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GUIDE: RETURNING TO THE U.S. AFTER LEAVING

What options would I have for re-entering or returning to the U.S. after leaving?

This resource will guide you through the important factors you need to consider when planning to re-enter the U.S.–whether temporarily or permanently–once you are living abroad. You will learn about unlawful presence and waivers for unlawful presence bars, as well as how your specific immigration circumstances might impact your ability to visit or move back to the U.S. We hope this guide will support you in making informed choices about leaving and re-entering the country.

General Questions

1. What is "unlawful presence"?

In the 1990s, Congress added a test of "unlawful presence" to immigration law. Before that, people who overstayed their status could leave the United States, apply for an appropriate visa, and return. Nowadays, unlawful presence counts the days of unauthorized stay, either after a status expires, or after an entry without inspection. In other words, if someone entered the U.S. with a B-2 tourist status valid until January 4, 2018, and overstays, then the unlawful presence clock started on January 5, 2018. If someone entered the U.S. without inspection across the border, then unlawful presence started counting on the first day.

2. Are there exceptions to unlawful presence?

Yes, in general, days where an application is pending (such as asylum, change of status) do not count toward unlawful presence. Also, any days where the person is under the age of 18 do not count, days in the U.S. with permission, such as DACA, do not count, and sometimes an overstay of an F or J status (such as students) do not count.

3. Why is unlawful presence so important to understanding immigration options for undocumented and DACA recipients?

Unlawful presence is important because there are serious penalties if a person decides to leave the U.S. But sometimes, leaving the U.S. is the only way to get a lawful immigration status.

Congress created the unlawful presence bars (penalties) to discourage people from overstaying, but the main result was trapping people in the U.S. The unlawful presence bars are also known as the three-year and the ten-year bars. For example, someone who has 180 days of unlawful presence and leaves the United States, they cannot come back for three years. Someone who has a full year or more of unlawful presence and leaves the United States cannot come back for ten years.

Example

Consider Pavel, who came to the United States with his parents in 2008 on a tourist visa, turned 18 in 2018, and is now graduating college with a computer science degree, and has a job offer to work in the IT department at his college. The school has offered him an H-1B visa, but Pavel is stuck. He cannot file to change status to H-1B in the United States because he is not in status now due to his visa overstay. And if he leaves the U.S. to process the H-1B at the U.S. Embassy in his country of birth, he faces the ten-year bar because he has over a year of unlawful presence (days in the U.S. without status since he turned 18).

4. Are there ways to "waive" the unlawful presence bars?

Yes, the procedure depends on whether the person is applying for a temporary visa (such as tourist, business, student, employment visas) or permanent residence (green card). If someone is applying for a temporary visa, they could apply for a D3 waiver. If someone is applying for permanent residence, they may be able to apply for a I-601 waiver. For more information about bars and waivers, check out this link.

D3 Waivers

D3 waivers are a powerful tool, but there is a risk. The waiver is subjective. It is up to the visa officer to judge whether the person applying will overstay their visa once again or not. As a result, obtaining a D3 waiver is not guaranteed. In addition, the applicant has to be living outside of the U.S. while waiting for the decision. Providing proof of ties to the place where you are living is critical when applying for a waiver because that demonstrates that you already have an established life elsewhere and are not interested in pursuing a life in the U.S. D3 waivers are open to people seeking any

kind of temporary visa, including tourist, business, student, or work visas to return to the U.S. To apply for a D3 waiver, you don't have to be living in your country of birth, however, it is usually easier to apply for it from within a country where you hold citizenship.

Example

Pavel could apply for a D3 waiver in the U.S. Embassy in his country of citizenship. The processing time for the D3 waiver is about five months. If this waiver is approved, Pavel will not need to wait ten years to return to the U.S.

The D3 waiver is subjective and requires a balancing test–the U.S government would evaluate the risk of allowing Pavel back into the U.S. (very low if he has no criminal record), the benefit of allowing him back into the U.S. (significant since the school wants and needs him), and the nature of his immigration violation (being brought into the U.S. as a child). For more information on D3 waivers, check out this link.

I-601 Waivers

For someone applying for permanent residence (green card), the waiver is based on hardship to a U.S. citizen or green card holder parent or spouse (called an "anchor relative"). About halfway through a green card process, the person can make a plan to file for the waiver abroad or in the U.S. Since President Obama added the option to file in the U.S. before traveling abroad for the interview and medical exam, most people do that if they can. The waiver is subjective and based on showing that it would be an extreme hardship for the anchor relative if the person being sponsored had to leave the U.S. Preparing a waiver application involves taking a deep dive into your family situation– are there medical or psychological conditions? What is the situation for career, salary, safety in the home country?

Example

Consider Pavel again, what if the school wants to sponsor him for a green card as a computer programmer, and Pavel's mother just got her green card? His mother would be the anchor relative, and Pavel could file an I-601A waiver application in the U.S. During the application process, Pavel would need to prove that his mother would face extreme hardship if he left the U.S. He would not leave the U.S. for the green card interview and medical exam until the I-601A waiver application is approved. Once the green card application is approved, Pavel would be able to go back to his country of birth for the green card interview, but he would not face a ten-year bar if he wanted to return to the U.S.

5. How do the requirements differ based on immigration status?

- **DACA Recipients:** If you have had DACA continuously since before the age of 18 and a half, you will not face an unlawful presence bar.
- **TPS Receipts:** If you have had TPS continuously since before the age of 18 and a half, you will not face an unlawful presence bar. In addition, TPS is a lawful "status," so you may be able to finish the green card process in the U.S. The law on TPS and its processing in the U.S. is currently evolving through various court cases.
- **Under Deportation Proceedings:** Deportation cases are complicated and the immigration court file needs to be reviewed carefully before making a plan.
- **Have Criminal Convictions:** The actual court docket sheets need to be evaluated. Some more serious criminal convictions may block a green card or visa application. Others that are more minor might have a negative effect on a waiver application. Be sure to tell your attorney or legal service organization about ANY arrest, even if there was no follow up, or if the record was sealed or expunged. Check out this link for a list of free accredited legal services.

Summary of Unlawful Presence Bars and Waivers

	Non-Immigrant Visa (tourist, business,student etc.)		Immigrant Visa (green card)	
Unauthorized Presence Length	Overstayed more than 180 days	Overstayed more than one year	Overstayed more than 180 days	Overstayed more than one year
Barred from Entering the U.S.	3 years	10 years	3 years	10 years
Waiver	D3 waiver	D3 waiver	I-601 waiver	I-601 waiver

- **Entered the U.S. Without a Visa:** It may be possible to apply for an unlawful presence waiver. Be sure to tell the attorney or legal service provider about ALL trips to the U.S. There is a separate permanent bar for being in the U.S. without inspection, leaving and coming back without inspection. Check out this link for more information.
- **Canadian Citizens:** Canadians are exempt from having to apply at a U.S. consulate for a visa stamp to enter the U.S. temporarily. The D3 process is done at the U.S.-Canadian border. Check out this link for more information.

Miscellaneous/Advanced Questions

6. During visa interviews, if the visa consul asks about my family in the U.S., is that information passed along to ICE?

It can be possible because there are fraud units embedded in the consulates. However, it is quite uncommon for the consular office to communicate with ICE, unless the family has a significant criminal or immigration issue.

7. If I decide to apply for a non-immigrant visa after my ten-year bar, do I still have to disclose that I was undocumented in the past?

Yes, the DS160 form goes through visa, work, and study history. Assume the consular officer will know.

8. How will being undocumented in the past affect my chances of being granted a non-immigrant visa?

It depends. Visa officers will analyze how likely you are to overstay your visa. They will make their analysis based on different factors like the legitimacy of your reasons for traveling to the U.S. and the strength of your ties to the country you currently live in. Some consular officers are sympathetic to a situation where a person was brought to the U.S. as a minor.

9. If I naturalize in Canada and apply to come back to the U.S. with my new passport, will U.S. immigration know it is the same person who overstayed years ago?

Most likely yes. It is best to be upfront about this.

10. If I trigger the 10-year bar, does coming back on a non-immigrant visa push back the date that my bar ends?

There is a case law that the ten-year bar can be served in the U.S. on a valid temporary visa such as H-1B.

Example

If Pavel goes to his country of birth, and obtains the D3 waiver and the H-1B visa stamp in the U.S. Embassy, he can then temporarily travel to the U.S. Then, he can apply for a green card ten years after the date he first left the U.S. to get his non-immigrant visa back in his country of birth. He can serve out the ten-year bar in the U.S. (if he does not have the option of filing an I-601A green card waiver before then).

There are many different factors to consider when thinking about returning to the U.S. (temporary or permanently). Although this is an issue that you will only encounter once outside the country, it is important to understand how your journey back to the U.S. might look like before leaving. Such understanding will empower you to make more informed decisions about your departure.

This resource is part of the "Life Outside the U.S." project. It was created by Beleza Chan and Dan Berger from Curran, Berger and Kludt with editing support from Claire Calderón. Visit LifeOutsideTheUS.org to learn more. Find all the resources created and gathered for this project at immigrantsrising.org/LifeOutsideTheUS-resources.