

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



HL

FILE: [REDACTED] OFFICE: MIAMI

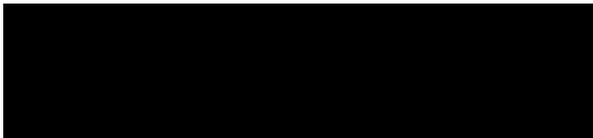
DATE:

NOV 14 2005

IN RE: APPLICANT: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h)
of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the district director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the district director is withdrawn and the matter remanded to the district director for action consistent with this opinion.

The record indicates that the applicant is a lawful permanent resident and that therefore United States Citizenship and Immigration Services (USCIS) does not have jurisdiction to consider I-485 adjustment of status application or the I-601 waiver application.

The applicant is a native and citizen of Haiti who was admitted into the United States as a lawful permanent resident (LPR) at Miami, FL on December 16, 1989. She is the wife of a U.S. citizen. On December 6, 1995, the applicant pled guilty to Aggravated Battery-Pregnant Victim, Battery on a Law Enforcement Officer-three counts, Resisting an Officer with Violence, Child Abuse, Battery-2 counts and Criminal Mischief/\$200.00-\$999.99. The adjudication of guilt was withheld and the applicant was placed on five years probation. Immigration proceedings were initiated on October 15, 1997 and the applicant was charged with being removable under Section 237(a)(2)(E)(i) of the Immigration and Nationalities Act (the Act), 8 U.S.C. 1227(a)(2)(E)(i) for having been convicted of the crime of child abuse. The Executive Office of Immigration Review (EOIR), Immigration Judge Michael C. Horn, terminated those proceedings without prejudice on January 28, 2000. *See Order of the Immigration Judge*, January 28, 2000.

Because it appears that the Immigration Judge terminated proceedings without a final order of removal or any other action that would have had an effect upon the applicant's status, the record indicates that the applicant remained in lawful permanent resident status after proceedings were terminated. There is also insufficient evidence in the record to indicate that USCIS took any action that would have terminated or rescinded the applicant's status. Included in the record is Form I-881, *Memorandum of Creation of Record of Lawful Permanent Residence*. On the form is a handwritten notation stating "Applicant entered on I.V. (P21) 12/16/89 (Rescinded)." (Last parenthesis added). The form is not dated and does not refer to any documents or rescission process or notice of rescission. The record contains no further evidence that LPR status was rescinded or that any process was followed to rescind status. Standing alone, the described Form I-881 is insufficient to establish that the applicant's LPR status was rescinded.

It also appears that there is no statutory or regulatory authority that would allow USCIS to rescind status in this matter. INA § 246, 8 U.S.C states in pertinent part:

- (a) If, at any time within five years after status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of this act...or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject

to all provisions of this Act to the same extent as if the adjustment of status has not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240..., and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

The applicant was admitted on December 16, 1989. There is no indication in the record that a determination was made within five years of her admission that she was inadmissible at the time of admission. The record does not indicate that the immigration judge ordered the applicant to be removed. Therefore, she appears to be in LPR status. It is also important to note that the 8 C.F.R. § 246 describes certain processes that must occur before rescission may take place. For example, 8 C.F.R. § 246.1 reads:

If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case...a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status....The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.

There is no record of notice to the applicant indicating the intention to rescind, the reasons why and providing an opportunity to respond in a manner consistent with the process described. Given the fact that the record does not show that the immigration judge issued a final order of removal, that the record also does not show that USCIS properly rescinded status, and that it appears that USCIS does not have the authority to rescind status, the applicant appears to be a lawful permanent resident. As an LPR, her application for adjustment of status and waiver of inadmissibility grounds is moot, as she already possesses the status that she is attempting to acquire through application.

While the AAO finds that the record indicates that the applicant is an LPR and any consideration of her applications for waiver of inadmissibility or adjustment of status moot, some comment about the proceedings in the district may ensure a more complete record if this matter should be resubmitted to the AAO.

The district director found the applicant to be inadmissible under § 212(a)(1)(A)(iii) of the Act and denied the waiver under § 212(g) of the Act finding that the alien failed to meet examination and reporting procedures required to admit aliens found to have a physical or medical disorder. On appeal, counsel for applicant contends that all required medical records were submitted, additional records would have been submitted if requested and the applicant's removal would cause extreme hardship to the applicant's United States citizen spouse and children.

Section 212(a)(1)(A) of the Act states in part:

Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.-

(A) In general.-Any alien-

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior...is inadmissible.

(B) Waiver authorized.- For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

Section 212(g) of the Act reads in part:

The Attorney General may waive the application of-

(1) subsection (a)(1)(A)(i) in the case of any alien who-

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa,

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe; or

(C) qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B);

...

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

8 C.F.R. § 212.7(b) regulates aliens with certain mental conditions who are eligible for immigrant visas but require the approval of waivers of grounds of inadmissibility. The regulations require that the applicant submit the waiver application and a statement to the appropriate Service office indicating that arrangements have been made to provide the alien's complete medical history, including details of any hospitalization or institutional care or treatment for any physical or mental condition; the alien's current physical and mental condition, including prognosis and life expectancy; and a psychiatric examination. 8 C.F.R. § 212.7(b)(4). "For an alien with a past history of mental illness, the medical report shall also contain available information on which the U.S. Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery." *Id.* The medical report must then be forwarded to the U.S. Public Health Service for review. *Id.* These regulations further provide:

(ii) *Submission of statement.* Upon being notified that the medical report has been reviewed by the U.S. Public Health Service and determined to be acceptable, the alien or the alien's sponsoring family member shall submit a statement to the consular or Service office. The statement must be from a clinic, hospital, institution, specialized facility, or specialist in the United States approved by the U.S. Public Health Service.

The alien or alien's sponsor may be referred to the mental retardation or mental health agency of the state of proposed residence for guidance in selecting a post-arrival medical examining authority who will complete the evaluation and provide an evaluation report to the Centers for Disease Control. The statement must specify the name and address of the specialized facility, or specialist, and must affirm that:

(A) The specified facility or specialist agrees to evaluate the alien's mental status and prepare a complete report of the findings of such evaluation.

(B) The alien, the alien's sponsoring family member, or another responsible person has made complete financial arrangements for payment of any charges that may be incurred after arrival for studies, care, training and service;

(C) The Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control, Atlanta, GA. 30333 shall be furnished:

(1) The report evaluating the alien's mental status within 30 days after the alien's arrival; and

(2) Prompt notification of the alien's failure to report to the facility or specialist within 30 days after being notified by the U.S. Public Health Service that the alien has arrived in the United States.

(D) The alien shall be in an outpatient, inpatient, study, or other specified status as determined by the responsible local physician or specialist during the initial evaluation.

It is not clear that the district director acted in accordance with regulations prescribed by the Secretary of Health and Human Services, as the statute requires, in finding the applicant inadmissible. The district director should have consulted with Department of Human Services Center for Disease Control and Prevention (CDC) before making a determination about the applicant's inadmissibility under § 212(a)(1)(A) of the Act. A form letter to the civil surgeon from the district director, asking the civil surgeon for a complete psychological evaluation, is included in the record. There is no date on this form letter. A Class A medical notification listing the specific condition for which the alien is inadmissible is required before the inadmissibility determination can be made. See 42 C.F.R. § 34.4. The record includes Form I-693 *Medical Examination of Aliens Seeking Adjustment of Status*, dated 10/16/01, completed and signed by a civil surgeon. That form indicates that the civil surgeon observed no Class A conditions. It also appears that counsel submitted a significant amount of medical evidence in support of her application for waiver but that evidence was not submitted to the U.S. Public Health Service for review, as is required by 8 C.F.R. § 212.7(b).

Because neither the director's decision nor the record demonstrated that the applicant is properly before USCIS as an applicant for adjustment of status, the AAO finds it necessary to remand to the district director for re-evaluation of the facts. If upon further review the district determines that the applicant is not an LPR and is therefore properly before USCIS as an applicant to adjust status and to waive inadmissibility grounds, both the application and waiver should be reconsidered in light of this decision. If a new decision that is adverse to the applicant is issued, the decision shall be certified to the AAO for review.

ORDER: The director's decision is withdrawn and the matter remanded to the director for further action consistent with the present decision.