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Funny How Time Slips Away: Unlawful Presence and Status Violations

Written By:

**Raed Gonzalez,
Faye Kolly
Linsay Curcio**

Funny How Time Slips Away¹:

Unlawful Presence and Status Violations

***By Raed Gonzalez, Faye Kolly and Linsay Curcio²**

This article will discuss how a practitioner determines when unlawful presence, overstays, and status violations begin to accrue and how those issues affect a client's eligibility for immigration benefits. The distinction between unlawful presence, overstays, and status violations, while all related, are distinct. It is imperative that practitioners understand the nuances to determine the best possible legal strategies for clients who may have "let time slip away."

1. Client Consultations: Well hello there...

During an initial consultation with a client, issues related to accrual of unlawful presences and status violations should be carefully vetted in order to determine eligibility for immigration benefits, and to discuss with the client potential risks. Below are common initial consultation scenarios in which these issues arise. Notably, while these issues may have been vetted during an initial consultation, it is important to monitor the issue of unlawful presence and status violations throughout the progress of the case as clients may fail to disclose prior orders of removal, return trips to their home countries, or other grounds of inadmissibility during an initial consultation.³

2. Unlawful Presence: My it's been a long, long time...

a. What is unlawful presence?

¹ Title attributed and inspired by Willie Nelson's song entitled "Funny How Time Slips Away."

² Lindsay A. Curcio is a sole practitioner in Brooklyn, New York. She also is an adjunct professor at New York Law School and Co-Director of New York Law School's Safe Passage Immigration Project

Raed Gonzalez JD LLM, was born in Puerto Rico and is an accomplished litigation attorney and community leader. He is the owner of Gonzalez Olivieri LLC in Houston. He has considerable litigation experience representing unappealing cases in all immigration, federal and appellate courts. Mr. Gonzalez has represented many foreigners before the immigration and appellate courts including the published precedents of *Manuel Flores Ledezma v. Gonzalez*, 415 F.3d 375, 380 (5th Cir. 2005), the first case to interpret the real ID Act in the 5th Circuit, *Perez-Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008), *McCarthy v. Mukasey*, 555 F.3d 459, 462 (5th Cir. 2009) and most notably on his groundbreaking victory before the U.S. Supreme Court where the court granted and remanded the case of *Dada v. Mukasey* No. 06-1181, ___ S. Ct. ___, 2008 WL 2404066, (June 16, 2008) (No. 06-1181), and most recently on his second grant of certiorari before the Supreme Court of the US on a collaborative effort in *Alexis v. Holder*, No. 09-955, ___ S.Ct. ___, 2010 (June 21, 2010).

Faye M. Kolly, a native Texan is a graduate of the University of Notre Dame and Saint Louis University School of Law. Faye specializes in several areas of immigration law and is dedicated to providing comprehensive short and long-term immigration legal strategies to individual and corporate clients. Prior to joining DMCA, Faye represented clients on a wide range of immigration needs including non-immigrant, immigrant business visas, consular issues and family and litigation based immigration matters. Faye is a frequent volunteer and presenter at immigration related events including public Testimony before Texas House and Senate Committees regarding immigration related issues on business and driver's licenses. In 2010, she co-authored a chapter in ILW.com book: *The I-140 Book*, "Derivative Beneficiaries of Employment Based Immigrant Petitions and the Child Status Protection Act (CSPA)." Faye often volunteers her time a pro bono naturalization clinics in the Austin and San Antonio area. Faye is a member of the Austin Bar Association and American Immigration Lawyers Association where she previously served as Texas Chapter Citizenship Day coordinator in 2008, 2009.

³ While not covered in this article it is important to determine if fraudulent misrepresentations were made for the purpose of obtaining an immigration benefit or if any false claim to U.S. Citizenship was made.

Unlawful presence is defined as the expiration of a period of stay authorized by the attorney general or any presence without being admitted or paroled.⁴ Generally, the period of unauthorized stay is determined by the expiration of an I-94 or any presence in the U.S. without admission or parole.

Periods of authorized stay include the period of stay annotated on the I-94. There are other periods of “authorized stay” which are not considered periods of lawful stay, but by USCIS policy are considered stays in which unlawful presence is not accumulated.⁵

3. When does Unlawful Presence triggers a bar: Too Much Time has Slipped Away

Inadmissibility due to unlawful presence is triggered upon departure from the United States, after April 1, 1997. INA § 212(a)(9)(B)(i)(I) makes inadmissible any alien for three years who “was unlawfully present in the United States for a period of more than 180 days but less than one year...who seeks admission within 3 years of date of such alien’s departure or removal.”⁶ In other words if your client either entered without inspection and has no status or has been found to have violated their status or if their status has expired and it has been more than 180 days but less than a year upon departure from the U.S., they will be subject to a 3 year bar from return to the U.S.

INA § 212(a)(9)(B)(i)(II) makes inadmissible any alien for ten years who “was unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien’s removal or departure.”⁷ Similarly, if your client entered without inspection and has no status, has been found to have violated their status, or if their status has expired for more than 365 days upon departure from the U.S., they will be subject to a 10 year bar from re-entry to the U.S.

a. How do I count Unlawful Presence for the 3/10 year bar?

As already indicated generally unlawful presence is calculated after the expiration of a period of stay authorized by the attorney general or any presence without being admitted or paroled.⁸ Generally the period of authorized stay is determined by the I-94 or any presence in the U.S. without admission or parole. There are however, other date calculations to bear in mind when determining how to calculate unlawful presence for the purposes of determining a 3/10 year or permanent bar.

- Unlawful under INA 212(a)(9)(B) is NOT counted in the aggregate for the 3/10 year bar.⁹

In other words, if an individual was in the U.S. prior to April 1, 1997 and left before this date, but re-entered the U.S. after April 1, 1997, the time spent in the U.S. prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) will not count toward the accumulation of time for the purposes of the bar. Similarly, if your client was

⁴ INA § 212(a)(9)(B)(ii)

⁵ Consolidation of guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, USCIS Memorandum, May 6, 2009. AILA Doc. 09051468.

⁶ INA § 212(a)(9)(B)(i)(I)

⁷ INA § 212(a)(9)(B)(i)(II)

⁸ Id. at note 3.

⁹ Id. at note 4.

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