

## Adjudicator's Field Manual

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### Chapter 43 Consent to Reapply After Deportation or Removal.

43.1 General.

43.2 Adjudication Process.

### 43.1 General.

#### (a) Background.

Under section 212(a)(9) of the Act, an alien who falls with certain classes of aliens may be barred from applying for admission to the U.S. unless he or she first obtains consent from the Attorney General to do so. For our purposes, the Attorney General's authority is vested in USCIS. The process for seeking such consent requires the alien to file Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, with the requisite fee. When consent to reapply is granted, the grant is permanent and applies to any prior exclusions, deportations and removals; it does not affect any such actions against that alien occurring after the grant. The alien may seek consent to reapply to overcome inadmissibility under either section 212(a)(9)(A) of the Act, or section 212(a)(9)(C) of the Act. The provisions under which the alien is inadmissible, and the threshold criteria for seeking consent to reapply, are as follows:

(1) Under section 212(a)(9)(A) of the Act, an alien may not return to the U.S., for any reason, for a specified period of time without the express consent of USCIS (under section 212(a)(9)(A)(iii) of the Act) if such alien:

- Was removed from the U.S. as an inadmissible alien;
- Was removed from the U.S. as a deportable alien;
- Was removed from the U.S. under any other section of law;
- Was excluded and deported from the U.S. (pre-April 1997);
- Was arrested and deported from the U.S. (pre-April 1997); or
- Departed from the U.S. while under an outstanding Order of Removal.

The period of time during which the alien is barred from returning depends upon the grounds of removal and other factors (see Appendix 43-1 for a list of the bars to admission following exclusion, deportation or removal).

(2) Under section 212(a)(9)(C) of the Act, an alien who enters the U.S. without being admitted (i.e., EWIs), or attempts to enter the U.S. without being admitted (i.e., tries to EWI) is inadmissible if he or she:

- Had been unlawfully present in the U.S. for more than one year in the aggregate since April 1, 1997 (i.e., if the total amount of unlawful time since April 1, 1997 amount to 366 or more days); or

- Had been ordered removed under section 235(b)(1) (expedited removal), section 240 (regular removal) or any other provision of law.

Such person can only overcome this ground of inadmissibility under one of two conditions:

- More than 10 years have passed since his or last departure from the U.S. AND he or she has applied for and been granted (as a matter of discretion) by USCIS) consent to reapply under section 212(a)(9)(C)(ii) of the Act; or

- He or she is granted (in the discretion of USCIS ) a waiver of inadmissibility under section 212(a)(9)(C)(ii) of the Act because he or she:

- qualifies as a self-petitioner under the domestic violence provisions of paragraphs (iii), (iv), or (v) of section 204(a)(1)(A) of the Act or paragraphs (ii), (iii), or (iv) of section 204(a)(1)(B) of the Act; and
- establishes a connection between his or her having been battered or subjected to extreme cruelty and either his or her removal or departure from the U.S. or his or her reentry(ies) or attempted reentry into the U.S.

Note 1:

This domestic violence exception does not require any particular waiting period between the time of the removal and the approval of the waiver. The alien could even apply for waiver in advance of his or her departure from the U.S. (see paragraph (d)).

Note 2:

Even though the statute refers to the domestic violence exception as a “waiver” instead of a “consent to reapply,” the forms, fees, processes, and discretionary criteria involved for both are the same (although the statutory threshold criteria are obviously different), and both are discussed within this chapter. For the sake of simplicity, throughout this chapter both will be referred to as “consent to reapply.”

(b) Jurisdiction.

Jurisdiction over an I-212 is determined by the location of the alien and by the reason for which the application is being filed. Form I-212 should be filed:

- With the district director having jurisdiction over a port of entry, if the alien is at the port of entry.
  
- With the local office having jurisdiction over the alien's residence, if the alien is in the U.S. and is simultaneously applying for a concomitant benefit (e.g., an advance parole request in conjunction with a NACARA or HRIFA adjustment of status application where the alien's departure will effect the removal order) over which the local office has sole jurisdiction ( Note: If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director shall refer the Form I-212 to the immigration judge for adjudication);
  
- With the district director having jurisdiction over the alien's residence, if the alien is in the U.S. and not simultaneously applying for a concomitant benefit over which the local office has sole jurisdiction; or
  
- With the service center having jurisdiction over the place where the alien's deportation hearing was held, if the alien is outside the U.S. and applying for an immigrant visa [but not a waiver under section 212(g), (h), or (i)] through the U.S. consulate.
  
- With the American Consulate having jurisdiction over the alien's place of residence if the alien is outside the U.S. and is filing either (1) for a nonimmigrant visa abroad, provided that the consular officer is willing to accept the Form I-212 and recommends to the district director that the alien be permitted to reapply, or (2) an immigrant visa where a concurrent waiver under section 212(g), (h), or (i) must also be filed.

(c) Timing of Request and Adjudication.

Consent to reapply may only be considered in connection with future entries into the U.S. That is, it may

only be processed where the applicant is presently in the U.S. and under an order of removal which will take effect upon his or her departure from the country, or where the alien is outside the country and seeking to return, whether abroad or at a port of entry.

Note:

While the statute requires that consent must be obtained before the “date of the alien’s reembarkation at a place outside the U.S. or attempt to be readmitted from contiguous territory,” precedent decisions and long-established practice have allowed for *nunc pro tunc* (or “now for then”) approval of the application in meritorious cases. See *Matter of L-* , 1 I&N Dec. 1 (BIA, 1940); *Matter of S- N-* , 6 I&N Dec. 73 (BIA 1954, AG 1954); and *Matter of Vrettakos* , 14 I&N Dec. 593 (BIA, 1973 and 1974). If the application is granted *nunc pro tunc* , the approval is retroactive to the date on which the alien reembarked for the U.S. or sought admission from Canada or Mexico.

(d) Advance Consent to Reapply.

There is a provision in 8 CFR 212.2(j) for an alien in the U.S. to apply for consent to reapply in advance where departure from the U.S. will execute an outstanding warrant of removal. Approval of such an application would be conditioned upon the alien's departure from the U.S. Approval of consent to reapply is not conditioned or limited in any other way. In most cases, an application will be filed when the applicant is under an outstanding order of deportation and ineligible for adjustment of status, but because of the equity involved (such as a U.S. citizen spouse or an immediately available visa number), the alien will be allowed to remain in the U.S. while processing the immigration visa application abroad. In most cases, it is difficult to determine how long the visa processing will take, or when the alien will be called for an interview before the American Consular Officer. Frequently the I-212 will be filed concurrently with an I-130 filed by a U. S. citizen spouse. In those cases where the consent to reapply is granted in advance, endorse the Form I-212 to show that the grant is "effective upon execution of outstanding order of deportation" and forward it to the American Consular Office where the immigrant visa is being processed.

Note 1:

In accordance with *Matter of Ng* , 17 I&N Dec. 63 (BIA 1979), only USCIS can grant advance consent to reapply. An immigration judge does not have such authority.

Note 2:

While it may be proper to grant advance consent to reapply for an alien who qualifies under paragraph (9)(A)(iii) or under the “domestic violence” provision of paragraph (9)(C)(ii), it is not proper to grant

advance consent reapply under the “must wait ten years before requesting consent” provision of paragraph (9)(C)(ii).

(e) Application of Prior Bars to Reentry.

Previous bars to return (e.g., 5 year bar in effect for exclusion cases before IIRIRA) were superseded by IIRIRA, and by statute the alien is required to remain outside the U.S. for the duration of time set forth in section 212(a)(9) of the Act, as amended by IIRIRA. An alien who was order excluded under the prior law more than 5 years ago, and less than 10, needs to obtain an individual consent to reapply before embarking for travel to the U.S. In adjudicating such individual application for consent to reapply, the adjudicator should consider that the alien remained outside the U.S. for the 5 years required at the time of his or her exclusion to be a significant positive factor which, in the absence of overriding negative factors, would normally warrant approval of the application.

(f) Effect on Criminal Prosecution.

The granting of consent to reapply does not relieve the alien from the criminal penalty for illegal entry after deportation. By approving a Form I-212, USCIS is only giving consent for the alien to apply for admission to the U.S. legally. USCIS is not giving consent for the alien to make or seek illegal entry. Accordingly, just as the granting of the Form I-212 does not exempt an alien who subsequently enters without inspection from being removed, it also does not exempt him or her from criminal prosecution for entering illegally, attempting to enter illegally, or being in the U.S. after having entered illegally (see section 275 of the Act).

(g) Relationship to Reinstatement of Removal under Section 241(a)(5) of the Act.

An alien who has reentered the U.S. illegally after having been removed (which includes “deported” or “excluded and deported”), or after having departed voluntarily while under an order of removal (a “self-deport”) is ineligible for any relief under the Immigration and Nationality Act. Such relief includes consent to reapply for admission to the U.S. after deportation or removal under section 212(a)(9)(A) of the Act.

If an alien who falls within this category files a Form I-212 (or for any other benefit), hold such application in abeyance and initiate reinstatement proceedings under section 241(a)(5) using Form I-871 (see 8 CFR 241.8 and Chapter 15.7 of the Detention and Deportation Officer’s Field Manual). Once those proceedings have been completed (including the consideration of any rebuttal made by the alien) and the removal order has been reinstated, the alien may be removed from the U.S. and the Form I-212 denied.

Note 1:

It does not matter whether the removal of the alien or the denial of the application comes first, so long as the Form I-871 has been completed.

Note 2:

While the proceedings set forth in 8 CFR 241.8 and Chapter 15.7 of the *Deportation Officer's Field Manual* must be completed before the application can be denied due to the provisions of section 241(a)(5), a Form I-212 filed may be denied on any other appropriate basis regardless of whether the Form I-871 proceedings have been completed.

Note 3:

If the Form I-871 process has been completed, and the prior order reinstated, prior to the submission of the Form I-212, such application should be rejected and the fee returned (uncollected) to the applicant. In such situations, the applicant has no right to any further review of the matter.

(h) Relationship to Advance Parole.

Normally, an alien would not be applying for both advance consent to reapply for admission after deportation or removal and advance parole (Form I-512), but there are at least two situations where he or she could:

- An alien in the U.S. who is an applicant for an immigrant visa at an American consular abroad and who will self-deport when he or she leaves to obtain such visa might want an advance parole either as a "guarantee" of his or her ability to return to the U.S. should any complication arise in obtaining the visa or in order to satisfy the country in which the American consulate is located (particularly if he or she is not a national of that country). In this case, each application should be adjudicated on its own merits, without regard to its effect on the other.

- An alien in the U.S. who is an applicant for adjustment of status, either before an immigration judge in removal proceedings or before USCIS under a provision of law which allows an alien under an order of deportation to so apply (e.g., NACARA 202 and HRIFA), and who wishes to resume his or her application for adjustment upon return to this country after a journey abroad. Such alien's departure (either with or

without the advance parole) brings the bar under section 212(a)(9)(A) into effect. Since approval of the advance parole without approval of the Form I-212 (and the alien's resulting departure and return) would render the alien ineligible for the adjustment of status, the Form I-212 should be adjudicated first (and on its own merits), and the advance parole should only be issued if the Form I-212 has been approved. (NOTE that it is not possible for the adjudication of the Form I-212 to wait until the alien's return due to the requirement that consent be obtained before embarking or reembarking for travel to this country.)

(i) Authorization for Entry as a Nonimmigrant by a Previously-removed Alien.

An alien who wishes to enter as a nonimmigrant but is inadmissible under section 212(a)(9)(A) of the Act might file either Form I-212 or Form I-192. Approval of Form I-212 permanently relieves the alien from inadmissibility under §212(a)(9)(A) (with regard to removals which occurred prior to the approval) and covers entries either as a nonimmigrant or as an immigrant. On the other hand, approval of Form I-192 only relieves the alien from the inadmissibility ground for the number of visits and time period specified in the approval (again, with regard to removals which occurred prior to the approval), and only pertains to admission as a nonimmigrant. For this reason, there are situations where it may be appropriate to approve the more limited Form I-192, but not the I-212. If the alien's justification for travel to the U.S. is limited to a single event which is not likely to recur (e.g., the funeral of the alien's sole relative in the U.S.) or where the proof of the alien's rehabilitation is not quite as convincing (perhaps due only to the recency of the removal), USCIS would be likely to approve the Form I-192 but not the Form I-212. Conversely, if the alien's need to make trips to the U.S. is ongoing, his or her rehabilitation is unquestioned, and his or her ties to his country of residence are undoubted, both applications would be equally approvable and the I-212 would obviate the burden on the alien to file, and on USCIS to adjudicate, future applications.

Note:

There are also situations where it may not be appropriate to approve either Form I-212 or Form I-192, but to authorize parole. For example, an (unrehabilitated) alien with a criminal record whose testimony is required in court proceedings might be paroled into the U.S. in the custody of law enforcement authorities, but would not be granted either a nonimmigrant waiver under section 212(d)(3) of the Act or consent to reapply under section 212(a)(9)(A) or (C).

(j) Blanket Consent to Reapply.

In 1958, certain groups of deported aliens were granted blanket consent to reapply. These grants applied to a previously deported alien who had a spouse, parent or child who was a U.S. citizen or lawful permanent resident. In 1959, a cut-off date of March 1, 1959, and a stipulation precluding aliens who entered surreptitiously were added. The blanket grants were finally eliminated completely on July 1, 1961, and are not a factor for an applicant who entered after that date.



## 43.2 Adjudication Processes.

Adjudication of Form I-212 is a six step process:

- (a) review of the application,
- (b) review of the alien's file to determine whether the application is necessary,
- (c) determination of whether the alien is barred from applying for consent to reapply,
- (d) determination of whether the approval would serve any purpose,
- (e) consideration of discretionary factors, and (f) generation of a decision.

### (a) Review of Application and Supporting Documentation (If Any).

Review the application for fee, jurisdiction, completeness, and signature. There are no particular supporting documents which must be attached to the application, although the instructions on the back of the I-212 describe what documentation may be submitted with the application. Essentially, supporting documentation should establish the relationship(s) or compelling factors which the alien wishes you to consider when you adjudicate the application. If a relative petition has previously been approved in behalf of the alien, it will not be necessary to request documentation to establish that relationship again unless you have reason to believe that some aspect of that relationship or a prior relationship was not considered. Frequently the applicant fails to submit documentation to establish the relationship claimed to U.S. citizen children or siblings; however, if the relationship is to be considered as a favorable factor, it must be documented. If the alien wishes you to take into consideration the illness of a close relative, that illness or medical condition must be documented by a statement from the attending physician describing in some detail the diagnosis, prognosis, history, treatment being given, and any need for the applicant, other than for moral support. Frequently, such letters will state only that the patient has been under the doctor's care and the patient "needs" the applicant; a letter of that nature is useless for any immigration purposes, particularly where the claimed illness is a basis for seeking a benefit.

(b) Review of the Alien's File to Determine Whether the Application Is Necessary.

(1) Obtaining the Alien's File.

If the file was not furnished to you with the application, you must obtain it before you can adjudicate the request. You may be able to locate the file number or location by checking the lookout system or the Central Index System. Your file room can check the local indices or Central Office index for you. Sometimes the file may be charged to the Administrative Appeals Unit (AAU) on a Legalization appeal. If the file is not readily available for transfer, you may wish to contact the AAU to verify the information contained in the file and whether any of the information would influence your decision regarding the pending application. If a file cannot be located, you must have a substitute file opened or a new file created before completing your action on the application. Frequently the applicant will not know the file number or will improperly complete the form as to the reason it is required. However, sometimes the alien may be in possession of the deportation documentation. If the file is not available, you may want to request a copy of these documents and any others you may think are necessary for the proper adjudication of the case. If you are unable to locate any file or record on the alien you may accept the alien's statement on the application concerning a deportation or removal, have a new A-file created, and approve the request, if the alien is otherwise eligible. In that event, you should endorse the remarks block: "No relating file located. Application granted only on alien's allegation of prior deportation." In addition to material located in relating A- files, a record of the revocation of landing permits and deportation of alien crewmen is also maintained in Headquarters indices.

(2) Determining Whether Circumstances of Alien's Removal Resulted in His or Her Inadmissibility under Section 212(a)(9)(A).

It is not unusual for an alien to file Form I-212 even if it is not required. In order to determine whether the application is required, you must review the alien's file to determine what transpired. If, in reviewing the A-file, you determine that the alien is not inadmissible under section 212(a)(9)(A) of the Act, the application is not required. In that event, make brief notations in the remarks block to explain your finding, check the appropriate block on the I-272, (or select the appropriate approval text in CLAIMS) and count the application as a statistical denial. Form I-272 (or CLAIMS notice) is then routed as in approval cases.

· Removal (Including Deportation) under a Formal Order. An alien who was deported or removed following a deportation or removal hearing before an immigration judge requires consent to reapply within 10 years of the date of removal. If the alien was actually arrested and deported, the file will usually contain a Warrant of Deportation/Removal ( Form I-205 ). Generally, if a warrant was not issued and executed, consent to reapply is not required: however, in the case of an alien who departed after the

voluntary departure period set forth in the decision of the immigration judge, the file may not contain an executed Warrant of Deportation/Removal. Nevertheless, because the judge's deportation order became effective the day after the expiration of voluntary departure authorization, the alien's departure after the date is a deportation pursuant to 8 CFR 241.1(f) , and the alien does require consent to reapply. Occasionally, an alien who departed the U.S. under voluntary departure will believe that such departure constituted a deportation, and will file a Form I-212. If the relating A- file does not contain an executed Warrant of Deportation or an indication that departure was effected after the voluntary departure date granted in an alternate order of deportation, the Form I-212 is not necessary.

**Note:**

In **Matter of Fueyo** , 20 I&N Dec. 84 (BIA 1989) it was held that evidence that an alien who was taken into custody and deported by the Immigration and Naturalization Service establishes that she was "arrested and deported" within the meaning of section 212(a)(17) of the Act [now section 212(a)(9)(A) of the Act]. The burden is on the respondent to prove that, following her deportation, she applied for and received consent to reapply for admission to the U.S. from the Attorney General or his designate. A nonimmigrant waiver of inadmissibility under section 212(d)(3)(B) of the Act may not be granted nunc pro tunc in deportation proceedings. This interim decision superseded a number of others, including *Matter of P-* , 8 I&N Dec. 302 (Asst. Comm. 1959); and *Matter of M-* , 8 I&N Dec. 285 (R.C., Asst. Comm. 1959).

- Removal as an Inadmissible Arriving Alien under an Order of an Immigration Judge . An arriving alien who was removed from the U.S. as an inadmissible alien under the provisions of section 240 of the Act needs consent to reapply within 5 years of such removal. Consent to reapply is not needed by an alien who an immigration judge allowed to withdraw his or her application for admission and depart.
- Removal of a Crewman under Section 252(b) . Summary revocation of a crewman's landing permit pursuant to section 252(b) who seeks to return to the U.S. within 10 years of the date of removal requires consent to reapply. You may receive an application from an crewman or former crewman who was refused landing at a seaport and who believes that such refusal constituted an exclusion or a removal under section 252(b). If the alien was only refused entry, there will probably not be a relating A-file. If the alien was held for an exclusion hearing, an A-file would have been created whether the decision was in the alien's favor or against him or her, therefore the file would have to be consulted to determine if the I-212 is required.

**Note:**

In **Matter of Di Santillo** , 18 I&N Dec. 407 (BIA 1983) it was held that an alien who is deported pursuant to the summary procedures contained in section 252(b) of the Act is not relieved of the requirements of obtaining consent from the Attorney General to reapply for admission under section 212(a)(17) of the Act [now section 212(a)(9)(A) of the Act]. The revocation of an alien's D-1

conditional landing permit and his removal from the U.S. pursuant to the provisions of section 252(b) of the Act constituted an arrest and deportation for purposes of section 212( a)(17). Therefore, his deportability under section 241(a)(1) was established by this failure to obtain consent from the Attorney General to reapply for admission as a lawful permanent resident.

· Expedited Removal An alien who was removed from the U.S. under the provisions of section 235(b) of the Act (“expedited removal”) needs consent to reapply within 5 years of such removal. Consent to reapply is not needed by an alien who was:

- Allowed to withdraw his or her application for admission;
  
- Refused admission as a Visa Waiver Program applicant; or
  
- Refused admission at the land border and returned to Canada (using Form I-160A, Notice of Refusal of Admission/Parole into the United States) or to Mexico

**Note:**

If the alien was only refused entry, there will probably not be a relating A-file. If the alien was held for an exclusion hearing, an A-file would have been created whether the decision was in the alien's favor or not. Therefore, the file would have to be consulted to determine if the I-212 is required.

· Removed as a Distressed Alien under Section 250 of the Act . An indigent alien is "removed after having fallen into distress" only if he or she makes a formal application on Form I-243 , and the request is approved. The A-file will contain the application, the decision, and verification of the alien's removal from the country. If ten years have not elapsed since such alien’s removal, consent to reapply is required.

· Removed as Enemy Alien . If the applicant was removed as an enemy alien, and 10 years have not elapsed since such removal, consent to reapply is required. Removal under these circumstances requires a formal order of removal issued by ICE or DHS and the alien's file should contain that order. There have been no removals of enemy aliens in many years, and such applications are rarely, if ever, seen. If the alien repatriated voluntarily, without any formal order for removal, consent to reapply is not required.

· Removed at Government Expense . If the applicant was granted voluntary departure in lieu of deportation for the convenience of the government and transportation was paid entirely by the government after a determination that the alien was financially unable to depart at his own expense, consent to reapply is required, unless ten years have elapsed since his or her departure. If removal was for the convenience of the government without regard to the alien's ability to pay, consent to reapply is not necessary.

[ **Note:** Prior to May 16, 1969, no consideration was given to the ability of most Mexican nationals to pay, and for the majority of Mexican nationals granted voluntary departure at government expense prior to that date, consent to reapply is not required. However, if the file reflects that such a determination of ability to pay was made, formal removal proceedings probably took place (usually following the Mexican alien's apprehension in a region other than the Southern Region--at that time the Southwest Region), and consent to reapply is required.]

· Removal of an Aggravated Felon under Any Provision of Law . An aggravated felon who has been removed under any provision of law [including sections 235(b), 240, 250, and 252(b)] is barred from returning to the U.S. for an indefinite period and thus will always need consent to reapply. The alien need not have been deported as an aggravated felon (i.e., the order of removal need not have specified that the alien was inadmissible or deportable as a criminal); he or she only need to meet the definition of aggravated felon.

### (3) Determining Whether Alien Has Complied with Requirement to Remain Outside the U.S. for a Specified Period of Time .

**Section 212(a)(9)(A)** of the Act only refers to passage of time (5 years for arriving aliens found inadmissible, 10 years for other aliens removed, 20 years for an alien with a second or subsequent removal, and indefinite for any aggravated aliens), it doesn't specify where that time must be spent. **8 CFR 212.2(a)** specifies that the time must be spent outside the U.S. Once the time period has elapsed, the alien is no longer in a position of needing consent to reapply under section 212(a)(9)(A), he or she is instead in a position of being inadmissible under section 212(a)(9)(A) if part or all of that time was spent in the U.S., unless he or she first obtained the necessary consent to reapply. Moreover, if an alien did not spend the entire time outside the U.S., **section 212(a)(9)(C)** of the Act also applies and the alien is inadmissible to the U.S. on that basis, unless the alien's presence in the U.S. had been authorized under section 212(d)(3) or 212(d)(5) of the Act. Section 212(a)(9)(C) carries an even stronger prohibition, in that (except for certain victims of domestic violence) the alien must acquire ten years outside the U.S. before even being able to request consent to reapply (see Chapter 42.2(e)(2) of this field manual.)

### (c) Determination of Whether the Alien Is Barred from Applying for Consent to Reapply .

Consent to reapply can only be granted prior to the date of the alien's embarkation or re-embarkation at a place outside the U.S. or attempt to be admitted from foreign contiguous territory. If a previously removed alien is already back in the U.S., he or she is barred from receiving consent to reapply and the I-212 application must be denied. ( **Note:** This bar does not pertain to an alien who is under an order of removal, will be departing from the U.S. to apply for an immigrant visa at an American consulate, and is seeking advance consent to reapply.)

Furthermore, if a determination is made that the alien reentered illegally (i.e., if the alien was not paroled into the U.S.) he or she is barred by section 241(a)(5) from receiving any benefits under the Act (including consent to reapply) and is subject to reinstatement of the prior removal order (see Chapter 15.7 of the Deportation Officer's Field Manual for the procedures to be followed in making such determination and reinstating the order).

(d) Determination of Whether the Approval Would Serve Any Purpose.

In processing an application for consent to reapply filed by such an alien, you should determine whether its approval would enable the alien to be admitted to the U.S. If even after approval of consent to reapply the alien would not be admissible, the application should be denied as its approval would serve no purpose. For example, if the alien is presently inadmissible under section 212(a)(4) as likely to become a public charge, deny the application since the alien would be otherwise inadmissible, and no purpose would be served in granting the I-212.

Of course, an alien might be applying for both consent to reapply and a waiver of inadmissibility, provided the particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose.

**Note:**

In **Matter of Roman**, 19 I&N Dec. 855 (BIA 1988), it was held that an alien who was excludable under both sections 212(a)(17) and (20) of the Immigration and Nationality Act cannot establish combined eligibility for nunc pro tunc consent to reapply for admission and a waiver of inadmissibility pursuant to section 241(f) of the Act where she is not separately eligible for either form of relief. [Sections 212(a)(17) and (20) of the Act as it existed prior to 1990 correspond to the current sections 212(a)(9)(A) and 212(a)(7)(A).]

(e) Consideration of Threshold Eligibility Requirements.

The question of whether an applicant for consent to reapply must meet statutory threshold eligibility requirements depends on the section of law under which consent is sought:

(1) Under Section 212(a)(9)(A)(iii) of the Act.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify particular familial or hardship threshold requirements which must be met. A Form I-212 applicant need not be related to a citizen or resident of the U.S.; he or she need not establish a particular level of hardship would result if the application is not granted; he or she need only establish that the application should be granted as a matter of discretion. As always, the burden of proof is on the alien who is seeking a benefit under the Act.

(2) Under Section 212(a)(9)(C)(ii) of the Act.

Before weighing the positive and negative discretionary factors relating to an application for consent to reapply under section 212(a)(9)(C)(ii) of the Act, you must first determine whether the alien has met either of two statutory threshold requirements:

(A) The Ten-Year Provision.

An alien may apply for consent to reapply under this section if more than 10 years have elapsed since the date of his or her **last** departure from the U.S. This is not necessarily the date of the alien's formal deportation or removal. If the alien returned to the U.S. one or more times after having been deported or removed, and then departed after such return(s), a new "10-year clock:" starts ticking with the last departure. If more than 10 years **have elapsed** since that last departure, then you must weigh the positive and negative discretionary factors (see paragraph (f)). If more than 10 years **have not elapsed** since the alien's last departure (and the alien cannot meet the domestic violence requirement), the application must be denied.

(B) The Domestic Violence Provision.

In order to be apply for consent to reapply under this provision, the alien must:

· Be the beneficiary of an approved self-petition (see **Chapter 21** of this field manual) filed any of the following sections of law relating to spouses and child who have been the victims of battering or extreme cruelty:

- **Section 204(a)(1)(A)(iii)** of the Act;
  - **Section 204(a)(1)(A)(iv)** of the Act;
  - **Section 204(a)(1)(A)(v)** of the Act;
  - **Section 204(a)(1)(B)(ii)** of the Act;
  - **Section 204(a)(1)(B)(iii)** of the Act; or
  - **Section 204(a)(1)(B)(iv)** of the Act; **and**
- Establish that there is a connection between:
- The battering or extreme cruelty on which the self-petition was based; and



- The applicant’s removal, departure, reentry (or reentries) into the U.S., or attempted reentry into the U.S.

The nature of this connection is not specified in the statute. It could be as direct as the alien having had to take the action in order to escape from life- threatening abuse, as indirect as a simple desire to “get away for a while in order to sort things out”, or anything in between.

**Note:**

There is no minimum amount of time that must elapse following removal or departure for an alien qualifying for the domestic violence provision.

If the alien **is able** to establish both that a self-petition under one of the relevant sections of law has been approved and that there is a connection between the alien having been battered or subjected to extreme cruelty, then you must weigh the positive and negative discretionary factors (see paragraph (f)). If the alien **is not able** to establish either or both of these requirements (and 10 years have not elapsed since the alien’s last departure from the U.S.), the application must be denied.

(f) Consideration of Discretionary Factors.

In adjudicating an application for consent to reapply, you must weigh the unfavorable factors against the favorable factors and be guided by published precedent decisions where similar factors were considered. In cases where the alien is mandatorily excludable on some other ground(s), the denial must include all grounds considered for the denial. In cases where there are precedent decisions involving similar cases, you would cite the appropriate precedent decisions on which you are basing your denial. In other words, the denial must cover all grounds for the denial; not just one area.

Among a number of precedent decisions dealing with discretionary determinations in Consent to Reapply cases, two which stand out are **Matter of Carbajal** , 17 I&N Dec. 272 (BIA 1978) and **Matter of Lee** , 17 I&N Dec. 275 (BIA 1978) :

- In **Matter of Carbajal** the Board weighed the favorable factor of the needs of the U.S. employer who petitioned for an alien against negative factor of the alien having repeatedly violated immigration law

(through 4 occasions of illegal entry), and found the favorable factor to be more persuasive. The Board did not find that prior grants of voluntary departure indicated bad moral character, since good moral character is one of the requirements for being granted voluntary departure.

· In **Matter of Lee** the Board found that a record of immigration violations standing alone will not conclusively support a finding of lack of good moral character. Recency of deportation can only be considered when there is a finding of a poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience. In such circumstances, there must be a measurable reformation of character over a period of time in order to properly assess an applicant's ability to integrate into our society. In all other instances when the cause for deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered.

When determining whether an alien meets the discretionary threshold for approval, you may find it useful to draw up two separate lists of the factors you must consider:

Some favorable factors to consider:

- Close family ties in the U.S.;
  
- Unusual hardship to the applicant or to lawful permanent residents or U.S. citizens, including relatives, and employers;
  
- Deprivation of livelihood to a bona fide crewman who has not abandoned that calling;
  
- Evidence of reformation and rehabilitation;
  
- Length of lawful residence in the U.S., and status held during that residence;
  
- Evidence of respect for law and order, good moral character, and intent to hold family responsibilities;

- Considerable passage of time since deportation;
- Deportation for less serious reason(s);
- Absence of significant undesirable or negative factors;
- Eligibility for waiver of other exclusionary grounds;
- Likelihood that lawful permanent residence will ensue in the new future.

Some unfavorable factors to consider:

- Evidence of moral depravity, criminal tendencies reflected by an ongoing or continuing police record;
- Repeated violations of immigration laws, willful disregard for other laws;
- Likelihood of becoming a public charge;
- Poor physical or mental condition (however, a need for treatment in the U.S. for such condition would be a favorable factor);
- Previous instances of fraud in dealings with service or false testimony;

- Absence of close family ties or hardships;
  
- Spurious marriage to a USC for the purpose of gaining an immigration benefit (204(c) applies and waiver cannot be granted);
  
- Unauthorized employment in the U.S.;
  
- Lack of skill for which labor certification could be issued;
  
- Serious violations of immigration laws which evince a callous attitude without hint of reformation of character.

(f) Generation of a Decision.

(1) Application Approved.

If the application is approved, advise the applicant, and any attorney or representative of record, using either the appropriate approval letter now generated by CLAIMS, or by completing the form I-272 (if CLAIMS is not available). Either method specifies the reason for the approval and tells the applicant and/or attorney where the application was sent. If the CLAIMS notice is generated, the adjudicator will no longer need to instruct the clerk to prepare the I- 272.

Place the approval stamp in the appropriate block on the I-212, and endorse both copies with "Consent granted" in the decision block. If a CLAIMS notice is generated, note in the remarks area of the I-212 "Claims approval notice sent". Update the case in CLAIMS as an approval and pick the appropriate approval phrase (if CLAIMS notice generated). If the applicant is applying through a Consular Office abroad for an immigrant or nonimmigrant visa, a copy of the approved I-212 should be forwarded to the location indicated by the alien on the application. If the alien is a nonimmigrant who will not require a visa, retain both I-212's in the file. The approval notice will suffice for the alien to make application for admission.

When the Form I-212 is filed and adjudicated concurrently with Form I-601, approval of both applications is recorded on Form I-607 and placed in the file.

(2) Application not Required.

If the application is not required, make brief notations in the remarks block of Form I-212 to explain your finding, check the appropriate block on the I-272, (or select the appropriate approval text in CLAIMS) and count the application as a statistical denial. Form I-272 (or CLAIMS notice) is then routed as in approval cases.

(3) Application Denied.

Prepare Form I-292. Since the denial is appealable to the AAO, attach a Form I-290B to the denial. As with any denial on Form I-292, discuss the basis of your decision in the text of the denial. If you reached that decision after balancing all the factors in the case, list those factors, both negative and positive, which you considered. If the decision was based on the alien's ineligibility, state the basis for that ineligibility. If the decision is based on both the factors of the case and the ineligibility of the alien, address both issues. However, if the applicant is excludable under a ground for which a waiver is not possible, a discussion of the favorable and unfavorable factors is not necessary. When a denial is based on precedent decisions, use these decisions to support your denial.

Remember to keep the application with supporting documents in the file. In general, the record should include copies of documentation in the file relating to the alien's deportation or exclusion proceedings. Documents might include a copy of the Order to Show Cause or Notice to Appear, the executed Warrant of Deportation, any final court orders relating to criminal proceedings, and any other documentation (e.g., results of agency checks) from the file which supports the decision.

**Appendix 43-1 Guide to Requirement of Consent to Reapply for Admission to the U.S. after Deportation or Removal.**

<b>Type of Removal or Other Event</b>	<b>Section of Law</b>	<b>Document Likely to Be Found in File</b>	<b>Period When Consent Is Required</b>	<b>Remarks</b>
Removal under IJ order (other than an arriving alien or aggravated felon)	§ 240	Form I-205	10 years from date of removal	
Removal of arriving alien under IJ order (other than an aggravated felon)	§ 240	Form I-38	5 years from date of removal	
Expedited Removal	§235(b)	Form I-860	5 years from date of removal	
Removal on security and related grounds	§235(c)	Form I-147 or Form I-148	5 years from date of removal	
Arriving alien allowed to withdraw	§235	Form I-275, Form I-160A	None - §212(a)(9)(A) does not apply	Withdrawal may have been authorized by either inspector or IJ Refusal under VWP §217 None - §212(a)(9)(A) does not apply
Crewman (landing permit revoked)	§ 252(b)		5 years, if removed under §235(b) or §240	
Crewman (landing permit refused)	§252(a)		None - §212(a)(9)(A) does not apply	
Removed as a distressed alien	§ 250	Form I-243	10 years from date of removal	
Removed at government expense			10 years from date of removal	Prior to 5/16/69, no consideration was given to the ability of most Mexican

Type of Removal or Other Event	Section of Law	Document Likely to Be Found in File	Period When Consent Is Required	Remarks
				nationals to pay, and for the majority of Mexican nationals granted voluntary departure at government expense prior to that date, consent to reapply is not required. However, if the file reflects that such a determination of ability to pay was made, formal removal proceedings probably took place (usually following the Mexican alien's apprehension in a region other than the Southern Region--at that time the Southwest Region), and consent to reapply is required.]
Removed as an enemy alien			10 years from date of removal	
Aggravated felon	Any section of law		Any time	The alien need not have been deported as an aggravated felon (i.e., the order of removal need not have specified that the alien was inadmissible or deportable as a criminal); he or she only need to meet the definition of aggravated felon.
Voluntary departure of alien within period authorized by IJ on alternate order		Form I-38 and evidence of alien's tardy departure	None - §212(a)(9)(A) does not apply	