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Remaining in the U.S. After 4/1/98 RISKY

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April 1, 1998 is an important date to remember for aliens who have been unlawfully present in the U.S. since April 1 of the prior year. Before that date they have to make the tough decision of whether to leave or remain in the U.S. If they choose to leave their penalty for unlawfully staying in the U.S. will be limited to three years of inadmissibility. If they remain after that date, the penalty will increase to ten years. Those who are the beneficiaries of an immediate relative petition or an immigrant visa petition filed under the grandfather clause of Section 245 (i) are not subject to these bars of inadmissibility unless they depart the U.S.

Recently, the State Department issued interim guidelines as to when unlawful presence begins to accrue.

For aliens who entered the U.S. without inspection (EWI's), unlawful presence begins from the date of entry into the U.S. Aliens admitted for "duration of status" (students or exchange visitors, for example) begin to accrue unlawful presence only from the date that an immigration judge (IJ) or the INS has found that the alien has violated status. For those admitted until a specified date (i.e. dates on I-94's or any extensions), unlawful presence starts accruing the day after the expiration or if the INS or an IJ finds that there has been a status violation, whichever comes first.

If unlawful presence has been established by a finding by the INS or an IJ, the period of unlawful presence is deemed to begin from the date of the finding, and not the date of the actual violation of status. Let's say that a foreign student entered the U.S. on September 1, 1997, dropped out of school on October 1, 1997, and the INS subsequently rules that he violated his status on February 1, 1999. He would then be considered to be unlawfully present beginning on February 1, 1999, not on October 1, 1997. He will not be subject to the ten year bar until February 1, 2000.

Aliens who have received grants of "voluntary departure" (V/D's) are not considered to be unlawfully present. Unlawful presence starts only when they fail to depart by the date specified in the VD order.

Aggregate periods of unlawful presence are not considered. Any period of unlawful presence must have been accrued continuously for an alien to be considered inadmissible. Even if an alien visited the U.S. on two separate occasions and accrued three months of unlawful presence during each visit, he or she would not be subject to the three-year bar because the six-month period was not continuous. Also not considered would be any periods of unlawful presence accrued prior to April 1, 1997.

The Attorney General may waive the three-year or ten-year bar for an immigrant who is the spouse or child of a U.S. citizen or legal permanent resident, but only after it is satisfactorily established that refusal of admission would result in "extreme hardship" to the citizen or permanent resident spouse or parent. Since "extreme hardship" is not clearly defined and even harder to establish, it is imperative that anyone considering remaining the United States make their decisions carefully, lest they risk complicating their lives needlessly.