

HR

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[Redacted]

FILE: [Redacted]

Office: Los Angeles

Date:

MAY 12 2003

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 APPLICANT:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

MAY1203_01H2212

DISCUSSION: The application was denied by the District Director, Los Angeles, California, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole on February 25, 1987. He was served with an Order to Show Cause on December 7, 1987. The applicant was ordered deported by an immigration judge on December 27, 1987, and he was deported on December 29, 1987. Therefore he is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant was present in the United States again without a lawful admission or parole in 1990 and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). The applicant married a native of Laos and naturalized U.S. citizen on December 13, 1995, and he is the beneficiary of an approved Petition for Alien Relative.

The district director noted that the applicant had been convicted of the offense of Aggravated Assault in the United States on December 4, 1987. He was sentenced to a period of not less than 1 year nor more than 3 years, suspended, as long as he abides by the terms of his probation, 5 years. Therefore, he is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The applicant seeks a waiver of that ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), on Form I-601.

The district director denied the application after concluding that the applicant failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly.

On appeal, counsel states that the applicant has strong family ties in the United States and there are illnesses in the family that need his support.

The record reflects that the applicant has a driving violation in California using an alias on February 3, 1992, which supports the fact that he reentered unlawfully in less than five years. A Bureau officer determined that the applicant had reentered the U.S. in 1990 as indicated on the applicant's Form I-485 application sworn to under oath during his interview.

Section 212(a)(9)(A) of the Act provides, in part, that:

- (i) Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien

convicted of an aggravated felony) is inadmissible.

(iii) Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission.

The record reflects that the applicant was removed from the United States, and as a result, he requires permission to reapply for admission.

Service instructions at O.I. § 212.7 specify that a Form I-212 application will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) shall be rejected on the ground that the applicant is not "otherwise admissible" as required and the fee for filing the application refunded.

The present record does not contain evidence that the applicant has remained outside the United States for five consecutive years since the date of deportation or removal as required by 8 C.F.R. § 212.2(a), or that he was granted permission to reapply for admission to the United States.

Therefore, since there is no evidence that the Form I-212 application has been adjudicated first and approved in this instance, the appeal of the district director's decision denying the Form I-601 application will be rejected, and the record remanded so that the district director may adjudicate the Form I-212 application first, or provide evidence for the record that a decision has already been made on the Form I-212.

If the district director approves the Form I-212 application or provides evidence that such application has been approved, he shall certify the record of proceeding to the AAO for review and consideration of the appeal regarding the Form I-601 application. However, if he denies the Form I-212 application or provides evidence that such application has been denied, he shall certify that decision to the AAO for review, reject the Form I-601 application, and refund the fee.

ORDER: The appeal is rejected. The decision of the officer in charge is withdrawn. The matter is remanded for further action consistent with the foregoing discussion.