Holiday Visit Hypothetical – Prior 4-Month Overstay

Hypothetical

• Visitor previously entered the United States on a B-2 visitor visa.

• The visitor overstayed by approximately 4 months beyond the I-94 expiration date, then departed the United States voluntarily.

• The visitor now wants to return for a short holiday visit.

Analyze: Impact of Prior Overstay on New Visa Issuance and Admission

A four-month overstay generally means the person remained in the United States beyond the "period of stay authorized by the Attorney General" (now the Secretary of Homeland Security). That overstay has at least three legal consequences to analyze: unlawful presence, automatic visa voidance under INA § 222(g), and discretionary concerns about nonimmigrant intent.

1. Unlawful Presence and the Three- and Ten-Year Bars

- Under INA § 212(a)(9)(B), a noncitizen who is unlawfully present for more than 180 days but less than 1 year and then departs is inadmissible for 3 years; unlawful presence of 1 year or more triggers a 10-year bar. A 4-month overstay (about 120 days) is below the 180-day threshold, so it does not by itself trigger the 3- or 10-year unlawful-presence bars.
- Even though no 3- or 10-year bar is triggered, the client still accrued a period of unlawful presence and violated status, which consular and CBP officers may treat as a significant negative factor in future adjudications.

2. INA § 222(g): Automatic Visa Voidance

- INA § 222(g), codified at 8 U.S.C. § 1202(g), provides that if a nonimmigrant "remained in the United States beyond the period of stay authorized," the nonimmigrant visa used for that admission becomes void after the overstay. The person must generally apply for any new nonimmigrant visa in the country of nationality, absent a narrow exception.
- In this hypothetical, the prior B-2 visa would be void under § 222(g). The visitor cannot use the old visa to board a plane or apply for admission; they must seek a new visa from a U.S. consulate, typically in the home country.

3. Discretionary Concerns: INA § 214(b) and CBP Inspection

- For most visitor visas, the applicant bears the burden under INA § 214(b) to show that they are a bona fide nonimmigrant with sufficient ties abroad. A prior overstay is powerful evidence that the applicant may not comply with future periods of stay.

- Even if the consulate issues a new visa, Customs and Border Protection (CBP) officers at the port of entry may still refuse admission or limit the duration of stay after reviewing the prior overstay in the arrival/departure history.

Possible Bars and Waivers

- Unlawful-presence bars under INA § 212(a)(9)(B): triggered only if the client remained unlawfully present more than 180 days (3-year bar) or more than 1 year (10-year bar). In this fact pattern (about 120 days), these bars should not apply, but you should verify exact dates.
- Permanent bar under INA § 212(a)(9)(C): applies to certain individuals who reenter illegally after prior unlawful presence or removal. Not implicated here if the client departed once and has not reentered without inspection.
- If a bar under § 212(a)(9)(B) or another inadmissibility ground did apply, the client might seek a nonimmigrant waiver under INA § 212(d)(3). This requires a favorable, discretionary recommendation from the consular officer and approval by DHS.

In many "short overstay" cases like this hypothetical, there is no formal 3- or 10-year bar and therefore no need for a 212(d)(3) waiver. The real obstacle is discretionary: convincing a consular officer that the applicant now appreciates U.S. immigration rules and will depart on time.

Practice: Explaining Risk to the Client

- No automatic 3- or 10-year bar arises from a 4-month overstay, but the prior violation makes a new visa far from guaranteed. Denial under INA § 214(b) is common in this scenario.
- The client must understand there is no right to a visitor visa or to admission. Even a strong application can be refused, and there is no formal appeal from most consular denials.
- If the consulate refuses the visa under § 214(b), the only realistic option is to wait, strengthen ties, and reapply later. Repeated reapplications with no change in circumstances often lead to repeated denials.
- If a visa is issued, CBP at the port of entry still has authority to deny admission or limit the I-94 period. Any new overstay could trigger a 3- or 10-year bar and seriously damage future immigration options.

Practice: Documentation Strategy to Show Ties and Compliance

For the new visitor visa application, counsel can help the client assemble a record that addresses both the past violation and future compliance.

1. Written Explanation of the Prior Overstay

- Prepare a concise, truthful letter explaining the circumstances of the prior overstay (for example, medical issues, family emergency, misunderstanding about the I-94 date), emphasizing that the client departed voluntarily and has had no other violations.

- Avoid minimizing or denying the overstay—the consulate will have the entry/exit history. Instead, frame it as a one-time mistake and demonstrate what has changed to ensure future compliance.

2. Evidence of Strong Ties Abroad

- Current employment letter with salary, position, and approved vacation dates; proof of self-employment income if applicable.
- Property ownership or long-term lease; business registrations; ongoing financial obligations in the home country.
- Family ties: birth certificates or marriage certificates for spouse, minor children, or dependent parents remaining abroad.
- Prior compliant international travel, if any, to show a pattern of respecting immigration rules elsewhere.

3. Evidence of Limited, Credible Holiday Plans

- Round-trip flight itinerary with short, clearly defined travel dates and a return before any major obligation (work or school).
- Hotel reservations or invitation letter from U.S. host, with clear description of holiday activities and financial arrangements.
- Bank statements or other proof of funds to show the client can pay for the trip without unauthorized U.S. employment.

4. When to Counsel Against Travel

- If the client has weak employment, few assets, or an undisclosed desire to remain long-term, counsel may advise delaying any visitor visa application until a more appropriate immigrant or dual-intent option is available.
- Document in your engagement letter and file notes that you advised the client of the risks of denial and possible future bars if they overstay again.

CLE Discussion Prompts

• Would you encourage this client to apply now, or advise waiting until ties and circumstances are stronger?

• How would your advice change if the overstay was just under 180 days? Just over 180 days? More than one year?

• When, if ever, would you explore a 212(d)(3) nonimmigrant waiver for a former visitor with an overstay history?

Selected Authorities and Sources (Bluebook Citations)

Statutes

8 U.S.C. § 1182(a)(9)(B) (2024) (unlawful presence; three- and ten-year bars).

8 U.S.C. § 1182(a)(9)(C) (2024) (certain individuals unlawfully present after previous immigration violations).

8 U.S.C. § 1202(g) (2024) (INA § 222(g) — nonimmigrant visa void after overstay).

Regulations and Department of State Guidance

22 C.F.R. § 40.68 (2024) (aliens subject to INA 222(g)).

U.S. Dep't of State, 9 Foreign Affs. Manual § 302.11-3(A)–(B) (interpretation of unlawful presence and time frames under INA § 212(a)(9)(B)) (2024).

U.S. Dep't of State, 9 Foreign Affs. Manual § 302.1 (ineligibility based on inadequate documentation and effect of INA § 222(g)) (2024).

U.S. Dep't of State, 9 Foreign Affs. Manual § 305.4 (processing waivers, including INA § 212(d)(3)(A) nonimmigrant waivers) (2024).

USCIS Policy and Practice Resources

Unlawful Presence and Inadmissibility, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility (last visited Dec. 8, 2025).

Chapter 4 – INA 212(d)(3) Waivers, U.S. Citizenship & Immigr. Servs. Policy Manual, vol. 9, pt. O, ch. 4 (Oct. 20, 2021), https://www.uscis.gov/policy-manual/volume-9-part-o-chapter-4.

June 24 – INA 212(a)(9)(B) Policy Manual Guidance, U.S. Citizenship & Immigr. Servs. (June 24, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220624-INA212a9B.pdf.

Secondary Explanations (Optional for CLE Background)

The Three- and Ten-Year Bars, Am. Immigr. Council (Mar. 2022), https://www.americanimmigrationcouncil.org/fact-sheet/three-and-ten-year-bars.

USCIS & BIA Affirm Three- and Ten-Year Unlawful Presence Bars Can Run in the U.S., Immigr. Legal Resource Ctr. (Aug. 2023), https://www.ilrc.org/sites/default/files/2023-08/USCIS%20%26%20BIA%20Affirm%20Three-%20and%20Ten-Year%20Unlawful%20Presence%20Bars%20Can%20Run%20in%20the%20US.pdf.

Visa Overstay and Illegal Presence in the U.S., Temple Univ. Global Programs, https://global.temple.edu/isss/students/current-students/f-1-student/maintaining-legal-status/visa-overstay-and-illegal-presence-us (last visited Dec. 8, 2025).