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The Statutory Bars to Reentry into the United States

Federal immigration laws set forth the conditions under which aliens (as defined in 8 U.S.C. § 1101(a)(3)) may enter or remain in the United States. Aliens applying for a visa from abroad, presenting themselves at U.S. ports of entry, or found in the country after entering unlawfully, may be denied admission if subject to grounds of inadmissibility listed in 8 U.S.C. § 1182(a). In particular, under § 1182(a)(9), aliens who have been removed from the United States or accrued unlawful presence in the United States and either departed or were removed are thereafter inadmissible for specified time periods.

Historical Background

Federal immigration laws have long barred aliens previously removed from the United States from being admitted into the country for specified periods of time. The current reentry bars found in 8 U.S.C. § 1182(a)(9) were added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA amended the reentry bars by including aliens who accrued unlawful presence in the United States, making some returning aliens permanently inadmissible, and establishing several exceptions and waivers.

The Current Statutory Regime

Aliens Who Were Previously Removed

Under 8 U.S.C. § 1182(a)(9)(A), certain aliens who were previously removed from the United States are inadmissible. Under Subsection (i), any alien who was removed after being placed in expedited removal proceedings or following the completion of formal removal proceedings that were initiated upon the alien's arrival at a U.S. port of entry is inadmissible (1) for 5 years after the date of removal; (2) for 20 years after the date of removal if the alien has previously been removed two or more times; or (3) at any time if the alien was convicted of an aggravated felony (as defined in 8 U.S.C. § 1101(a)(43)).

Under Subsection (ii), an alien not described in Subsection (i) and who has either been removed upon the completion of formal removal proceedings (or some other type of removal process) *or* has departed the United States while an order of removal was outstanding is inadmissible (1) for 10 years after the alien's departure or removal; (2) for 20 years after departure or removal in the case of a second or subsequent removal; or (3) at any time if the alien was convicted of an aggravated felony.

Aliens Who Accrued Unlawful Presence

Under 8 U.S.C. § 1182(a)(9)(B)(i), aliens (other than an alien lawfully admitted for permanent residence [LPR]) who accrued unlawful presence in the United States before their departure or removal are inadmissible. Under Subsection (I), aliens who were unlawfully present in the United States for more than 180 days but less than one year, and who voluntarily departed the United States before the commencement of expedited or formal removal proceedings, are inadmissible for 3 years after the date of departure.

Under Subsection (II), aliens who were unlawfully present in the United States for 1 year or more are inadmissible for 10 years after the date of departure or removal. Unlike the 3-year bar, the 10-year bar applies even if the alien left the United States after removal proceedings had commenced.

8 U.S.C. § 1182(a)(9)(B)(ii) explains that an alien is considered "unlawfully present" if the alien "is present in the United States after the expiration of the period of stay authorized by the [Secretary of the Department of Homeland Security (DHS)] or is present in the United States without being admitted or paroled." Under DHS's policy, an authorized "period of stay" includes, among other things, a period in which an alien is admitted under a nonimmigrant visa; has a pending adjustment of status application filed with DHS; has been granted asylum or refugee status; has been granted a stay of removal or voluntary departure; has been granted deferred action (e.g., under the Deferred Action for Childhood Arrivals program); and has a pending application for temporary protected status.

The unlawful presence period is only calculated during a *single stay* in the United States and is not counted in the aggregate by combining periods of unlawful presence accrued during multiple stays in the United States. Further, only unlawful presence periods occurring after IIRIRA's April 1, 1997, effective date can be considered. *See Matter of Rodarte-Roman*, 23 I. & N. Dec. 905 (BIA 2006).

The 3- or 10-year period runs from the date of departure or removal without interruption, and an alien who accrued unlawful presence and seeks admission after the requisite period runs is not inadmissible, even if the alien had returned to the United States during the 3- or 10-year period. The alien's return during the 3- or 10-year period could result in the accrual of a new unlawful presence period. *See Matter of Duarte-Gonzalez*, 28 I. & N. Dec. 688 (BIA 2023).

Section 1182(a)(9)(B)(iii) provides that certain periods of physical presence do not count toward the accrual of unlawful presence. These include periods when an alien is under 18; has a pending "bona fide" asylum application (unless the alien worked without authorization during that period); or was the beneficiary of family unity protection pursuant to statutes.

Additionally, under § 1182(a)(9)(B)(iii), the reentry bars do not apply to an alien self-petitioning for a visa under the Violence Against Women Act (VAWA), based on evidence the alien (or the alien's child) has been domestically battered or subjected to extreme cruelty if there is a substantial connection between the abuse and the violation of the terms of the alien's nonimmigrant visa. Nor do the reentry bars apply to a victim of a "severe form of trafficking" (as defined in 22 U.S.C. § 7102) if the trafficking was at least one central reason for the alien's unlawful presence in the United States.

Under § 1182(a)(9)(B)(iv), a lawfully admitted or paroled alien with a pending and timely application for an extension or change of nonimmigrant status, and who has not been employed without authorization, may have, for purposes of the 3-year bar only, an unlawful presence period "tolled" for 120 days while the application is pending. Under DHS policy, an alien does not accrue unlawful presence and is in an authorized "period of stay" for purposes of the 3- and 10-year bars (as well as for purposes of the permanent bar under § 1182(a)(9)(C)(i), discussed below) during the entire period the application is pending.

Aliens Who Violate the Reentry Bar

Under 8 U.S.C. § 1182(a)(9)(C)(i), an alien who has been unlawfully present in the United States for an aggregate period of more than one year, or has been ordered removed from the United States, and who *enters or attempts to reenter* the United States without authorization is permanently inadmissible. An alien who accrued less than one year of unlawful presence and departed the United States prior to a removal order is not inadmissible under this provision upon the alien's reentry, but could potentially be subject to the 3-year bar of § 1182(a)(9)(B)(i)(I).

As under § 1182(a)(9)(B)(i), an alien is "unlawfully present" under § 1182(a)(9)(C)(i) if present in the United States after expiration of an authorized "period of stay" or "without being admitted or paroled." Unlike § 1182(a)(9)(B)(i), however, the total period of unlawful presence for purposes of § 1182(a)(9)(C)(i) is calculated *in the aggregate* by adding all periods of unlawful presence on or after April 1, 1997, regardless of whether they occurred during a single stay or multiple stays in the United States. 8 U.S.C. § 1182(a)(9)(C)(i)(I).

Additionally, § 1182(a)(9)(C)(i) does not contain exceptions to the reentry bars (e.g., if the alien was under 18, had a pending "bona fide" asylum application, or was a victim of a "severe form of trafficking").

Discretionary Exceptions and Waivers

Although aliens who have been removed from, or accrued unlawful presence in, the United States are inadmissible for specified periods, 8 U.S.C. § 1182(a)(9) gives immigration officials discretion to consider applications for admission or issue waivers to the reentry bars in some cases.

Section 1182(a)(9)(A)(iii) provides that the reentry bars for those who were previously removed do not apply if the DHS Secretary "has consented to the alien's reapplying for admission." Under long-standing administrative guidance, the DHS Secretary's decision whether to consent to an application for admission is based on various factors, including, among others, the recency and basis of the prior removal, the alien's length of U.S. residence, the alien's moral character, the need for the alien's services in the United States, evidence of hardship to the alien and others, and the alien's family responsibilities. *See Matter of Tin*, 14 I. & N. Dec. 371 (BIA 1973).

Section 1182(a)(9)(B)(v) authorizes the DHS Secretary to waive the 3- and 10-year reentry bars applicable to those who have accrued unlawful presence in the case of an alien who is the spouse, son, or daughter of a U.S. citizen or LPR if the alien shows that denial of admission would result in "extreme hardship" to the U.S. citizen or LPR spouse or parent. An extreme hardship determination is based on several factors, including the alien's family ties to the United States, financial considerations, and health conditions. *See Matter of Cervantes-Gonzalez*, 22 I. & N. Dec. 560 (1999). If an alien who accrued unlawful presence is still in the United States, the alien may apply for a "provisional unlawful presence" waiver under § 1182(a)(9)(B)(v), allowing the alien to depart the United States to obtain an immigrant visa abroad. 8 C.F.R. § 212.7(e).

Section 1182(a)(9)(C)(ii) provides that the reentry bar covering those who unlawfully enter the United States after prior removal or unlawful presence does not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if the DHS Secretary "has consented to the alien's reapplying for admission." Additionally, under § 1182(a)(9)(C)(iii), the DHS Secretary may waive this reentry bar in the case of an alien who is a VAWA self-petitioner if there is a connection between the abuse suffered by the alien and the alien's removal, departure from the United States, or reentry or attempted reentry into the United States.

Some classes of aliens may request waivers of the reentry bars under other statutes. For example, 8 U.S.C. § 1182(d)(3)(A) authorizes consular officers to waive most inadmissibility grounds for aliens who seek to temporarily enter the United States with a nonimmigrant visa (e.g., as a tourist). This waiver requires examining the risk of harm to society if the alien is admitted, the seriousness of the alien's past immigration or criminal violations (if any), and the alien's reasons for returning to the United States. *See Matter of Hranka*, 16 I. & N. Dec. 491 (BIA 1978).

Another statute, 8 U.S.C. § 1159(c), authorizes the DHS Secretary or the Attorney General to waive, for humanitarian, family unity, or public interest reasons, most inadmissibility grounds with respect to asylees or refugees who are applying for adjustment to LPR status.

Finally, 8 U.S.C. § 1182(d)(5)(A) authorizes the DHS Secretary to temporarily "parole" into the United States an inadmissible alien "for urgent humanitarian reasons or significant public benefit."

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