9 FAM 40.92 N4.1 Minors

(CT:VISA-1741; 10-13-2011)

Any period of time that an alien spends unlawfully in the United States while under the age of 18 would not count toward calculating the accrual of unlawful presence for purposes of INA 212(a)(9)(B).

9 FAM 40.92 N4.2 Family Unity

(CT:VISA-1385; 12-11-2009)

This provision stems from Section 301 of the Immigration Act of 1990 (IMMACT 90) and relates to the spouses and children of legalized aliens who have not themselves yet become lawful permanent residents. This exception applies only if they maintain protection under that provision, which means that they must regularly apply for re-registration under it.

9 FAM 40.92 N4.3 Battered Spouses and Children

(CT:VISA-1741; 10-13-2011)

The battered spouses and children provision exception stems from the related provisions in INA 204(a)(1)(A)(iii)(I) (8 U.S.C. 1154(a)(1)(A)(iii)(I)) and INA 212(a)(6)(A)(ii) (8 U.S.C. 1182(a)(6)(A)(ii)). In this instance, a critical requirement is a direct relationship between the battering or cruelty and the violation of the terms of the alien's nonimmigrant visa. In this context, the abuse must have started before and led to the alien's accrual of unlawful presence. This requires, at a minimum, establishing the dates of arrival and termination of the authorized stay, as well as the timing of the abuse and its relationship to the continued stay beyond that date.

9 FAM 40.92 N4.4 Victims of a Severe Form of Trafficking in Persons

(CT:VISA-1741; 10-13-2011)

The victims of a severe form of trafficking in persons exception stems from INA 212(a)(9)(B)(iii)(V), which provides that INA 212(a)(9)(B)(i) should not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in 22 U.S.C. 7102) was at least one central reason for the alien's unlawful presence in the United States.

9 FAM 40.92 N5 "TOLLING" FOR GOOD CAUSE

(CT:VISA-1741; 10-13-2011)

a. Subparagraph (iv) of INA 212(a)(9)(B) provides for "tolling" for up to 120 days

of a possible period of unlawful presence during the pendency of an application to change or extend NIV status. This subparagraph applies only to possible inadmissibility under subsection INA 212(a)(9)(B)(i)(I). The tolling is only permitted if the alien is lawfully admitted to or paroled into the United States, has filed a nonfrivolous application for a change or extension of status prior to the date of expiration of the authorized period of stay, and has not been employed without authorization in the United States before or during the pendency of such application.

b. DHS has inferred that the "120 days" limitation was probably predicated on an assumption that they would be able to adjudicate the application within that time frame. Due to DHS backlogs, however, some cases have been pending as long as six months or more, during which the applicants could incur the three or 10-year penalties through no fault of their own if only the first 120 days were tolled and the application was ultimately denied. Therefore, for all cases involving potential inadmissibility under INA 212(a)(9)(B) whether under the three-year bar of 212(a)(9)(B)(i)(I) or the 10-year bar of INA 212(a)(9)(B)(i)(II), DHS has decided to consider all time during which an application for extension of stay (EOS) or change of nonimmigrant status (COS) is pending to be a period of stay authorized by the Secretary of Homeland Security provided:

   (1) The application was filed in a timely manner; i.e., before the expiration date of the Form I-94, Arrival and Departure Record;

   (2) The application was "nonfrivolous"; and

   (3) The alien has not engaged in unauthorized employment (whether before or after April 1, 1997).

   NOTE: Although INA 212(a)(9)(B) did not go into effect until April 1, 1997, and the law is not retroactive, unauthorized employment prior to April 1, 1997, will render an alien ineligible for the nonfrivolous COS and/or EOS exception because aliens who have engaged in unauthorized employment are generally not eligible for change or extension of nonimmigrant stay, and therefore, an application under such circumstances should generally be considered frivolous.

c. 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 (e.g., as a groundless excuse for the applicant to remain in activities incompatible with his or her status). It is not necessary to determine that the DHS would have approved the application for it to be considered nonfrivolous.

9 FAM 40.92 N6 WAIVERS

(CT:VISA-1741; 10-13-2011)

a. Nonimmigrants who are inadmissible under INA 212(a)(9)(B) may apply for an INA 212(d)(3)(A) waiver. (See 9 FAM 40.301.)