U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 I Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

PUBLIC COPY

[redacted]

FILE [redacted] Office: California Service Center Date: JAN 02 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: Self-represented

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, and the matter will be remanded for further action.

The applicant is a native and citizen of Mexico who filed an Application for Permission to Reapply for Admission into the United States. He alleges that he was excluded and removed from the United States in February 1999. The record is devoid of any evidence that a Notice to Appear was issued in his behalf, that he was ordered removed by an immigration judge, or that he was removed.

The director determined that the applicant was also inadmissible under section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), 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)(i) of the Act.

The director's decision will be withdrawn because there is a waiver available under section 212(a)(9)(B)(v) for a ground of inadmissibility under section 212(a)(9)(B)(i) of the Act.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

The applicant married a U.S. citizen on October 17, 1997, and is the beneficiary of a Petition for Alien Relative filed on October 23, 1997 which remains unadjudicated in the record.

On appeal the applicant's wife states that it is tormenting and traumatic for her and her child not to have the applicant with them. She submits a psychological evaluation regarding her emotional stress and anxiety.

Although the record fails to contain any evidence that the applicant has been removed from the United States, Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated <u>first</u> 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 does not contain evidence that the applicant was removed pursuant to judicial proceedings. Therefore, it is unclear whether he needs to reapply for admission. In the event that he had been removed, the Form I-212 must be adjudicated independently, on its own merits. If that application is approved, the issue of inadmissibility can then be addressed since there is a waiver available for unlawful presence in the United States.

The director shall render a new decision on the Form I-212 application based on the applicant's full record and 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.