



June 24, 2022

PA-2022-15

Policy Alert

SUBJECT: INA 212(a)(9)(B) Policy Manual Guidance

Purpose

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the [USCIS Policy Manual](#) on inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act (INA), specifically, the effect of returning to the United States during the statutory 3-year or 10-year period after departure or removal (if applicable).¹ Under this policy guidance, a noncitizen who again seeks admission more than 3 or 10 years after the relevant departure or removal,² 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.

Background

In 1996, Congress provided specific grounds of inadmissibility related to a noncitizen's accrual of unlawful presence in the United States, including inadmissibility under [INA 212\(a\)\(9\)\(B\)](#).³ A noncitizen is inadmissible under INA 212(a)(9)(B) if the noncitizen accrues more than 180 days of unlawful presence, departs or is removed (whichever applies), and again seeks admission within 3-years or 10-years, respectively, after the departure or removal. This INA provision does not speak to the effect of returning to the United States during the statutory 3-year or 10-year period without first obtaining a waiver of inadmissibility.⁴ There are neither regulations, precedent federal court decisions, nor published⁵ administrative decisions on the issue. However, more recently, two federal district courts have issued decisions on this issue, concluding that the statutory 3-year and 10-year periods run from the date of departure or removal (whichever applies) without interruption.⁶

¹ See [INA 212\(a\)\(9\)\(B\)](#).

² "Relevant departure or removal" means, in this instance, the departure or removal immediately following the accrual of the requisite unlawful presence.

³ See [INA 212\(a\)\(9\)\(B\)\(i\)\(I\)](#). See [INA 212\(a\)\(9\)\(B\)\(II\)](#). See [INA 212\(a\)\(9\)\(C\)\(i\)\(I\)](#).

⁴ See [INA 212\(a\)\(9\)\(B\)\(v\)](#). See [INA 212\(d\)\(3\)](#).

⁵ The Board of Immigration Appeals (BIA) has issued unpublished (non-precedent) decisions and the Administrative Appeals Office (AAO) has likewise issued non-precedent decisions. Non-precedent decisions of the BIA and the AAO only bind parties to the case, but they do not have any precedential value. See [8 CFR 103.3\(c\)](#) and [8 CFR 1003.1\(g\)](#) (addressing precedent decisions).

⁶ See *Neto v. Thompson*, 506 F.Supp.3d 239 (D.N.J. Dec. 10, 2020). See *Kanai v. Department of Homeland Security*, No. 20-05345, 2020 WL 6162805 (C.D.Cal. Aug. 20, 2020). Although neither of these cases are binding, USCIS has considered the reasoning of these courts in developing its policy.

USCIS is issuing this guidance to explain the effect of returning to the United States during the statutory 3-year or 10-year period after departure or removal (whichever applies) on inadmissibility determinations under [INA 212\(a\)\(9\)\(B\)](#).

USCIS has not previously issued guidance on this specific issue in a policy memorandum, the Adjudicator's Field Manual, or the Policy Manual.⁷ USCIS is now issuing this policy guidance to memorialize clear, express, and public-facing policy guidance in the Policy Manual regarding the impact of returning to the United States during the statutory 3-year and 10-year periods of inadmissibility under [INA 212\(a\)\(9\)\(B\)](#). This policy guidance, which is consistent with two recent district court decisions and an unpublished BIA decision on this issue, will ensure efficient and consistent adjudication in such cases, and enable the government to preserve significant resources.

This guidance contained in Volume 8 of the Policy Manual is effective immediately and applies prospectively to USCIS inadmissibility determinations made on or after June 24, 2022. The guidance contained in the Policy Manual is controlling and supersedes any prior related guidance on the topic.

In addition, some noncitizens may be eligible to file a motion to reopen⁸ their previously denied application with USCIS using a Notice of Appeal or Motion ([Form I-290B](#)). For more information, see the [Unlawful Presence and Inadmissibility](#) webpage.

Policy Highlights

- Explains that USCIS does not consider a noncitizen who has accrued more than 180 days of unlawful presence and has departed or been removed (whichever applies) inadmissible under [INA 212\(a\)\(9\)\(B\)](#) unless the noncitizen again seeks admission to the United States within the statutory 3-year or 10-year period after departure or removal (whichever applies) following accrual of the requisite period of unlawful presence.⁹
- States that the statutory 3-year or 10-year period begins to run once the noncitizen departs or is removed (whichever applies) and continues without interruption from that date until 3 or 10 years after such departure or removal.
- States that a noncitizen's location during the statutory 3-year or 10-year period and the noncitizen's manner of return to the United States during the statutory 3-year or 10-year period are irrelevant for purposes of determining inadmissibility under [INA 212\(a\)\(9\)\(B\)](#).¹⁰

⁷ However, USCIS has informally issued various statements on the effect of returning to the United States during the statutory 3-year or 10-year period without first obtaining a waiver of inadmissibility.

⁸ See [8 CFR 103.5\(a\)\(2\)](#).

⁹ If a noncitizen accrues more than 180 days but less than a year of unlawful presence during a single stay in the United States, departs, and again seeks admission within 3 years of such departure, the noncitizen is inadmissible. See [INA 212\(a\)\(9\)\(B\)\(i\)\(I\)](#). If a noncitizen accrues 1 year or more of unlawful presence during a single stay in the United States, departs or is removed from the United States, and again seeks admission within 10 years of such departure or removal, the noncitizen is inadmissible. See [INA 212\(a\)\(9\)\(B\)\(i\)\(II\)](#).

¹⁰ The manner by which the noncitizen returns to the United States during the statutory 3-year or 10-year period, however, may result in the accrual of a new period of unlawful presence. In addition, noncitizens who return lawfully during the statutory 3-year or 10-year period, but remain beyond their period of admission or parole, begin to accrue a

Summary of Changes

Affected Section: Volume 8 > Part O, Noncitizens Unlawfully Present

- Adds new Chapter 6 (Effect of Seeking Admission Following Accrual of Unlawful Presence).
- Adds new [Reserved] Chapters 1, 2, 3, 4, and 5.

Citation

Volume 8: Admissibility, Part O, Noncitizens Unlawfully Present, Chapter 6, Effect of Seeking Admission Following Accrual of Unlawful Presence [[8 USCIS PM O.6](#)].

new period of unlawful presence unless a statutory exception or exemption applies or they are otherwise in a period of stay authorized.