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US IMMIGRATION & NATIONALITY LAW

A PRACTICAL GUIDE TO SPENDING THE 3 AND 10 YEAR BARS IN THE US

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On June 24, 2022, USCIS issued a Policy Alert on inadmissibility under § 212(a)(9)(B) of the Immigration and Nationality Act (INA) This provision states that a noncitizen was unlawfully present in the United States for a period of more than 180 days but less than 1 year will be inadmissible to the United States for 3 years after departure or removal, while an individual who has accrued more than one year of unlawful presence will be barred for 10 years. The Policy alert, which is included in Volume 8 of the USCIS Policy Manual, clarified that a noncitizen who seeks admission after the 3- or 10- year bar has expired "is not inadmissible under INA § 212(a)(9)(B) even if the noncitizen returned to the United States, with or without authorization, during the statutory 3-year or 10-year period." Further, "a noncitizen's location during the statutory 3- or 10-year period and the noncitizen's manner of return to the United States during the statutory period are "irrelevant" for purposes of determining inadmissibility under INA § 212(a)(9)(B)", the alert stated. USCIS stated that noncitizens whose applications were denied because they had entered, or remained in, the U.S. during the period of inadmissibility may be able to file Form I-290B, Notice of Appeal or Motion to request that their applications be reopened.

Whether noncitizens can spend the 3-and 10-year bars in the United States has long been a source of uncertainty. In a 2008 blog, we discussed this issue in the context of a July 14, 2006 letter from Robert Divine, former Chief Counsel of the USCIS, to attorneys David P. Berry and Ronald Y. Wada. *See* AILA Doc. No. 08082930. In the letter, Mr. Divine confirmed that the 3-year inadmissibility period continues to run even if the noncitizen subsequently returned to the US

on parole under INA §212(d)(5). The letter included the caveat that a noncitizen who is unlawfully present in the U.S., leaves, and later attempts to reenter would be inadmissible and could trigger additional bars.

The guidance laid out in the new policy guidance applies most readily to a noncitizen who has been unlawfully present in the U.S. departs and reenters on a nonimmigrant visa along with a nonimmigrant waiver under INA §212(d)(3). Individuals who are subject to the 3- and 10-year bars could seek to be admitted in a nonimmigrant status such as H-1B or O-1 with a §212(d)(3) nonimmigrant waiver and spend the bars in the US. After spending the 3- or 10-year bar in the US, this individual would no longer be inadmissible and be eligible to adjust status to permanent residence. Of course, those who have a qualifying relative can obtain an immigrant waiver under 212(a)(9)(5) by demonstrating extreme hardship to that relative and would not need to spend all the 3 or 10 years before they can adjust status to permanent residence. The new policy guidance truly comes to the rescue of those who do not have qualifying relatives as they can spend the 3- or 10-year bars in the US and no longer be inadmissible under INA § 212(a)(9)(B).

Take the example of a person who came to the US in B-2 status on January 1, 2020 and has remained in the US unlawfully long after the authorized stay ended on June 30, 2020. If this individual was offered a job in early 2022, got selected in the H-1B lottery and became the beneficiary of an H-1B visa petition with a start date of October 1, 2022, she would not be eligible to change status to H-1B on October 1, 2022 as she has been out of status. If she left the US to apply for an H-1B visa at a US Consulate, she would become subject to the 10-year bar and be denied the visa due to inadmissibility under INA §212(a)(9)(B)(i)(II). However, she can request the US consul to recommend the nonimmigrant visa waiver under §212(d)(3). If the waiver is granted by the Admissibility Review Office within Customs and Border Protection, she can be admitted in H-1B status and be able to spend at least six years in H-1B status.

The standard for obtaining a §212(d)(3) nonimmigrant waiver is quite broad. It does not require a showing of extreme hardship to a qualifying relative as one has to demonstrate to apply for the corresponding immigrant waiver under §212(a)(9)(v). In *Matter of Hranka*, 16 I&N Dec. 491, 492 (BIA 1978), the Board of Immigration Appeals (BIA) explained the factors used to adjudicate a § 212(d)(3) waiver:

> *here are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's prior immigration law, or criminal law, violations, if any. The third factor is the nature of the applicant's reasons for wishing to enter the United States.*

Matter of Hranka, 16 I&N Dec. at 492.

The BIA also clarified that "there is no requirement that the applicant's reasons for wishing to enter the United States be 'compelling.'" *Id.*

Notwithstanding the broad standard set forth in *Matter of Hranka,* the waiver is still discretionary and can be easily refused by the Admissibility Review Office or not even be recommended by the US Consul. Individuals who have spent long periods unlawfully in the US and who leave, and then immediately request the waiver through the US Consulate can be denied in the exercise of discretion. Moreover, the chances are better when one is applying for an H-1B or L visa that clearly allows "dual intent" as opposed to applying for an F-1 visa. In the latter instance, the US Consul can simply refuse the visa on the grounds that the applicant is presumed to be an intending immigrant under INA §214(b). H-1B and L visas are exempted from this presumption in §214(b). Even though an O visa is recognized as a "dual intent" visa under 8 CFR §214.2(o)(13), the recipient while being exempted from requiring a residence abroad must still return home at the end of the O-1 validity period. Therefore, even an O-1 visa applicant would be susceptible to a refusal under INA §214(b) when seeking a 212(d)(3) nonimmigrant waiver.

An individual who is subject to the 10-year bar and already in the United States in H-1B status can potentially wait the period out by getting one-year H-1B extensions beyond the sixth year under §106(a) of the American

Competitiveness in the 21st Century Act (AC 21). If this individual is born in India, she can become eligible for 3 year H-1B extensions under §104(c) of AC 21. As cautioned in our previous blog, though, one year extensions under AC 21 can potentially be denied under 8 CFR § 214.2(h)(13)(iii)(D)(10) if the individual has not filed his adjustment of status application within one year of the priority date becoming current, unless good cause is shown. USCIS has the discretion to excuse a failure to file an I-485 if the noncitizen establishes that the failure to apply was due to circumstances beyond his or her control. It is unclear whether

USCIS might accept a good cause argument from an individual who wished to continue applying for H-1B extensions in order to spend the 10-year bar in the United States.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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