



U.S. Department of Justice
Immigration and Naturalization Service

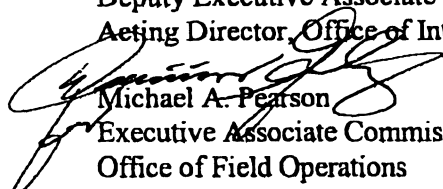
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IN 00-14

Office of Field Operations

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Washington, DC 20536

MAR 3 2000

MEMORANDUM FOR: All Regional Directors
Deputy Executive Associate Commissioner, Immigration Services Division
Acting Director, Office of International Affairs

FROM: 
Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Section 222(g) of the Immigration and Nationality Act (Act) (IN-0014)

This memorandum addresses issues related to the automatic voidance of nonimmigrant visas (and combination nonimmigrant visa/border crossing cards) under section 222(g) of the Act arising at ports of entry. These policies and procedures are effective immediately and will be included in the Inspector's Field Manual (IFM) in the next release of INSERTS. This memorandum amends portions of the memorandum issued by the Office of the Executive Associate Commissioner for Field Operations on January 14, 1999, as well as Chapter 15 of the IFM. This memorandum is being issued simultaneously with a separate memorandum amending the Service's guidance on unlawful presence under section 212(a)(9)(B) of the Act, specifically the inclusion of an additional class of aliens considered to be in a period of stay authorized by the Attorney General. See HQADN70/21.1.24-P, issued simultaneously with this memorandum, to be included in Chapter XXX of the Adjudicator's field Manual (AFM), in the next release of INSERTS.

By way of background, section 222(g) provides that an alien who was admitted on a nonimmigrant visa and who remains in the United States beyond the period of stay authorized by the Attorney General becomes subject to 222(g). When the alien is subject to section 222(g), the nonimmigrant visa becomes automatically void at the conclusion of the authorized stay. In addition, aliens who remain in the United States beyond the period of stay authorized by the Attorney General accrue unlawful presence towards the 3- and 10-year bars under section 212(a)(9)(B)(i)(I) and (II) of the Act. See HQADN70/21.1.24-P, issued simultaneously with this memorandum, to be included in Chapter XXX of the AFM, in the next release of INSERTS.

The Service, in cooperation with the Department of State (DOS), has adopted essentially the same interpretation of "remain in the United States beyond the period of stay authorized by the Attorney General" for unlawful presence under sections 212(a)(9)(B) and the automatic voidance of nonimmigrant visas under section 222(g). The Service has designated as a period of stay authorized by the Attorney General the entire period during which a timely filed, nonfrivolous application has been 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. As a result, this newly designated period of stay authorized by the Attorney General affects the application of section 222(g) of the Act and necessitates the following changes to

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IFM Chapter 15.15.

Chapter 15 of the IFM is amended by revising Chapters 15.15(a), 15.15(b), 15.15(c)(1)(iii), 15.15(c)(1)(v), 15.15(e)(2), 15.15(g)(1), 15.15(h), and 15.15(k), and by removing and reserving Chapter 15.5(j)(1)(i) to read as follows:

15.15 Cancellation of nonimmigrant visas under section 222(g) of the Act.

(a) **Section 222(g) defined.** An alien who was admitted to the United States on a nonimmigrant visa and who remained beyond the period of stay authorized by the Attorney General is subject to section 222(g) of the Act. The nonimmigrant visa becomes void at the conclusion of the authorized stay, unless the alien filed an application for extension of stay (E/S) or change of status (C/S) that would otherwise fall within the tolling provisions under section 212(a)(9)(B)(iv) of the Act or be deemed a period of stay authorized by the Attorney General. See paragraph (e) of this chapter. When the alien is subject to section 222(g) of the Act, the nonimmigrant visa becomes automatically void, and the alien may not be admitted to the United States, unless he or she obtains or has already obtained another visa in the country of his or her nationality. Consular officers and immigration officers who encounter aliens in possession of nonimmigrant visas that have become automatically void must physically cancel those visas. Aliens subject to section 222(g) may obtain a new visa in a third country only when the Department of State (DOS) finds extraordinary circumstances. Section 222(g)(2)(B) of the Act. Aliens arriving at a POE with a visa that has become automatically void under section 222(g) may apply for a waiver under section 212(d)(4) of the Act in limited circumstances. See paragraph (k) of this chapter. Aliens who present upon arrival at the POE a nonimmigrant visa that is automatically void under section 222(g), and who are not eligible for a waiver under section 212(d)(4) of the Act, are subject to expedited removal under section 235(b)(1) of the Act. In some cases, it may be appropriate to allow them to withdraw their application for admission, rather than to issue an expedited removal order. See paragraph (l) of this chapter and chapter 17.2. (Revised IN-00-14)

(b) **Effective date.** Section 222(g) of the Act became effective on the date of enactment, September 30, 1996, and applies to any alien seeking admission on or after that date. The statute voids visas issued before, on, or after the date of enactment. For example, an alien who was issued a B-2 visa in 1994, valid indefinitely for multiple entries, who was admitted to the United States shortly thereafter for six months, and who remained in the United States beyond the I-94 expiration date is subject to section 222(g) if he or she seeks to be admitted with that visa on or after September 30, 1996. In addition, any future application for a nonimmigrant visa must be made in the country of the alien's nationality or last residence abroad, unless the alien is granted an exception under section 222(g)(2)(B) of the Act. We note that section 632(b)(2) of IIRIRA provides a limited exception in cases where the alien overstayed prior to September 30, 1996, was issued another nonimmigrant visa before that date, and has not, during any admission to the United States pursuant to that second visa, remained beyond the period of stay authorized by the Attorney General. The alien may continue using that visa, as appropriate; however, when that visa expires, any subsequent nonimmigrant visa applications must be made in the country of the alien's nationality or last residence abroad, unless an exception is granted under section 222(g)(2)(B) of the Act. (Revised IN-00-14)

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(c) *****

(1) ***

(iii) Aliens who were admitted with an I-185 or I-586, Canadian or Mexican Border Crossing Card (BCC) and remain in the United States beyond the authorized period of admission. (Note: Aliens admitted with a combination B-1/B-2 NIV/BCC issued by DOS are subject to section 222(g) of the Act if they remain in the United States beyond the authorized admission, including those who were not issued a Form I-94. However, the overstay should be documented through a sworn statement or other credible evidence.) (Revised IN 00-14)

(iv) ***

(v) Aliens who remain in the United States beyond the period of admission authorized under the Visa Waiver Pilot Program (VWPP) under section 217 of the Act, or under the Guam Visa Waiver Program under 8 CFR 212.1(e). (Revised IN 00-14)

(2) ***

(d) *****

(e) Meaning of period of stay authorized by the Attorney General.

(1) *****

(2) *****

(iv) Date certain nonimmigrants with timely filed E/S and C/S applications. Section 212(a)(9)(B)(ii) of the Act provides that an alien is unlawfully present if he or she is present in the United States without admission or parole or beyond the period of stay authorized by the Attorney General. Section 212(a)(9)(B)(iv) of the Act, however, is a tolling provision that covers certain nonimmigrants. Specifically, if the 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)(I) of the Act. The Service has designated as a period of stay authorized by the Attorney General the entire time during which a timely filed, non-frivolous application for E/S or C/S is pending, provided the alien meets the requirements set forth below. Aliens who meet these requirements are not subject to section 222(g). See also chapter 30.1(d) of the AFM.

(A) The E/S or C/S application must have been timely filed, as required under 8 CFR § 214.1(c)(4) or 8 CFR § 248.1(b), respectively. The application is timely filed if it is submitted before the previously authorized admission expires, as provided under 8 CFR § 214.2, as applicable to the nonimmigrant class under which the alien was admitted. This requirement

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may be established by submitting 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.

(B) The E/S or C/S application must be nonfrivolous. The application must have an arguable basis in law or fact and must not have been filed for an improper purpose. When applying for a visa at a consular post abroad, the applicant may be required to satisfy additional criteria, as provided in section (g)(1) of this chapter; and

(C) The alien must not have worked without authorization before the E/S or C/S application was filed or while it was pending. Service and consular officers may take a sworn statement from the alien to this effect. Aliens who make misrepresentations to satisfy this requirement become subject to section 212(a)(6)(C)(i) of the Act relating to fraud and willful misrepresentation of a material fact.

(Added IN 00-14)

(f) * * * * *

(g) Effect on 222(g) of departure during pending E/S or C/S application.

(1) Aliens admitted until a specific date. Nonimmigrants admitted to the United States until a specific date who apply for E/S or C/S but who then leave the United States after the I-94 expires and before a decision on the application has been issued are not subject to section 222(g) of the Act if they can establish, to the satisfaction of the consular officer (if applying for a nonimmigrant visa), or to the satisfaction of the inspecting officer (if applying for admission at a POE) that they were in a period of stay authorized by the Attorney General prior to departure. The application must be timely, nonfrivolous, and the alien must not have engaged in unauthorized employment, as provided in chapter 15.15(e)(2)(iv) of the IFM. When these requirements have been met, the alien's nonimmigrant visa should not be canceled. (Revised IN 00-14)

(2) Aliens admitted D/S. Nonimmigrants admitted D/S who leave the United States while the E/S or C/S application is pending are not subject to section 222(g) of the Act, if no status violation was found that would have resulted in the termination of the period of stay authorized by the Attorney General. In addition, D/S nonimmigrants whose C/S or E/S applications were denied for reasons other than a status violation are not subject to section 222(g) of the Act.

(h) Effect of voluntary departure on 222(g). An alien who has complied with an order of voluntary departure is not subject to section 222(g), if:

(1) There was no gap between the date the prior period of authorized stay lapsed and the date that voluntary departure was granted; and

(2) The voluntary departure was not issued in conjunction with the finding of a status violation.

(Revised IN 00-14) InfoNet Doc. No. 00030773. (Posted 03/07/00)

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(i) * * * * *

(j) Extraordinary circumstances exceptions for third-country nonimmigrant visa applicants outside of the United States.

(1) * * *

(i) (RESERVED)

(ii) * * *

(iii) * * *

(2) * * * * *

(3) * * * * *

(4) * * * * *

(k) * * * * *

(1) Waivers granted under section 212(d)(4) of the Act at the POE based on an unforeseen emergency. An alien whose nonimmigrant visa has been canceled pursuant to section 222(g) may apply for a waiver under section 212(d)(4)(A) of the Act based on an unforeseen emergency. These waiver applications are accepted and reviewed on a case-by-case basis, and at the discretion of the inspecting officer. To apply for the waiver, the alien must file Form I-193, Application for a Waiver of Passport and/or Visa, with a designated officer, and pay the required fee. (Revised IN 00-14)

(2) Waiver denied under section 212(d)(4) of the Act. An alien whose nonimmigrant visa has become automatically void under section 222(g) of the Act is inadmissible under section 212(a)(7)(B)(i)(II) of the Act, as a nonimmigrant who lacks the required visa. When the alien does not qualify for any waiver under section 212(d)(4) of the Act, the automatically voided NIV or NIV/BCC must be canceled under section 222(g)(1) of the Act. Consequently, the alien is subject to expedited removal. (Revised IN 00-14)

Please ensure the consistent application and implementation of section 222(g) of the Act in your areas of jurisdiction. Linda Loveless, Chief Inspector, Office of Inspections, is the point of contact for inspections-related issues arising at POEs. She may be reached at 202-514-3019. Sophia Cox, Adjudications Officer, Office of Adjudications, 202-514-4754, and Joanna London, Associate General Counsel, Office of the General Counsel, 606-616-0113, are points of contact for questions concerning section 222(g) not arising at a POE.