U.S. Department of Justice
Executive Office for Immigration Review

http://eoir-vll/lib_index.html
Published since 2007

Immigration Law Advisor

February 2013 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 7 No. 2*

In this issue...

The Unlawful Presence Bars: Think Twice

by Melanie J. Siders and Alexa C. McDonnell

Introduction

This article will examine the unlawful presence bars at sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(i)(II) and (C)(i)(I). There is sometimes confusion among practitioners regarding the application of these unlawful presence bars. This article seeks to provide a full analysis of the two bars and to identify the areas of overlap between them. The article will compare and contrast the statutory language of sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Act; note the lack of regulatory guidance on these sections of inadmissibility; discuss the legislative history of the sections; explore the contexts in which adjudicators may encounter the bars; and analyze case law dealing with these sections, particularly the Board of Immigration Appeals decisions in *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007) ("*Lemus I*"), and 25 I&N Dec. 734 (BIA 2012) ("*Lemus II*"), and *Matter of Arabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). The article will also discuss sources of guidance for adjudicators and provide suggestions for analyzing cases involving the unlawful presence bars.

Overview of the Unlawful Presence Bars

Definitions and Distinction

Section 212(a)(9)(B)(i)(II) of the Act states that "[a]ny alien (other than an alien lawfully admitted for permanent residence) who . . . has been 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 departure or removal from the United States, is inadmissible."

Section 212(a)(9)(C)(i)(I) of the Act provides that "[a]ny alien who . . . has been unlawfully present in the United States for an aggregate period of more than 1 year . . . and who enters or attempts to reenter the United States without being admitted is inadmissible."

Sections 212(a)(9)(B)(i)(II) and (C)(i)(I) share some essential elements, but they also contain distinctly different elements. The first basic commonality is that, like other grounds of inadmissibility, both apply to aliens who are "seeking admission." However, in referring to this element the exact language of the bars differs. Section 212(a)(9)(B)(i)(II) applies to an alien who "again seeks admission," while section 212(a)(9)(C)(i)(I) refers to aliens entering or attempting to reenter without admission. In *Lemus II*, the Board addressed the meaning of the phrase "again seeks admission" in section 212(a)(9)(B)(i)(II), explaining it is used as a term of art, defined by section 235(a)(1) of the Act, 8 U.S.C. § 1225(a)(1). 25 I&N Dec. at 743 n.6. That section states that "[a]n alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this Act an applicant for admission." Therefore, all aliens with a past period of unlawful presence have previously been considered applicants for admission and are *again* seeking admission under section 212(a)(9)(B)(i)(II). Similarly, aliens who fall under section 212(a)(9)(C)(i)(I) are also seeking admission. Having entered or attempted to reenter the United States without admission, such aliens are applicants for admission pursuant to section 235(a)(1) in that they either are present after entering without being admitted or have arrived in the United States after attempting to reenter without being admitted.

One difference between the bars is that an essential element of section 212(a)(9)(B)(i)(II) is 1 or more years of unlawful presence, while section 212(a)(9)(C)(i)(I) requires an aggregate period of more than 1 year of unlawful presence. The U.S. Citizenship and Immigration Services ("CIS") has stated that the unlawful presence accrued under section 212(a)(9)(B)(i)(II) must occur during a single stay—not over the course of multiple stays in the aggregate. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, et al., to USCIS Field Leadership (May 6, 2009), *reprinted in* 86 Interpreter Releases, No. 20, May 18, 2009, app. I ("Neufeld Memorandum"). Such an interpretation comports with canons of statutory construction, which state that Congress knew how to express a particular concept when it wished to do so and that its use of different phraseology in the same statute is presumed to be an intentional differentiation. However, the statutory language does not necessitate this conclusion. The statute does not clearly state that unlawful presence under section 212(a)(9)(B)(i)(II) is only that which accrued during a single stay or that it cannot be counted in the aggregate. It should be noted that the persuasiveness of the memo in which the CIS determined the calculation of unlawful presence has been called into question by the Board in *Matter of Arabally and Yerrabelly*, 25 I&N Dec. at 776 n.4. No other source of guidance has addressed the question whether section 212(a)(9)(B)(i)(II) could include aggregate periods of unlawful presence.

Sections 212(a)(9)(B)(i)(II) and (C)(i)(I) also differ significantly with respect to the penalties they impose on aliens and the availability of a waiver. Section 212(a)(9)(B)(i)(II) renders aliens inadmissible for a period of 10 years from their departure from the United States after accruing the requisite period of unlawful presence. Section 212(a)(9)(C)(i)(I), however, renders aliens permanently inadmissible if they fall within that provision. Section 212(a)(9)(B)(i)(II) may be waived if the alien is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident if a refusal of the alien's admission would result in extreme hardship to the qualifying relative. Section 212(a)(9)(B)(v) of the Act. In contrast, no such waiver is generally available for section 212(a)(9)(C)(i)(I), although an inadmissible alien may reapply to the Department of Homeland Security ("DHS") for admission outside of the United State after 10 years.[1] Section 212(a)(9)(C)(ii) of the Act.

Individuals Covered

From the above essential elements, it is clear that section 212(a)(9)(B)(i)(II) includes the following individuals: those present in the United States seeking adjustment of status after having previously accrued 1 year or more of unlawful presence; those presenting themselves for inspection and admission at a United States port of entry after having previously accrued 1 year or more of unlawful presence; and those applying for permission to enter the United States (that is, seeking a visa) at a foreign consulate after having previously accrued 1 year or more of unlawful presence. *See Lemus II*, 25 I&N Dec. at 742-43.

Section 212(a)(9)(C)(i)(I) includes the following: individuals present in the United States who entered without inspection after previously having accrued more than 1 year of unlawful presence; and those who attempt

to enter the United States, not at a port of entry, and who are apprehended on arrival after having previously accrued more than 1 year of unlawful presence in the United States.

Aliens may be barred under section 212(a)(9)(B)(i)(II), but not under section 212(a)(9)(C)(i)(I). For example, persons with a year or more of unlawful presence who are seeking permission to enter the United States at a foreign consulate or presenting themselves for inspection at a port of entry would be inadmissible under section 212(a)(9)(B)(i)(II), but not under section 212(a)(9)(C)(i)(I). *Lemus II*, 25 I&N Dec. 734. Also, individuals who have exactly 1 year of unlawful presence would fall under section 212(a)(9)(B)(i)(II), but not section 212(a)(9)(C)(i)(I).

However, a comparison of the above essential elements also leads to the conclusion that many aliens who fall under section 212(a)(9)(B)(i)(II) also fall under section 212(a)(9)(C)(i)(I). Any alien who is present in the United States pursuant to an entry without inspection and who is seeking adjustment of status after having previously accrued more than 1 year of unlawful presence falls under section 212(a)(9)(B)(i)(II) as an alien who is again seeking admission after previously accruing unlawful presence. This same alien also falls under section 212(a)(9)(C)(i)(I) as an alien who entered the United States without inspection after previously accruing more than 1 year of unlawful presence. The inevitable conclusion is that many, if not all aliens falling under section 212(a)(9)(C)(i)(I) also fall under section 212(a)(9)(B)(i)(II). If section 212(a)(9)(B)(i)(II) includes aggregate periods of unlawful presence, then all aliens falling under section 212(a)(9)(C)(i)(I) would also fall under section 212(a)(9)(B)(i)(II), because they would be aliens who have been unlawfully present in the United States for more than 1 year and would be again seeking admission pursuant to section 235(a)(1). If section 212(a)(9)(B)(i)(II) does not include aggregate periods of unlawful presence, only those aliens who accrued more than 1 year of unlawful presence in a single stay would fall under both sections 212(a)(9)(B)(i)(II) and (C)(i)(I).

In this sense, therefore, section 212(a)(9)(B)(i)(II) is more comprehensive than section 212(a)(9)(C)(i)(I), almost entirely encompassing aliens inadmissible under section 212(a)(9)(C)(i)(I) and also a larger class of aliens seeking lawful admission, either in the United States or abroad. With such vast areas of overlap, there is reason to question Congress' rationale for creating two substantially similar bars, which result in inconsistent and sometimes apparently irrational outcomes. Of particular consequence is the result that aliens who fall under both sections 212(a)(9)(B)(i)(II) and (C)(i)(I) may be able to obtain a waiver of inadmissibility under section 212(a)(9)(B)(i)(II), but not section 212(a)(9)(C)(i)(I). The effect of such a statutory scheme is to permanently bar aliens based on the same conduct that is waivable under another section of the Act.

Contexts in Which Issues Arise

Adjudicators will most frequently encounter sections 212(a)(9)(B)(i)(II) and (C)(i)(I) in the context of applications for adjustment under section 245(i). Applicants for section 245(i) adjustment include individuals who entered the United States without inspection and are therefore likely to have accrued some period of unlawful presence. *See* section 212(a)(9)(B)(ii) of the Act. The bars generally do not apply in the context of adjustment of status under section 245(a), which requires aliens to show that they are present pursuant to an admission (or parole) to be eligible. However, these bars also apply in other contexts. For example, section 212(a)(9)(B)(i)(II) may apply to aliens who seek consular processing, having applied to the Department of State for a visa under section 221 of the Act, 8 U.S.C. § 1201, after accruing a year of unlawful presence during a previous visit to the United States.

With respect to certain types of relief, Congress has explicitly excepted the application of the unlawful presence bars. For example, section 212(a)(9)(B) is not applicable to aliens seeking relief under either the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-538 ("HRIFA"), or section 202 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193, 2193 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997) ("NACARA"). *See also* 8 C.F.R. §§ 1245.13(c)(1), 1245.15(e)(1). Section 212(a)(9)(C) remains applicable to adjustment applicants under section 202 of NACARA and the HRIFA, but a waiver of this ground is available. *See* 8 C.F.R. §§ 1245.13(c)(2), 1245.15(e)(3). Additionally, aliens eligible for Temporary Protected Status may

seek a waiver of their unlawful presence under section 212(a)(9)(B)(i)(II) or (C)(i)(I) "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." Section 244(c)(2)(A)(ii) of the Act, 8 U.S.C. § 1254a(c)(2)(A)(ii).

However, no such waiver of the bars has been found to apply to applications for section 245(i) relief. Rather, based on the existence of the above-noted explicit waivers in the Act, the Board concluded that Congress knew how to provide for waivers when it wished to do so and that, in the context of section 245(i) relief, no implicit waivers of sections 212(a)(9)(B)(i)(II) and (C)(i)(I) should be read into the Act. *See Lemus II*, 25 I&N Dec. at 738.

History and Purpose of the Bars

The Illegal Immigration Reform and Immigration Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), created sections 212(a)(9)(B) and (C). As noted by the Board in *Matter of Arabally and Yerrabelly*, the legislative history of these sections is "rather sparse." 25 I&N Dec. at 776. IIRIRA's legislative history provides little explanation of the purpose of sections 212(a)(9)(B)(i)(II) and (C)(i)(I), or of the differences between them. However, the Board found that the "manifest purpose" of the provisions at section 212(a)(9) is to "compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter." *Id.* at 776 (quoting *Matter of Rodarte*, 23 I&N Dec. 905, 909 (BIA 2006)) (internal quotation marks omitted). Such a distinction focuses on the idea that individuals subject to section 212(a)(9), as opposed to only section 212(a)(6), have previously run afoul of U.S. immigration laws. In *Lemus I*, the Board noted that the general purpose of the Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762 (2000) ("LIFE Act"), which extended section 245(i) availability, supported the conclusion that aliens subject to section 212(a)(9)(B)(i)(II) are ineligible for section 245(i) relief, because they have not "played by the rules." 24 I&N Dec. at 379-80 n.6 (citing 146 Cong. Rec. S11263, S11265 (daily ed. Oct. 27, 2000), 2000 WL 1608338).

A common distinction between the two bars has been drawn such that section 212(a)(9)(C)(i)(I) is said to target recidivist aliens who repeatedly violate inspection and admission procedures. For example, in *Matter of Briones*, 24 I&N Dec. 355, 365-66 (BIA 2007), the Board noted that section 212(a)(9)(C) applies to aliens who are recidivists in that they have accrued unlawful presence while in the United States, departed, and then reentered or attempted to reenter. The Board concluded that such an interpretation was supported by the title of the section, "Aliens Unlawfully Present After Previous Immigration Violations," and the legislative history. *Id.* at 366 (citing *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991)). The Board emphasized that the Conference Committee Report issued at the IIRIRA's enactment stated that the section was to apply to aliens who *subsequently* enter or attempt to enter after having been present unlawfully in the United States. *Id.* In *Lemus II*, the Board affirmed its position that section 212(a)(9)(C)(i)(I) is focused on recidivism, while it asserted that section 212(a)(9)(B)(i)(II) is not. 25 I&N Dec. at 742.

On the other hand, the Board has held that section 212(a)(9)(B)(i)(II) is primarily focused on aliens who are seeking admission after having already accrued a prior period of unlawful presence. Such aliens need not have reentered the United States unlawfully. *Lemus II*, 25 I&N Dec. at 742. It should be noted, though, that aliens *could* have reentered unlawfully and be in the same position.

It is possible that Congress provided a waiver of inadmissibility under section 212(a)(9)(B)(i)(II) but not section 212(a)(9)(C)(i)(I) because it viewed violations under the latter as more serious and thus deserving of the harsher punishment of a permanent bar from the United States (with an opportunity to reapply for admission after 10 years).[2] But because of the definition of "applicant for admission" in section 235(a)(1) of the Act, many, if not all, individuals targeted by section 212(a)(9)(C)(i)(I) also fall under the terms of section 212(a)(9)(B)(i)(II), and yet are not able to obtain a waiver. Thus, although there may be some theoretical distinction between the classes of individuals who have accrued unlawful presence in both sections 212(a)(9)(B)(i)(II) and (C)(i)(I), the drafting of the statutes has inexplicably blurred the line between the two classes.

Summary and Analysis of Case Law

Precedential decisions addressing the unlawful presence bars have done so within the context of the specific set of facts and issues raised on appeal, and no one decision has fully construed the complex interplay between sections 212(a)(9)(B)(i)(II) and (C)(i)(I). Although many aliens are subject to both bars, the cases generally focus on one or the other, rather than on addressing the overlap or parallel concerns of both.

For example, in *Rodarte*, the Board addressed the bar at section 212(a)(9)(B)(i)(II) but not the overlap of applicants who are also inadmissible under section 212(a)(9)(C)(i)(I). 23 I&N Dec. 905. The Board addressed the unlawful presence bar under section 212(a)(9)(C)(i)(I) as it relates to entry without inspection under section 212(a)(6)(A) in the context of section 245(i) adjustment of status in *Briones*, but it did not reach the question of inadmissibility pursuant to section 212(a)(9)(B)(i)(II). 24 I&N Dec. 355. In *Briones*, to which at least seven circuits have afforded *Chevron* deference,[3] the Board determined that an alien subject to section 212(a)(9)(C)(i)(I) was ineligible for section 245(i) adjustment of status absent a waiver of inadmissibility, which, as previously noted, is generally unavailable. *Id.* at 371; *see also supra* note 2 and accompanying text. The Board held the same in *Lemus I and II* with respect to an alien who was determined to be inadmissible under section 212(a)(9)(B)(i)(II) but who may also have been ineligible to adjust based on section 212(a)(9)(C)(i)(I). *See* 25 I&N Dec. at 744-45.

In *Lemus I*, the Board held that an alien is inadmissible under section 212(a)(9)(B)(i)(II) if he departs the United States, whether or not through a removal or voluntary departure order, after having accrued 1 year of unlawful presence in the United States. 24 I&N Dec. 373. The Board stated that "for purposes of section 245(i) adjustment, we see no reason to distinguish between aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act . . . and aliens who, like the respondent, accrued more than 1 year of unlawful presence, illegally reentered the country, and then sought admission through adjustment of status within the United States." *Id.* at 378.[4] That decision was appealed to the Seventh Circuit, which found that the Board did not "pay sufficient heed to the difference between" sections 212(a)(9)(B)(i)(II) and (C)(i)(I), and remanded the case. *Lemus-Losa v. Holder*, 576 F.3d 752, 761 (7th Cir. 2009).

Following the Seventh Circuit remand, the Board stated that the bars in sections 212(a)(9)(B)(i)(II) and (C)(i)(I), rather than being "practically the same" are, in fact, "substantially different," although they each deserve the same treatment for purposes of section 245(i) of the Act. *Lemus II*, 25 I&N Dec. at 742. The Board explained that section 212(a)(9)(C) applies exclusively to recidivist immigration violators, while section 212(a)(9)(B) applies to both recidivists and nonrecidivists. Thus, an alien who is not a recidivist immigration violator and is seeking consular processing may be ineligible for an immigrant visa despite the attempt to play by the rules this time. Further, the Board pointed out that an alien is only inadmissible under section 212(a)(9)(B)(i)(II) if he applies for admission within 10 years after having departed; in contrast, an alien who reenters the United States without being admitted is inadmissible under section 212(a)(9)(C)(i)(I) regardless of how much time passed between his departure and reentry. *Id.* at 745-46.

In spite of these differences, the Board stated that the bars should not be differentiated based on the perceived lawfulness of the actions falling under the two bars (with section 212(a)(9)(C)(i)(I) referring to the more clearly unlawful conduct of recidivist entry without inspection), as presumed by the Seventh Circuit.[5] Rather, individuals inadmissible under section 212(a)(9)(B) may be just as culpable as aliens covered under section 212(a)(9)(C)(i)(I). Inadmissibility under section 212(a)(9)(C)(i)(I) is usually dispositive of the case, since it bars adjustment of status and cannot be waived in removal proceedings; thus, where section 212(a)(9)(C)(i)(I) applies, there is generally no need to reach the applicability of section 212(a)(9)(B)(i)(II). Perhaps as a result, neither *Lemus II* nor any other published decision acknowledges that section 212(a)(9)(C)(i)(I) is, in fact, substantially, if not wholly, encompassed by section 212(a)(9)(B)(i)(II). However, the Board hinted at the overlap between the two bars by remanding to the Immigration Judge to decide both whether the passage of time changed the applicability of 212(a)(9)(B)(i)(II) and whether the alien was covered by section 212(a)(9)(C)(i)(I). *Lemus II*, 25 I&N Dec. at 745-46 (noting that section 212(a)(9)(B)(i)(II) provides for the inadmissibility of an alien who seeks admission within 10 years of having departed and, as a result of the time that passed while the case was on appeal, the alien's triggering departure date was more than 10 years before).

continued on page 10

AILA InfoNet Doc. No. 13010399. (Posted 1/3/13)

CIRCUIT COURT DECISIONS FOR JANUARY 2013

by John Guendelsberger

The United States courts of appeals issued 165 decisions in January 2013 in cases appealed from the Board. The courts affirmed the Board in 146 cases and reversed or remanded in 19, for an overall reversal rate of 11.0%, compared to last month's 11.5%. There were no reversals from the Second, Fourth, and Sixth Circuits.

The chart below shows the results from each circuit for January 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	4	1	20.0
Second	1	1	0	0.0
Third	31	30	1	3.2
Fourth	9	9	0	0.0
Fifth	11	9	2	18.2
Sixth	12	12	0	0.0
Seventh	7	6	1	14.3
Eighth	4	3	1	25.0
Ninth	75	65	10	13.3
Tenth	4	2	2	50.0
Eleventh	6	5	1	16.7
All	165	146	19	11.5

The 165 decisions included 77 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 47 direct appeals from denials of other forms of relief from removal or from findings of removal; and 41 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	77	64	13	16.9
Other Relief	47	43	4	8.5
Motions	41	39	2	4.9

The 13 reversals or remands in asylum cases involved credibility (4 cases), well-founded fear (2 cases), level of harm for past persecution, internal relocation, the changed circumstances exception to the 1-year filing deadline for asylum, the particularly serious crime bar, corroboration requirements, evidentiary filing deadlines, and the Convention Against Torture. The four reversals or remands in the "other relief" category included application of the modified categorical approach, crimes involving moral turpitude, good moral character, and aggravated felony crimes of violence. The motions cases involved ineffective assistance of counsel and a remand to consider an issue not addressed by the Board.

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Chaidez v. United States, No. 11-820, 2013 WL 610201 (U.S. Feb. 20, 2013): The Supreme Court held that under the Court's holding in *Teague v. Lane*, 489 U.S. 288 (1989), the requirement set out in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that a criminal defense attorney must advise an alien of the immigration consequences of a guilty plea, does not apply retroactively to final decisions that predate *Padilla*. The issue was whether *Padilla* "announced a new rule." If so, under the holding in *Teague*, it would not apply to collateral challenges to final decisions (such as habeas or coram nobis petitions) that were entered prior to *Padilla*. The court noted that before *Padilla*, only two State courts had held that an attorney's failure to advise of the "deportation risks or other collateral consequences of a guilty plea" (i.e., consequences not comprising a component of the criminal sentence) violated the Sixth Amendment. Since the Court had not addressed this issue prior to *Padilla*, its subsequent ruling in that case was not one that would have been "apparent to all reasonable jurists." The Court concluded that *Padilla* therefore announced a new rule, making it inapplicable retroactively in collateral attacks on decisions that were final prior to its issuance.

Justice Kagan wrote the majority decision, which was joined by Chief Justice Roberts, and Justices Scalia, Kennedy, Breyer, and Alito. Justice Thomas filed a concurring opinion, and Justice Sotomayor filed a dissenting opinion, which was joined by Justice Ginsburg.

AILA InfoNet Doc. No. 13010399. (Posted 1/3/13)

Second Circuit:

Pascual v. Holder, No. 12-2798, 2013 WL 599519 (2d Cir. Feb. 19, 2013): The Second Circuit dismissed a petition for review of a Board decision affirming an Immigration Judge's finding that the petitioner was convicted of an aggravated felony and was therefore ineligible for cancellation of removal. The petitioner was convicted of criminal sale of a controlled substance (cocaine) in the third degree pursuant to section 220.39(1) of New York Penal Law. The court stated that a State offense constitutes an aggravated felony under the Controlled Substance Act ("CSA") only when it corresponds to a felony under Federal law (i.e., it must correspond to an offense under the CSA carrying a maximum penalty of over 1 year). Applying the categorical approach to the State law in question, the court found that its elements correspond to 21 U.S.C. § 841(a)(1), which carries a term in excess of 1 year. The court disagreed with the petitioner's claim (based on an unpublished Fifth Circuit opinion) that the New York statute includes offers to sell, which are not trafficking crimes under the CSA. The court explained that 21 U.S.C. § 841(a)(1) prohibits "distribution," which does not require actual sale but includes delivery, which the court has interpreted to mean "the actual, constructive, or *attempted* transfer of a controlled substance" (quoting *United States v. Wallace*, 532 F.3d 126, 129 (2d Cir. 2008)). Finding that the petitioner's conviction was for an aggravated felony, the court held that it lacked jurisdiction to review the removal order.

Sixth Circuit:

Yeremin v. Holder, No. 10-4525, 11-3975, 2013 WL 535755 (6th Cir. Feb. 14, 2013): The Sixth Circuit denied a petition for review of the Board's decision affirming an Immigration Judge's order of removal. The Immigration Judge found that the petitioner's conviction for conspiracy to traffic in identity documents pursuant to 18 U.S.C. § 1028(a)(3) was for a crime involving moral turpitude. Applying the categorical approach, the court observed that (1) the statutory language requires knowing possession of the identity documents in question; and (2) courts have interpreted the statute as requiring "proof of an intent to use or transfer the . . . documents unlawfully." The court found unpersuasive the petitioner's argument that the intent to use or transfer the documents unlawfully "does not necessarily require fraud or deceit." The petitioner also claimed that the Immigration Judge improperly relied on charges contained in the criminal indictment. However, the court rejected this argument because (1) the petitioner pled guilty to the same offense that was charged in the indictment; and (2) the Immigration Judge and the Board had held that the "inherent nature" of the crime involved fraud, with the former looking to the indictment language only for additional confirmation. The court also upheld the Board's denial of the petitioner's subsequent motion to reconsider its decision, because the court found that the motion asserted legal arguments that were previously raised, as opposed to arguments that were overlooked or based on a change of law.

Seventh Circuit:

Boadi v. Holder, No. 12-2742, 2013 WL 452506 (7th Cir. Feb. 7, 2013): The Seventh Circuit denied a petition for review of the Board's decision affirming an Immigration Judge's order of removal. The petitioner had obtained conditional residence based on his marriage to a U.S. citizen. He was placed into removal proceedings after the Department of Homeland Security ("DHS") denied his Form I-751 petition to remove the conditions of his permanent residence because of questions about the validity of the marriage. The petitioner was divorced soon thereafter and filed an application for a good-faith marriage waiver under section 216(c)(4)(B) of the Act with the Immigration Judge. At the master calendar hearing, the petitioner requested a change of venue from Chicago to Cleveland since he was living in Ohio, and the DHS opposed the change of venue. The Immigration Judge set the case in Chicago for a hearing limited to the issue of removability, because the DHS was pursuing a fraud charge that required the testimony of a DHS agent there. The Immigration Judge added that after the next hearing, he would transfer the case to Cleveland. Shortly before the next hearing, the petitioner's counsel withdrew. The petitioner appeared pro se and was told by the Immigration Judge that this was to be a final hearing and that the Immigration Judge would decide all issues (not just removability). The Immigration Judge agreed to grant the petitioner a 20-day continuance to retain new counsel. However, the Immigration Judge also granted the DHS's request to allow testimony of its agent who had appeared that day to testify in support of the fraud charge. The petitioner was afforded the right to cross-examine the agent, but asked only one question. Before adjourning, the Immigration Judge asked the petitioner if he wished to submit additional evidence and reminded him he could do so at the next hearing. Twenty days later, the petitioner (still appearing pro se) addressed the

discrepancies raised by DHS. The Immigration Judge ultimately made an adverse credibility finding as to the petitioner, sustained the charge of removability, and denied the good-faith marriage application. The Board affirmed. On appeal, the circuit court responded to the petitioner's challenge to the Immigration Judge's conduct of the proceedings by focusing on the lack of prejudice. Although the petitioner would have preferred to have his hearing at a later date in Cleveland, the court found that he had not demonstrated how the outcome would have been altered. The court noted that "[i]t is not enough to suggest that cross-examination might have gone differently or that an attorney . . . would have presented different evidence." Rather, the petitioner must point out a specific weakness "and explain how it affected his case." Responding to the petitioner's claim that he was not afforded adequate time to file applications for relief, the court observed that 18 months had passed from the time of the Immigration Judge's decision, yet no other available form of relief had been identified by the petitioner. The court found two additional factual grounds raised by the petitioner to be unpersuasive.

Smykiene v. Holder, Nos. 12-1800, 12-2877, 2013 WL 514556 (7th Cir. Feb. 13, 2013): The Seventh Circuit granted the petition for review of a Board order affirming an Immigration Judge's denial of a motion to rescind an in absentia deportation order where notice of the hearing was not received. The petitioner, who had overstayed her visitor's visa, was served with an Order to Show Cause in New York in 1996. She provided the Immigration and Nationality Service ("INS") with her address at the time, which was in Chicago. The Immigration Court sent a notice of hearing by certified mail to the address she provided, but the Postal Service returned the notice of hearing stamped "Attempted—Not Known." As a result, the petitioner did not appear for her hearing and was ordered deported in absentia. Unaware of the order, in 1997 the petitioner married a man who became a naturalized U.S. citizen 2 years later. She did not learn of the outstanding deportation order until 2010, after which she moved to reopen. In denying the motion, the Immigration Judge found that since the notice was mailed to the address she had provided to the INS, the petitioner had been properly notified of the hearing. The Immigration Judge also mentioned that the petitioner waited 14 years to move to reopen. The circuit court distinguished between proper notice (which could be achieved through mailing to the address provided) and the separate issue of receipt by the petitioner (the absence of which is a ground for rescinding an in absentia order under the relevant statute). The court noted that where the petitioner provided an affidavit alleging that she did not receive the notice and there is no conclusive evidence that she evaded receipt, the order must be rescinded. While the Immigration Judge's decision stated that one cannot evade notice by either refusing delivery or providing an incorrect address, the court found no evidence of such actions in the record. The court pointed out that the returned notice was not marked "Refused," but rather "Attempted—Not Known." Addressing the Board's affirmance, the court again distinguished between the concepts of "notice" and "receipt" and provided several hypotheticals under which the petitioner may have failed to receive the notice without evasion.

Ninth Circuit:

Henriquez-Rivas v. Holder, No. 09-71571, 2013 WL 518048 (9th Cir. Feb. 13, 2013): The en banc court granted a petition for review of the Board's decision reversing an Immigration Judge's grant of asylum. In 1998, when she was 12 years old, the petitioner witnessed the murder of her father in El Salvador by four members of a gang known as M-18. She subsequently identified two of the suspects in a police line-up and testified against them in their criminal prosecution. In granting her asylum, the Immigration Judge found the petitioner to be a member of a particular social group consisting of "people testifying against or otherwise opposing gang members." The Board reversed, holding that the proposed group lacked the requisite "social visibility" and therefore did not constitute a particular social group. A three-member panel of the circuit had initially denied the petition for review before the en banc court granted rehearing. On rehearing, the court observed that the ambiguity of the term "social visibility" has been a cause of disagreement between the circuits as to the permissibility of that requirement. The court concluded that in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), the Board intended the term to mean "social awareness" rather than to refer to a literal ocular "visibility" (i.e., the group membership is apparent at a glance). The court reached this conclusion based on examples of particular social groups (former military leaders and land owners) referenced in an earlier Board precedent, *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), noting that "former military officers do not always wear epaulets, nor do landowners wear T-shirts mapping

their holdings." The court next stated that neither it nor the Board has yet addressed the key question of to *whom* the group must be socially visible. Although the court left this question to the Board to decide in the first instance, it opined that the perception of the persecutor might be most crucial. The court stated that the group need not be visible to the petitioner (e.g., an infant is unaware of its race, nationality, or religion yet may nevertheless be targeted on account of one of these grounds). Furthermore, greater society may be unaware of the existence of an obscure religious sect or of a group that is limited to a certain region or is trying to remain hidden. The court held that evidence of a group's visibility to society may suffice to meet the requirement, but in cases such as the examples above, where overall visibility has not been shown, the requirement may be met "by looking to the perceptions of persecutors." The court next recognized the Board's "particularity" requirement to be a separate, relevant determination from "social visibility," noting that the absence of boundaries or specific definitions may make it "more difficult to believe that a collection of individuals is in fact perceived as a group." However, the court stated that it clarified these criteria "without reaching the ultimate question of whether the criteria themselves are valid," because the Board could find the proposed social group valid under the older standard in *Matter of Acosta* (which did not include the two elements in question). The court ultimately remanded the record to the Board to reconsider its "social visibility" ruling in light of the fact that the petitioner had testified against the gang members in open court, making her highly visible. A dissenting opinion cited the Supreme Court's holding in *Gonzales v. Thomas*, 547 U.S. 183 (2006), that a circuit court's role is limited to review, and not first view. The dissent also cited to the precedent decisions of numerous other circuits that have agreed with the Board's approach.

Correa-Rivera v. Holder, No. 08-72258, 2013 WL 440647 (9th Cir. Feb. 6, 2013): The Ninth Circuit granted a petition for review and reversed a decision of the Board dismissing an appeal based on a claim of ineffective assistance of counsel. The petitioner's attorney did not file an application for cancellation of removal by the deadline set by the Immigration Judge, which resulted in a determination that the application was abandoned and the issuance of an order of removal. The Board dismissed the petitioner's appeal on the grounds that he did not comply with the third requirement of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The circuit court first addressed the fact that the petitioner raised the issue by filing an appeal of the Immigration Judge's decision with the Board, rather than submitting a motion to reopen. The latter is the procedurally correct method, because an ineffective assistance claim raises facts that are not part of the record below. However, the court held that since the DHS did not raise this argument and the Board chose to decide the appeal on its merits, the court would treat the appeal as a motion to reopen, over which it has jurisdiction. Moving to the merits of the claim, the court found that the first two *Lozada* requirements were satisfied: the petitioner submitted an affidavit detailing the agreement with counsel and proof that counsel was notified of the charges and was given an opportunity to respond. The court next turned to the third *Lozada* element, which states that the record "should reflect" whether a complaint was filed with appropriate disciplinary authorities against the impugned counsel. The court noted that no "probative evidence" of a filing was required and further contrasted the Board's "hortatory" use of the word "should" in the third element with its rule that the first two elements "must" be satisfied. The court recognized that there could be several reasons for this word choice but found that the language was nevertheless binding. Since the petitioner was prejudiced by counsel's failure to file the application for relief and counsel admitted to such in writing, the court reversed the Board's decision based on the third element because the language of *Lozada* did not require strict compliance with that element.

BIA PRECEDENT DECISIONS

In *Matter of G-K-*, 26 I&N Dec. 88 (BIA 2013), the Board considered whether the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 ("UNTOC"), provides an independent basis for relief from removal in immigration proceedings and concluded that it does not. The respondent, who had been convicted of an aggravated felony drug trafficking offense and was found removable under sections 237(a)(2)(A)(iii) and (B)(i) of the Act, had applied for asylum, withholding of removal, and protection under the Convention Against Torture. He also sought relief under the UNTOC treaty, which accords protection from retaliation or intimidation to cooperating witnesses in certain criminal proceedings, based on his cooperation with United States authorities in his prosecution. The Immigration Judge found the respondent ineligible for asylum and withholding because

AILA InfoNet Doc. No. 13010399. (Posted 1/3/13)

of his conviction and separately found him ineligible for CAT protection. Additionally, she determined that she lacked authority to craft or adjudicate an independent remedy under the UNTOC.

On appeal, the Board observed that the objectives of the UNTOC were advanced through existing statutes, which provide relief to witnesses, cooperators, informants, and victims of trafficking or criminal organizations via, in relevant part, S nonimmigrant visas. The Board noted that an S visa may be available to an alien like the respondent who has critical reliable information that aids a successful prosecution of an individual involved in a criminal organization or enterprise. Pointing out that an S nonimmigrant visa is issued by the DHS pursuant to a request from an interested Federal or State law enforcement authority, the Board stated that it lacks jurisdiction over S visas.

Rejecting the respondent's argument that the UNTOC provides for the Board and Immigration Judges to adjudicate and grant relief to satisfy the United States' obligations under the treaty, the Board pointed out that nothing in the self-executing treaty gives it authority to permit the respondent to remain in the United States or prevent his removal to Ghana. The Board concluded that the UNTOC does not create an independent basis for relief from removal that can be advanced by the respondent in his removal proceedings. Finding that the Immigration Judge had not erred in denying the respondent's applications for withholding of removal and CAT protection, the Board dismissed the appeal.

The Unlawful Presence Bars: Think Twice
continued

Although the Board's 2012 decision in *Arabally and Yerrabelly* addressed the unlawful presence bar under section 212(a)(9)(B)(i)(II) as it relates to a departure pursuant to advance parole, it did not examine the section 212(a)(9)(C)(i)(I) bar under the unique facts of the case and therefore does not offer any insight into the interaction between the two. *See* 25 I&N Dec. 771. The Board did, however, call into question several DHS memoranda addressing advance parole and the meaning of a departure for purposes of the unlawful presence bars. *Id.* at 776 n.4. While these memoranda gave some level of guidance in applying the unlawful presence bars under section 212(a)(9), the Board has explicitly disavowed at least some of that guidance, raising doubts regarding their persuasive power for purposes of applying the unlawful presence bars.

Sources of Guidance

The unlawful presence bars do not have regulatory counterparts to guide in their interpretation or application. In the absence of regulations, Immigration Judges may look to DHS memoranda addressing the unlawful presence bars as potentially persuasive guidance for administration of the bars. For example, a memorandum from Louis Crocetti, Associate Commissioner of the former Immigration and Naturalization Service, which was issued shortly after enactment of the IIRIRA, clarifies that an alien must depart the United States in order to be inadmissible under section 212(a)(9)(B) or (C). Memorandum from Louis D. Crocetti, Jr., Assoc. Comm'r, Office of Examinations, to INS officials (May 1, 1997), *reprinted in* 74 Interpreter Releases, No. 18, May 12, 1997, app. II at 791-94. That memorandum also maintains that such individuals who depart the United States and return will be regarded as inadmissible for adjustment of status under section 245 of the Act. *Id.*

Other agency memoranda on the topic between 1997 and 2009 were consolidated into an interoffice memorandum by Acting Associate Director of USCIS, Donald Neufeld. Neufeld Memorandum, *supra*. This is the memo that the Board specifically called into question in *Arabally and Yerrabelly*, finding that the determination regarding advance parole as a departure was not adequately explained and did not address counterarguments. 25 I&N Dec. at 776 n.4. For its part, the Neufeld memorandum does acknowledge that aliens may be inadmissible under *both* sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Act. Neufeld Memorandum, *supra*, at 19. However, the memorandum does not address the consequences that attach when both sections apply, nor does it resolve the confusion that arises from the overlapping application of those provisions in the context of the availability of a hardship waiver for inadmissibility under section 212(a)(9)(B)(i)(II). *Id.* at 46-47. Furthermore, in the wake of *Arabally and Yerrabelly*, it is unclear whether these memoranda are entitled to deference by adjudicators, given that portions of them were criticized by the Board in that case.

Conclusion

Although sections 212(a)(9)(B)(i)(II) and (C)(i)(I) are not always brought as charges of inadmissibility, the unlawful presence bars affect a large number of applications for admission into the United States. For individuals already in the United States and seeking adjustment of status, the application of the bars is particularly significant because they may be subject to a permanent bar to admission under section 212(a)(9)(C)(i)(I), without the possibility of a waiver. In the absence of regulatory guidance or case law definitively analyzing section 212(a)(9)(C)(i)(I), adjudicators must base their application of the unlawful presence bars on a close reading of the statutory language, the Board's holdings as to the applicability of section 212(a)(9)(B)(i)(II), and the portions of DHS memoranda that have not been criticized. Adjudicators should be particularly vigilant in carefully considering the applicability of both bars when the alien has accrued more than 1 year of unlawful presence.

Melanie J. Siders is an attorney advisor at the Philadelphia Immigration Court. Alexa C. McDonnell was formerly an attorney advisor at the Philadelphia Immigration Court.

1. A waiver of section 212(a)(9)(C)(i) inadmissibility may be available in limited circumstances to certain VAWA (Violence Against Women Act) self-petitioning aliens under section 212(a)(9)(C)(iii) of the Act. However, EOIR adjudicators have no jurisdiction over these waivers, which are granted by the DHS.

2. While recent Board decisions tend to recognize this distinction, historically this has not always been the case. For example, in *Matter of Rodarte*, 23 I&N Dec. at 909, the Board stated that "[i]t is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent." Thus, the Board appeared to view all provisions under section 212(a)(9) as targeting recidivist immigration violators, not just those inadmissible under section 212(a)(9)(C)(i)(I). Moreover, as this article describes, it is clear that many, if not all, recidivist violators under section 212(a)(9)(C)(i)(I) also fall under the bar in section 212(a)(9)(B)(i)(II).

3. *See Cheruku v. Att'y Gen. of U.S.*, 662 F.3d 198, 206 (3d Cir. 2011); *Garfias-Rodriguez v. Holder*, 649 F.3d 942, 948 (9th Cir. 2011); *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1152 (10th Cir. 2011); *Renteria-Ledesma v. Holder*, 615 F.3d 903, 908 (8th Cir. 2010); *Ramirez v. Holder*, 609 F.3d 331, 335-37 (4th Cir. 2010); *Mora v. Mukasey*, 550 F.3d 231, 239 (2d Cir. 2008); *Ramirez-Canales v. Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008).

4. The Board also noted in footnote 3 that it believed Congress had committed a drafting mistake in describing individuals inadmissible under section 212(a)(9)(B)(i)(II) as "again" seeking admission since such individuals were not described as having previously sought admission. 24 I&N Dec. at 376 n.3. As discussed earlier in this article, the Board later clarified this position in *Lemus II*, explaining that the statute used "seeks admission" as a term of art and that all aliens with a past period of unlawful presence have at some point been applicants for admission pursuant to section 235(a)(1) of the Act. 25 I&N Dec. at 743 n.6. It is precisely this use of the term "seeks admission" that continues to cause uncertainty regarding the distinction between the unlawful presence bars. The fact that entrants without inspection are construed to be constructive applicants for admission renders aliens who are inadmissible under section 212(a)(9)(C)(i)(II) *also* inadmissible under section 212(a)(9)(B)(i)(II). *See* section 235(a)(1) of the Act.

5. The Third Circuit, in *Cheruku*, also acknowledged that aliens subject to inadmissibility under section 212(a)(9)(B) remain culpable as previous immigration violators. 662 F.3d at 207. The Third Circuit did not, however, acknowledge that many of the "more culpable" aliens encompassed by section 212(a)(9)(C)(i)(I) are also encompassed by section 212(a)(9)(B)(i)(II).