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MEMORANDUM FOR:
REGIONAL DIRECTORS
DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER, IMMIGRATION SERVICES DIVISION
ACTING DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

FROM:
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Office of Field Operations

SUBJECT:
Period of stay authorized by the Attorney General after 120 day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act). (AD 00-07)

This memorandum addresses issues relating to the 3 and 10 year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act and the decision to designate as a period of stay authorized by the Attorney General the entire period during which a timely filed, nonfrivolous application for extension of stay (E/S) or change of status (C/S) is pending with the Service, provided the alien has not engaged in any unauthorized employment. This period of stay authorized by the Attorney General covers the 120 day tolling period described in section 212(a)(9)(B)(iv) of the Act, and continues until the date the Service issues a decision.

By way of background, section 212(a)(9)(B)(ii) of the Act states that an alien who is present in the United States without admission or parole, or who remains in the United States beyond the period of stay authorized by the Attorney General, accrues unlawful presence towards the 3 and 10 year bars under section 212(a)(9)(B)(i)(I) and (II) of the Act. Section 212(a)(9)(B)(iv) of the Act is a tolling provision that covers certain nonimmigrants. If an alien has timely filed a nonfrivolous application for E/S or C/S, the first 120 days of unlawful presence are not counted towards the 3 year bar under section 212(a)(9)(B)(i) of the Act. Section 212(a)(9)(B)(iv) of the Act further states that the alien must have been lawfully admitted or paroled into the United States, and must not have been employed without authorization before the E/S or C/S application was filed or while it was pending.

Although legislative history is silent regarding the intent of the 120 day tolling period, an inference may be drawn that Congress expected the Service to adjudicate the petitions within such a timeframe. However, due to unprecedented workload, in many instances the Service has been unable to adjudicate a timely filed application for E/S or C/S within the 120 day period envisioned by Congress.

Under current Service policy, if a decision is not rendered within the tolling period, aliens admitted to the United States until a specific date begin accruing unlawful presence on the 121th day after the expiration of their Form I-94. Because of the current backlogs, which in some cases "tend beyond six months, aliens who remain in the United States while the C/S or E/S is pending may incur a 3 year or even a 10 year bar to admission if the application is ultimately denied.

Therefore, in order to alleviate problems aliens may encounter concerning unlawful presence through no fault of their own, the Service has determined that nonimmigrants who were admitted until a specific date and who apply for C/S or E/S and whose applications have been pending beyond the 120 day tolling period should be considered to be in a period of stay authorized by the Attorney General, if certain requirements are met. Because these requirements are the same as those for tolling under section 212(a)(9)(B)(iv) of the Act, the Service has further determined that the period of stay authorized by the Attorney General covers the E/S or C/S application for the entire period that it is pending.

As a practical matter, we note that this policy applies only to those nonimmigrants who were admitted until a specific date and whose I-94 has expired while the E/S or C/S application is pending. This is because nonimmigrants admittedfor duration of status (D/S) do not begin accruing unlawful presence until a status violation is found. Refer to the Service's memorandum dated September 19, 1997, 96 Act #058, for a discussion of the Service's policy on unlawful presence as it relates to nomimmigrants admitted D/S.

This memorandum is being issued simultaneously with a separate memorandum, HQADN 70/12P, amending the Service's 1/14/99 guidance on section 222(g), which is found in Chapter 15 of the Inspector's Field Manual (IFM). These policies and procedures are effective immediately and will be included in the AFM and in the IFM, respectively, in the next release of INSERTS.

A new Chapter 30.1(d) is added in the AFM to read as follows:

(d) Unlawful Presence under Section 212(a)(9)(B) of the Act. (1) The 3 and 10 year bars to admission under section 212(a)(9)B)(i)(I) and (II) of the Act do not apply to:

§ Applicants for adjustment of status under section 202(b) of NACARA

§ Applicants for adjustment of status under HRIFA; and

§ Registry applicants under section 249 of the Act.

(2) Counting of Unlawful Presence for Nonimmigrants. An alien who remains in the United States beyond the period of stay authorized by the Attorney General is unlawfully present and becomes subject to the 3 or 10 year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service policy, unlawful presence is counted in the following manner for nonimmigrants.

(A) Nonimmigrants Admitted until a Specific Date. Nonimmigrants admitted until a specific date begin accruing unlawful presence on the date the period of admission authorized by the Service expires, as noted on the arrival document issued at the port of entry.

(B) Nonimmigrants Admitted Duration of Status (D/S). Nonimmignants admitted to the United States for D/S begin accruing unlawful presence on the date the Service finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings. If, however, the immigration judge concurrently issues voluntary departure and the alien complies with the order by making a timely departure, no unlawful presence accrues. See sections (d)(2) and (d)(5) of this chapter regarding voluntary departure as a period of stay authorized by the Attorney General.

(3) Period of Stay Authorized by the Attorney General. The Service has also designated the following as periods of stay authorized by the Attorney General:

* Voluntary departure;

* Refugee status;

* Asylee status:

* Grants of withholding or deferral of removal under the United Nations Convention Against Torture;

* Legalization and special agricultural worker applications for lawful temporary residence which are pending through an administrative appeal;

* Grants of withholding or suspension of deportation, or cancellation of removal;

* Applications for temporary and permanent residence by Cuban and Haitian entrants under section 202(b) of Pub. L. 99-603 through administrative appeal;

* Grants of Temporary Protected Status and Deferred Enforced Departure;

* Properly filed, affirmative applications for adjustment of status under section 245 of the Act (including section 245(i)), and properly filed, affirmative registry applications under section 249 of the Act, The period of stay authorized by the Attorney General continues if the application is denied and renewed in proceedings, through review by the Board of Immigration Appeals (BIA). The alien must, however, be eligible to renew the denied application in proceedings and have a legal basis for renewing that application; and

* Certain pending applications for extension of stay or change of status. See sections (d)(4) and (d)(5) of this chapter.

(4) Requirements for Period of Stay Authorized by the Attorney General with Respect to Pending Change of Status and Extension Applications.

(A) The application for change of status or for extension of stay was filed timely. To be considered timely, the application must have been filed before the previously authorized stay expired, as provided under 8 CFR 214.1 (c)(4) and 8 CFR 248.1 (b).

(B) The alien did not work without authorization before the application for change of status or extension of stay was filed or while it was pending; and

(C) The change of status or extension application has been pending with the Service for more than 120 days after the date the I-94 expired.

(5) Effect of Decision on Unlawful Presence and Tolling.

(A) Approved Applications. If the Service approves an E/S or C/S application, the alien will be granted a new period of stay authorized by the Attorney General, retroactive to the date the previously authorized stay expired, as applicable to the nonimmigrant classification under which the alien was admitted pursuant to 8 CFR 214.2. No unlawful presence accrues. This applies to aliens admitted until a specific date and aliens admitted D/S.

(B) Denied applications. (i) Denial of Timely Filed Applications and Frivolous Applications; Unauthorized Employment. If the timely filed C/S or E/S application is denied because it was frivolous or because the alien engaged in unauthorized employment, any and all time after the Form I-94 expiration date will be considered unlawful presence, if the alien was admitted until a specific date. If, however, the alien was admitted D/S, unlawful presence begins accruing on the date of the Service's decision.

(ii) Denial of Untimely Applications. If the application was untimely and was denied, unlawful presence begins accruing on the date the I-94 expired, regardless of the reason for denial. For aliens admitted D/S, unlawful presence begins accruing on the date of denial.

6) Voluntary Departure as a Period of Stay Authorized by the Attorney General. The Service has designated voluntary departure as a period of stay authorized by the Attorney General. However, any unlawful presence that accrued before the date the voluntary departure was actually granted is not eliminated. And, if the alien does not make a timely departure, the counting of unlawful presence resumes. Moreover, the alien becomes subject to civil penalties and is ineligible for any further voluntary departure or other forms of relief, such as adjustment of status, registry, and cancellation of removal.

7) Effect of Departure. : Applicants for Nonimmigrant Visas. Date certain nonimmigrants; who file an application for change of status or extension of stay who depart the United States while the applicationis pending and subsequently apply for another nonimmigrant visa must establish, to the satisfaction of the consular officer, that the application was timely filed and that it was not frivolous. The requirement that the application was timely may be established through the submission of evidence of the date the previously authorized stay expired, together with a copy of a dated filing
receipt, a canceled check payable to the Service for the E/S or C/S application, or other credible evidence of a timely filing. To be considered nonfrivolous, the application must have an arguable

basis in law and fact and must not have been filed for an improper purpose. If the consular officer finds that the alien qualifies for a visa in the same category as the visa classification that was sought in the abandoned E/S or C/S application, the consular officer may presume that the E/S or C/S application was not frivolous. The question then turns to whether the alien engaged in unauthorized employment before the E/S or C/S application was filed or while it was pending. Consular officers will determine this through the routine course of questioning. Consular officers may also review and consider evidence of an alternate means of support during the time in which the alien was not authorized to work. If the consular officer determines that the application was timely filed, nonfrivolous, and that the alien did not engage in unauthorized employment, the alien is not subject to the 3 or 10 year bars to admission under section 212(a)(9)(B)(i) of the Act. See Chapter 15 of the IFM for a discussion of the effect of the alien's departure on section 222(g). D/S nonimmigrants who depart the United States while an application for change of status or extension of stay is pending generally do not trigger the 3 and 10 year bars under section 212(a)(9)(B)(i) of the Act, unless a formal finding of a status violation has been made, and the alien has not been granted any other period of stay authorized by the Attorney General, such as voluntary departure.