18, a week ago. As a result, if Carlos leaves the U.S. (to pursue a green card through his stepmother by consular processing) within six months of his 18th birthday, he will avoid triggering 212(a)(9)(B) unlawful presence inadmissibility because he will have less than 180 days of unlawful presence when he departs.

- **Do not count time that the noncitizen has approved deferred action,[12] including Deferred Action for Childhood Arrivals (DACA),[13] or is the beneficiary of Family Unity protection.[14]**

- **Do not count time while certain applications are pending:** a bona fide asylum application or asylee-refugee relative petition,[15] properly filed affirmative application for adjustment of status, Registry, Special Agricultural Worker, Temporary Protected Status (TPS),[16] extension of status or change of status request is pending.[17] This applies to applications for adjustment of status under INA §§ 209, 245, and 245(i); NACARA § 202(b); HRIFA § 902; and the Cuban-Haitian Adjustment Act § 202.[18] It also applies to applications for Registry under INA § 249, and to a few other situations.[19]

- **Do not count time if the person was a victim of extreme cruelty or human trafficking and there is a connection between their victimization and the unlawful presence.** A person will not be inadmissible for unlawful presence under 212(a)(9)(B) if they are a VAWA self-petitioner and there was a "substantial connection" between the battery or cruelty, the unlawful presence, and the departure.[20] Similarly, they will not be inadmissible under 212(a)(9)(B) if the person was the victim of a severe form of human trafficking (T visa applicant), where they can demonstrate that the trafficking was "at least one central reason" for their unlawful presence in the United States.[21]

B. Is the applicant going to trigger the three- or ten-year bars of inadmissibility?

As mentioned in the previous section, inadmissibility under § 212(a)(9)(B) requires accumulation of a specific period of unlawful presence *and a departure* (as well as seeking re-admission to the United States). Therefore, if the individual need never depart to pursue a green card, because they are eligible to adjust status,[22] then they avoid triggering unlawful presence and will not need an unlawful presence waiver. Other scenarios where a person may have accumulated more than 180 days or more than a year of unlawful presence but does not trigger unlawful presence inadmissibility are where they leave the United States with advance parole, which does not count as a "departure" for 212(a)(9)(B) purposes, or they depart pursuant to an immigration judge's order after 180 days but less than a year of unlawful presence. Each of these scenarios is discussed below.

1. Adjustment of status eligibility may mean an applicant can avoid triggering unlawful presence

In order to trigger the three- or ten-year bars of inadmissibility, the applicant must *depart* the United States after having accrued the sufficient number of days of unlawful presence outlined in § 212(a)(9)(B) (i)(I) (more than 180 days but less than one year) or § 212(a)(9)(B)(i)(II) (more than one year), keeping in mind that unlawful presence does not start accruing until April 1, 1997, does not accrue while the applicant is a minor, and the other exceptions as detailed in Section A. This means that someone can have accrued twenty years of unlawful presence living in the United States without lawful status, for example, but as long as they never leave the United States, they are not inadmissible for unlawful presence. For this reason, if someone is eligible for adjustment of status (applying for a green card from within the United States)[23] and has not yet departed and triggered unlawful presence inadmissibility, they may be able to avoid ever needing a waiver for unlawful presence. People fortunate enough to be able to adjust their status do not have to depart the United States, and so the three- and ten-year bars will not apply to them regardless how much unlawful presence they have accumulated, as long as they have not previously left the United States.

> **Example:** Evie first came to the U.S. on a valid visitor visa. She stayed in the U.S. after her visa expired and currently does not have immigration status. After working without authorization in the U.S. for a few years, she met and married Bob, a U.S. citizen. As a U.S. citizen spouse, Bob can file an immediate relative petition for Evie. Evie is eligible to adjust status because she was inspected and admitted when she came to the U.S. with the visitor visa, and also because she is an immediate relative (even though she is now out of status and working without employment authorization),[24] without having to leave the U.S. to consular process. Because Evie does not need to leave the U.S. to pursue a green card, she will not trigger the three- or ten-year bars and will not need a waiver for unlawful presence inadmissibility.

2. A departure with advance parole is not a "departure" within the meaning of 212(a)(9)(B)

A departure from the United States under a grant of advance parole does not count as a "departure" under INA § 212(a)(9)(B) and thus—unlike other departures—does not trigger this ground of inadmissibility. *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). This applies regardless the basis for the advance parole, e.g. TPS or DACA. As a result, individuals who travel and return with advance parole will not need a waiver for unlawful presence if the trip with advance parole was the only time they left the United States. Further, because their last entry was with parole, they may become eligible for adjustment of status upon their return.

> **Example:** Lana came to the U.S. without inspection in 1998. She received TPS in 2001. Lana is now married to a U.S. citizen but is ineligible to adjust status since she entered without inspection, and she lives in Georgia.[25] If she visits her family in El Salvador with advance parole, she will not trigger unlawful presence bars when she leaves. In addition, she would then become eligible to adjust status upon her return, because her last entry would now be a "parole" entry.[26]

NOTE: USCIS takes the position that an asylee who departs the United States with a valid refugee travel document *does* make a "departure" for unlawful presence purposes. According to USCIS, asylees who have secured valid refugee travel documents *will* trigger the three- or ten-year bars upon departing, if they had accrued unlawful presence before applying for asylum. Persons who re-enter the United States as asylees with valid refugee travel documents will be permitted to re-enter, even if they triggered unlawful presence. Nonetheless, they will require a waiver for this ground of inadmissibility at time of adjustment, if they apply to adjust during the applicable three- or ten-year bar. Asylees adjusting status may apply for a waiver of inadmissibility for unlawful presence and other grounds under INA § 209(c), which is a more generous waiver provision. Following the logic of the BIA decision in *Arrabally and Yerrabelly*, asylees should argue that their departure is not a departure that triggers unlawful presence for purposes of INA § 212(a)(9)(B).

3. The three-year bar and removal proceedings

The three-year bar is only triggered when a person voluntarily departs the United States before being placed in removal proceedings. If the person is placed in proceedings, then receives voluntary departure from the judge or is ordered deported, and leaves after 180 days in the United States but prior to accruing one year of unlawful presence, they will not fall under the three-year unlawful presence bar. Thus, someone with more than 180 days of unlawful presence who is placed in removal proceedings can accept voluntary departure and leave before one year, avoiding needing a waiver of unlawful presence in order to consular process. This is a useful strategy for those already in relationships that would support a family-based visa petition.

In contrast, the ten-year bar is triggered regardless of the circumstances in which the person leaves the United States (unless they leave pursuant to a grant of advance parole, see above). The ten-year bar will include any departure from the United States, whether the person decides to leave on their own or is required to depart pursuant to removal proceedings.[27]

WARNING: Re-entry or Attempted Re-entry and the Permanent Bar. Those who not only depart after accumulating unlawful presence, but then also *re-enter or attempt to re-enter illegally* may be inadmissible under the "permanent bar" at INA § 212(a)(9)(C). The permanent bar applies to anyone (a) who has cumulatively accrued more than one year of unlawful presence or who has a prior removal order and (b) enters or attempts to enter without being admitted. Someone who has accrued more than a year of unlawful presence and leaves the United States, appearing to have triggered only the ten-year bar at § 212(a)(9)(B)(i)(II), *but then returns illegally*, has actually now triggered the much more serious permanent bar at § 212(a)(9)(C). If the permanent bar applies, the intending immigrant will be ineligible to even apply for a "waiver" of this ground of inadmissibility until they have spent at least ten years outside the United States. For this reason, make sure to screen carefully for all entries and departures from the United States. And keep in mind that if you are meeting with someone *in the United States* who seems to have triggered the ten-year bar by having accrued more than one year of unlawful presence and then departed the United States, they likely have triggered the permanent bar, as the fact they are now in the United States necessarily means they have since returned (and you will want to explore the details of their return). In other words, you are most likely to encounter either someone who *has not yet triggered 212(a)(9)(B)* unlawful presence but will when they depart for their consular interview—who may be a good candidate for the I-601A (see Part IV.)—or else someone who *has triggered the 212(a)(9)(C) permanent bar*, and thus cannot use either the I-601 or the I-601A to waive this inadmissibility.

> **Example:** Inez wants to consular process based on her marriage to Calvin, a U.S. citizen. She tells you she entered without inspection in 1999 when she was 19 years old. As you are preparing her unlawful presence waiver, you learn that Inez briefly left the United States in 2001 to attend her grandmother's funeral, after which she re-entered illegally. Unfortunately, this means Inez is subject to the permanent bar. She will not be able to consular process unless she remains outside the U.S. for at least 10 years, and only then if an I-212 "permission to reapply" is granted.

III. Requirements for a waiver of unlawful presence under INA § 212(a)(9)(B)

Once you have determined that the applicant has accrued sufficient unlawful presence such that departing the United States to consular process (in order to pursue a green card) would trigger the three- or ten-year bar,[28] the next step is to determine whether they are eligible for a waiver of unlawful presence. Under INA § 212(a)(9)(B)(v), the unlawful presence waiver requires a showing of hardship to a qualifying relative. The applicant must also warrant a favorable exercise of discretion. If the applicant lacks a qualifying family member, is unable to establish hardship that rises to the required level, or is denied based on discretion, then they will be unable to overcome this ground of inadmissibility.[29]

A. Qualifying family member

For the purposes of this waiver, a qualifying family member—sometimes referred to as the "statutory relative"—is a U.S. citizen or lawful permanent resident spouse or parent. No other relatives, including U.S. citizen or LPR children, can be qualifying family members for this type of waiver. The qualifying family member does not have to be the same person who filed the underlying petition for the applicant. Additionally, an applicant can have more than one qualifying family member.

> **Example:** Maria has been living in the United States without documents since she entered without inspection in 1998. She has a 21-year-old U.S. citizen daughter, Joy, and an LPR mother, Graciela. Joy can petition for her mother as an immediate relative of a U.S. citizen. To qualify for the waiver, Maria will need to show hardship to her LPR mother Graciela because Joy, as Maria's child, cannot be the qualifying family member for the waiver. If Maria's mother were undocumented or living abroad with no U.S. immigration status, Maria would be ineligible for the unlawful presence waiver because she would lack a qualifying family member.

B. Extreme hardship

Assuming the applicant has a qualifying family member, the next hurdle in obtaining an unlawful presence waiver is demonstrating that the qualifying family member would suffer extreme hardship if the waiver applicant is denied admission (denied the waiver). In establishing extreme hardship (and other eligibility requirements), the burden of proof is on the applicant[30] and requires a showing by a preponderance of the evidence, or "more likely than not" standard.[31]

Family separation, financial hardship, and other common consequences of inadmissibility are not enough. Rather, the applicant must show the qualifying relative would experience hardship beyond the common consequences of family separation or relocating to another country. Factors that may be relevant in establishing extreme hardship include emotional and psychological trauma suffered from separation, loss of employment or educational opportunities, loss of access to medical care, and other severe changes in the life of the qualifying family member resulting from the separation, as well as conditions in the country to which the relative may have to relocate to avoid living apart from the applicant.

When crafting your extreme hardship argument, be sure to read the USCIS policy guidance on extreme hardship in waivers, available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html. For further discussion on extreme hardship, see ILRC, *Understanding Extreme Hardship in Waivers: What Extreme Hardship Is and How to Prove It*, (Jan. 31, 2018).[32] If filing a provisional waiver, it is important to keep in mind the interplay between I-601A revocation and public charge when preparing the extreme hardship part of the waiver case.[33]

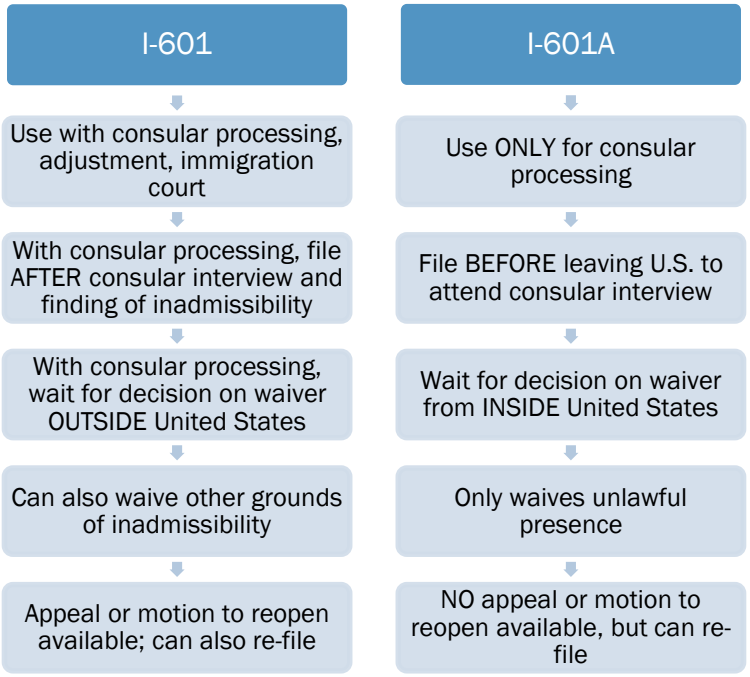
C. Favorable exercise of discretion

Even though establishing extreme hardship to the qualifying family member may be the focus of the waiver application, the waiver will only be granted if USCIS ultimately determines the applicant warrants a favorable exercise of discretion.[34] This means the positive factors must outweigh the negative factors in the case. Therefore, do not neglect this final point in your waiver application, which requires a shift in focus from the qualifying family member back to the applicant, explaining why the applicant "deserves" the waiver. Documentation to support the discretionary grant could include proof the applicant has filed taxes in the United States, volunteers with their church or a community organization or at their child's school, letters from family and friends attesting to the applicant's good moral character, and awards and certificates the applicant may have received.

IV. Understanding the difference between the I-601 and I-601A waivers for unlawful presence

Once you determine which grounds of inadmissibility apply to the applicant (and whether the applicant is eligible to adjust or must consular process), you can determine whether the applicant can utilize the I-601A provisional unlawful presence waiver process, file a traditional I-601 waiver for multiple grounds of inadmissibility including unlawful presence, or decide not to file either at this time based on the risks. If the three- or ten-year bar is the *only* ground of inadmissibility that applies to the applicant, and the applicant will be consular processing, then the provisional waiver may be appropriate.

Overview of the main differences between the I-601 and the I-601A waivers for unlawful presence:



Generally, if a person is immigrating through a U.S. consulate abroad and requires a waiver of inadmissibility, the traditional I-601 waiver procedure requires they first attend their immigrant visa interview at the consulate before applying for a waiver; the waiver application cannot be filed until a consular officer makes a formal finding of inadmissibility. More than one waivable ground of inadmissibility may be included with the same I-601 waiver. It can take over a year for the waiver to be adjudicated,[35] and during this entire time the immigrant visa applicant must remain outside the United States.

The provisional waiver is appealing for applicants whose only ground of inadmissibility is unlawful presence because it allows the applicant to leave to consular process with a waiver for unlawful presence already granted (if the provisional waiver is denied, the applicant may decide to remain inside the United States and avoid actually triggering unlawful presence inadmissibility with a departure). This allows those who are only inadmissible for unlawful presence to avoid long waits outside the United States while USCIS adjudicates the waiver,[36] and takes away at least some of the fear of not knowing whether a waiver will be granted after leaving the United States.

However, if another ground of inadmissibility is discovered at the consular interview, the I-601A will be revoked and the applicant will need to request a new waiver of unlawful presence using the I-601, if they are also able to overcome the other inadmissibility issue because it is waivable or an exception applies. Otherwise, they may be permanently stuck

outside the United States. For more information on the I-601A provisional waiver requirements and process, see forthcoming practice advisory from the ILRC.[37]

The traditional I-601 can waive other grounds of inadmissibility—not just unlawful presence—and it can be used in more situations. For instance, those adjusting status here in the United States can use the I-601 to waive multiple grounds of inadmissibility in conjunction with the adjustment application. An immigration judge or an immigration officer can adjudicate a traditional I-601 waiver.

The I-601A has its own set of eligibility criteria, beyond the statutory unlawful presence waiver criteria, including that a person cannot apply before age 17 and cannot be in removal proceedings, unless those proceedings are administratively closed. The person must be in the United States in order to avail themselves of this process, and can only file the I-601A after having paid the Immigrant Visa fee bill to the National Visa Center. For a thorough discussion of the I-601A eligibility requirements, process, and pitfalls, please see ILRC's companion advisory on the I-601A waiver.[38]

Attached as **Appendix A** is a chart which can be a starting point for determining whether an applicant should apply using the I-601 waiver or the I-601A provisional waiver, based on various considerations specific to each applicant.

End Notes

[1] For questions about this advisory, please contact abrown@ilrc.org.
[2] Form I-212, "Application for Permission to Reapply for Admission," or "Consent for Permission to Reapply for Admission." See forthcoming ILRC practice advisory on Form I-212, available at https://www.ilrc.org/.
[3] A "waiver" of the permanent bar can be requested *after ten years outside the United States* using Form I-212, Application for Permission to Reapply for Admission. See ILRC practice advisory on Form I-212, available at https://www.ilrc.org/.
[4] 8 CFR § 212.7(e)(11).
[5] Available at https://www.ilrc.org/.
[6] Assuming they are, or will be, seeking admission. Seeking admission includes an application for adjustment of status or an immigrant visa; these applications usually require a showing of admissibility.
[7] To date, USCIS has not published any regulations governing unlawful presence determinations. A significant instance where USCIS recently changed its policy is regarding accumulation of unlawful presence for F (student), J (exchange visitor), and M (vocational student) nonimmigrants and their dependents. Previously, F, J, and M nonimmigrants who were admitted or present in the United States for "duration of status" ("D/S") or until a specified date would only begin accruing unlawful presence once a formal finding was made by USCIS or an immigration judge that the person was out of status, regardless when the actual violation of status previously occurred. For those admitted until a specified date, they did not begin accruing unlawful presence until the day after their I-94 expired, or USCIS or an immigrant judge made a formal finding that they were out of status, whichever came first. An August 2018 USCIS memorandum ended this policy. *See* USCIS, *Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants*, (Aug. 9, 2018), *available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf*.
[8] Note these rules *only* apply to 212(a)(9)(B), the three- and ten-year bars, *not* to 212(a)(9)(C), the permanent bar. In some instances in the list we have noted where a rule differs from the permanent bar.
[9] Note, however, that the permanent bar at INA 212(a)(9)(C) *does* add time periods together, meaning unlawful presence is counted in the aggregate.
[10] *See* USCIS, *Interoffice Memorandum on Consolidation of Guidance Concerning Unlawful Presence*, 13 (May 6, 2009), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF, [hereinafter *USCIS Unlawful Presence Guidance*]; AFM Ch. 40.9.2(a)(4)(A).
[11] INA § 212(a)(9)(B)(iii)(I). However, there is no "minor exception" for the permanent bar at 212(a)(9)(C).
[12] *See* AFM Ch. 40.9.2(b)(3)(J) ("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."); 9 FAM § 302.11-3(B)(1) ("for purposes of INA 212(a)(9)(B), unlawful presence will not accrue during a 'period of authorized stay,' which includes… [f]or aliens granted deferred action, the period during which deferred action is authorized.'").
[13] *See* USCIS, *DHS DACA Frequently Asked Questions*, Q1., available at https://www.uscis.gov/archive/frequently-asked-questions#education.
[14] INA § 212(a)(9)(B)(iii)(III) (Family Unity exception). Under Section 301 of the Immigration Act of 1990. By USCIS policy, this exemption has been extended to Family Unity under section 1504 of the LIFE Act Amendments of 2000, for both 212(a)(9)(B) and the permanent bar.
[15] INA § 212(a)(9)(B)(iii)(II). Unless the noncitizen works without authorization during that time.
[16] If approved, a TPS application will only cure unlawful presence retroactively until the time of filing. If the TPS application is denied, unlawful status will have accrued since the time the previous authorized stay expired. *USCIS Unlawful Presence Guidance.*
[17] INA § 212(a)(9)(B)(iv) (tolling for good cause, includes for pending non-frivolous application for extension or change of status).
[18] The policies further indicate that, except in cases of NACARA or HRIFA applications, persons filing the listed applications after being served with a Notice to Appear in removal proceedings will not be protected from accrual of unlawful presence.
[19] *USCIS Unlawful Presence Guidance*.
[20] INA § 212(a)(9)(B)(iii)(IV).
[21] INA § 212(a)(9)(B)(iii)(V).
[22] And meet all the other requirements to adjust status; lack of unlawful presence inadmissibility under § 212(a)(9)(B) is not the only hurdle to overcome in order to be eligible to adjust status. *See* INA § 245.
[23] *See* ILRC, *Family-Based Adjustment of Status Options*, (Dec. 21, 2018), available at https://www.ilrc.org/family-based-adjustment-status-options.
[24] *See* INA § 245(c)(2), exception for immediate relatives.
[25] Georgia is in the Eleventh Circuit, which held that a TPS grant is *not* an "admission" for adjustment of status purposes, see *Serrano v. U.S. Attorney General*, 655 F.3d 1260 (11th Cir. 2011), in contrast to the Sixth and Ninth Circuit Courts of Appeal, which both found that a grant of TPS is an "admission" for adjustment of status purposes. *See Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017). If Lana instead lived within the Sixth or Ninth Circuit Courts of Appeal, then, she *would* be eligible for adjustment of status, notwithstanding her lack of an inspected entry or parole entry. For now, the government maintains that outside the Sixth and Ninth circuits, a grant of TPS is not an "admission."
[26] *See* ILRC, *Family-Based Adjustment of Status Options*, (Dec. 21, 2018), available at https://www.ilrc.org/family-based-adjustment-status-options.
[27] INA § 212(a)(9)(B)(i)(II). *See also Matter of Lemus*, 24 I. & N. Dec. 373 (BIA 2007); *vacated* by *Lemus-Losa v. Holder*, 576 F.3d 752 (7th Cir. 2009).
[28] Recall from discussion above that this is the most likely scenario in which you will encounter someone in need of a waiver of unlawful presence—someone who has not yet triggered the unlawful presence with a departure but will be when they leave the country to consular process—because if

instead they've already triggered the unlawful presence bar with a departure, and they've subsequently returned to the United States unlawfully, then they actually have a 212(a)(9)(C) permanent bar problem, which an I-601 or I-601A unlawful presence waiver cannot fix.

[29] Depending upon which unlawful presence waiver process was used, they may be able to appeal a denial. There is no appeal for denial of an I-601A provisional waiver. With either unlawful presence waiver, however, the applicant also always has the option to re-file, if they believe they can overcome the basis for the denial.

[30] *See* INA § 291.

[31] *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) (identifying preponderance of the evidence as the standard for immigration benefits generally, in that case naturalization).

[32] Available at https://www.ilrc.org/understanding-extreme-hardship-waivers-what-extreme-hardship-and-how-prove-it.

[33] For more information on this, see forthcoming companion ILRC advisory on the provisional waiver requirements, process, and potential pitfalls at https://www.ilrc.org/.

[34] *See* INA § 212(a)(9)(B)(v).

[35] See https://egov.uscis.gov/processing-times/ for I-601 processing times. At the time of this writing, processing times are 11 to 14 months.

[36] See https://egov.uscis.gov/processing-times/ for I-601A provisional waiver processing times. At the time of this writing, processing times are 6.5 to 8.5 months.

[37] This advisory, and others, can be accessed at https://www.ilrc.org/.

[38] Available at https://www.ilrc.org/.

Appendix A: Chart of Considerations for I-601 or I-601A

This chart can be a starting point for determining whether an applicant should apply for a waiver of unlawful presence using the I-601 waiver or the I-601A provisional waiver, based on various considerations. It accompanies the ILRC practice advisory *Understanding Unlawful Presence Under INA § 212(a)(9)(B) and Waivers of Unlawful Presence, I-601 and I-601A*, (March 2019), available at https://www.ilrc.org/. Please reference the corresponding practice advisory for a fuller discussion of unlawful presence under INA § 212(a)(9)(B) and the two different processes for waiving unlawful presence. For more details specifically on the provisional waiver, see companion advisory also available at https://www.ilrc.org/.

Consideration	Traditional I-601 Waiver	I-601A Provisional Waiver
What type of relief is the applicant considering?	Can be used with consular processing *and* adjustment of status cases.	Can *only* be used for *consular processing*.
(For consular processing cases) Has the applicant already left the U.S. or completed their consular interview?	If yes, can apply for the I-601 waiver. Can only apply *after* the consular interview has taken place and the applicant has been found inadmissible. If no, then the applicant is not yet able to apply for the I-601 waiver (but they can and should be advised about it prior to departing). And if eligible for the I-601A, should consider using instead of I-601.	If yes, the applicant *cannot* apply for the I-601A provisional waiver. The I-601A must be applied for and received *prior* to departing the U.S. for consular processing. If no, then the applicant *may* be eligible for the I-601A provisional waiver.
Is the applicant subject to or appears to be subject to multiple grounds of inadmissibility?	If yes, I-601 can be used to *waive multiple grounds of inadmissibility* (so long as the grounds are waivable—see next question). If no, but only ground is something other than unlawful presence, then I-601 is still only waiver option (so long as the grounds are waivable—see next question). If no, and only ground of inadmissibility is 212(a)(9)(B) unlawful presence, then may want to consider I-601A instead.	If yes, then cannot use I-601A process. Adjudicators *do not screen for other grounds of inadmissibility*, so the applicant may be granted I-601A even if other grounds of inadmissibility are present. However, the waiver will be revoked once additional grounds of inadmissibility are identified. If no, but only ground is something other than unlawful presence, then cannot use I-601A. If no, and only ground of inadmissibility is 212(a)(9)(B) unlawful presence, then consider I-601A.

What grounds of inadmissibility might the applicant need a waiver for?	May be used to waive the following grounds of inadmissibility: • Health-related grounds (INA § 212(a)(1)) • Certain criminal grounds (INA § 212(a)(2)) • Immigration fraud and misrepresentation (INA § 212(a)(6)(C)) • Membership in totalitarian party (INA § 212(a)(3)) • Helping someone enter illegally (alien smuggling) (INA § 212(a)(6)(E)) • Being subject to civil penalty (INA § 212(a)(6)(F)) • Three- or ten-year unlawful presence bars (INA § 212(a)(9)(B))	*Only waives three- or ten-year unlawful presence bars* (INA § 212(a)(9)(B)). It does not waive any other ground of inadmissibility. However, if during the consular interview or medical exam another ground of inadmissibility is identified, the I-601A provisional waiver will be revoked. Depending on the other inadmissibility ground, the applicant may then go through the regular I-601 waiver process, including re-requesting a waiver of the 212(a)(9)(B) unlawful presence.
Is the applicant in removal proceedings?	If yes, do not need to administratively close removal proceedings; if otherwise eligible to adjust, can apply for I-601 at same time as adjustment.	If yes, *removal proceedings must be administratively closed* so that USCIS can adjudicate the waiver. Once the I-601A is approved, the applicant should re-calendar and terminate removal proceedings prior to leaving for the consular interview.
What happens if the waiver is denied	Can re-file, appeal, or do a motion to reopen, but in consular processing cases this will be from outside the U.S.	No appeal or motion to reopen, only option is to re-file. Because denial of I-601A happens before applicant has actually left U.S. and triggered 212(a)(9)(B) inadmissibility, applicant may decide to remain in the U.S. and postpone pursuit of immigrant visa.
What happens if other inadmissibility grounds are identified after waiver approval	Can file I-601 for the other grounds, if waivable.	I-601A will be revoked. Applicant must file I-601 to re-request waiver of 212(a)(9)(B) unlawful presence, plus for other grounds, if waivable.
How long does it take?	Current processing times are a year or longer. (*See* https://egov.uscis.gov/processing-times/ for latest processing times)	Current processing times are approximately 6.5 to 8.5 months. (*See* https://egov.uscis.gov/processing-times/ for latest processing times)

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