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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D. C. 20536

[REDACTED]

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

FILE: [REDACTED] Office: California Service Center

Date: **JAN - 8 2003**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT: [REDACTED]

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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected. The director's decision will be withdrawn, and the matter will be remanded for further action.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole on September 5, 1994. He was served with an Order to Show Cause on September 6, 1994. On November 7, 1994, the applicant was ordered deported by an immigration judge under former section 241(a)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1251, as an alien who is excludable from the United States under section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. 1182(a)(7)(A)(i)(I), for not being in possession of a valid immigrant visa or lieu document. On November 7, 1994, the applicant was deported to Mexico. Therefore, the applicant 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 record reflects that when the applicant was encountered at the Service checkpoint, he claimed that he was a U.S. citizen. Later, after admitting alienage, he stated that he had been living in the United States since 1990, attended high school, was attending college and was a sheet metal worker. A complaint was filed against him charging him with (1) a violation of 18 U.S.C. § 911, false claim to U.S. citizenship and (2) a violation of 8 U.S.C. § 1325, illegal entry. The applicant pleaded guilty to Count 2 and was sentenced to 60 days in jail. Count 1 was dismissed.

The applicant was present in the United States again shortly thereafter, as evidenced by his California Identification Card which was issued on December 1, 1994, without a lawful admission or parole 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 United States citizen on October 20, 1995, and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), to remain with his wife.

The director determined that the applicant was also inadmissible under section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii), for having been unlawfully present in the United States for an aggregate period of one year or more. The director denied the application after determining that the applicant is not eligible for any exceptions or waivers for being inadmissible under section 212(a)(9)(B)(ii) of the Act.

The director's decision will be withdrawn because there is a waiver available under section 212(a)(9)(B)(iii) for a ground of inadmissibility under section 212(a)(9)(B)(ii) of the Act, and the Application for Permission to Reapply for Admission (Form I-212) must be adjudicated on its own merits.

On appeal, counsel properly points out that the applicant's time of unlawful presence prior to April 1, 1997, cannot be counted nor can any time be considered unlawful following the proper filing of an application for adjustment of status. The applicant's Petition for Alien Relative was filed on January 10, 1997, and the Application to Register Permanent Residence or Adjust Status (Form I-485) was filed on September 17, 1997. Counsel states that the Form I-212 application must be adjudicated on its own merits.

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 on Form I-601. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

The present record indicates that the applicant does not need to file the Form I-601 application because he was unlawfully present for fewer than 180 days between April 1, 1997, and the filing of the Form I-485 application on September 17, 1997. However, the Form I-212 must still be adjudicated independently and on its own merits.

The matter will be remanded for the director to render a new decision on the Form I-212 application based on the applicant's full record and he shall certify that decision, along with the applicant's entire Service record, to the Associate Commissioner for review.

ORDER: The appeal is rejected. The director's decision is withdrawn. The matter is remanded for further action consistent with the foregoing discussion.