

## Determining Unlawful Presence for the Purposes of the Three-Year, Ten-Year, and Permanent Bars

by Lee A. O'Connor

The grounds of inadmissibility based on unlawful presence set out in sections 212(a)(9)(B) and (C) of the Immigration and Nationality Act (INA)<sup>1</sup> are among the most draconian provisions in immigration law today. This article will focus on what constitutes unlawful presence for purposes of the three-year, ten-year, and permanent bars. It will not focus on other elements of these grounds of inadmissibility, the consequences of triggering the bars, or waivers of inadmissibility.<sup>2</sup>

A foreign national is inadmissible for three years (the three-year bar) if he or she: (1) departed the United States; (2) prior to the commencement of removal proceedings; (3) after having been unlawfully present in the United States for more than 180 days and less than one year.<sup>3</sup> A foreign national is inadmissible for ten years (the ten-year bar) if he or she: (1) departed the United States; (2) after having been unlawfully present in the United States for one year or more.<sup>4</sup> A foreign national is inadmissible for life (the permanent bar) for: (1) departing the United States after having been unlawfully present for more than one year in the aggregate, and then entering or attempting to enter "without being admitted"; or (2) departing the United States after having been ordered removed, and then entering or attempting to enter "without being admitted."<sup>5</sup>

### The Definition of Unlawful Presence

The INA states that a foreign national is unlawfully present in the United States if he or she: (1) remains in the United States after the expiration of the period of stay in the country granted by the attorney general (AG); (2) "or is present in the United States without being admitted or paroled."<sup>6</sup> Consequently, a foreign national accumulates unlawful presence for remaining in the United States after the expiration of a *period of stay authorized by the attorney general* (POSABAG), or for entering without inspection.

#### Authorized Stay Distinguished from "Status"

It is important to note that a period of authorized stay is granted to a for-



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1 Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

2 For a general overview of these other aspects of the unlawful presence bars, the reader should refer to L. O'Connor, "Representing the Unlawfully Present (pt. 1)," 08-09 *Immigration Briefings* 1 (Sept. 2008).

3 INA §212(a)(9)(B)(i)(I).

4 INA §212(a)(9)(B)(i)(II).

5 INA §212(a)(9)(C)(i).

6 INA §212(a)(9)(B)(ii).

