

Comment Submitted by Xuan Luo

This is a Comment on the **U.S. Citizenship and Immigration Services (USCIS) Notice: [Agency Information Collection Activities: Application To Register Permanent Residence or Adjust Status, Form I-485, and Adjustment of Status Under Section 245\(i\), Supplement A to Form I-485; Revision of a Currently Approved Collection](#)**

- **Docket ID:** USCIS-2009-0020
 - **Document Type:** Public Submission
 - **Document Subtype:** Comment(s)
 - **Status:** Posted
 - **Received Date:** Apr 1, 2016
 - **Comment Start Date:** Mar 31, 2016
 - **Comment Due Date:** May 31, 2016
-

Comment

View document:

Part 8, items 73a and 73b of the form ask whether the person has been "unlawfully present in the United States" for a given amount of time and then departed. This seemingly pertains to the INA 212(a)(9)(B) bans. Right after that is a note that attempts to define "unlawfully present in the United States" as "if you entered the United States without being inspected and admitted or inspected and paroled, or if you legally entered the United States but you stayed longer than permitted."

However, when someone is "unlawfully present" is actually a very complex topic as described in the Adjudicator's Field Manual (AFM) chapter 40.9.2, and the overly-simplistic definition given on the form is misleading or incorrect in some circumstances. There is no further guidance in the instructions about what is "Unlawfully present", and

the form does not refer the reader to any resources on the USCIS website for further information.

For example, although the definition does not define what exactly counts as being "permitted" to stay, an F-1 student or J-1 exchange visitor who is admitted to the US for Duration of Status (D/S) and who stays long after the completion of their program without transferring to a new program or obtaining practical training would, in most reasonable people's interpretations, have "stayed longer than permitted". Yet AFM section 40.9.2(b)(1)(E)(ii) explains that someone who is admitted on D/S does not start accruing unlawful presence by staying past any given period or by simply falling out of status, and only start accruing unlawful presence when 1) USCIS finds a status violation when adjudication a request for an immigration benefit, or 2) an immigration judge makes a determination of status violation in immigration proceedings. This does not follow from the definition on the form. Someone who previously entered on D/S and stayed for a long time past the completion of their program and then departed would likely answer these questions incorrectly if they only relied on the definition on the form.

Also, there are many circumstances listed in AFM sections 40.9.2(b)(2) and 40.9.2(b)(3) in which one aliens without status do not accrue unlawful presence. For example, aliens do not accrue unlawful presence while under 18 years of age (AFM section 40.9.2(b)(2)(A); applies for INA 212(a)(9)(B) purposes but not for INA 212(a)(9)(C)) or while under a grant of deferred action (AFM section 40.9.2(b)(3)(J)), even if the person entered without inspection, or stayed past all permitted periods. Given the large number of illegal aliens who are minors or have been minors during their stay in the US, and the large number of people granted deferred action via the Deferred Action for Childhood Arrivals (DACA) program in recent years, this is potentially relevant for many people. Yet these exceptions do not follow from the definition in the form at all. Someone who had stayed in the US without status for long periods, but whose period without status is covered by being under 18 and/or being under DACA, and who then departed, would likely answer these questions incorrectly if they only relied on the definition on the form.