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 f
determine whether the application is necessary, (c) determination of whether the alien is barred from a
consent to reapply, (d) determination of whether the approval would serve any purpose, (e) considera
discretionary factors, and (f) generation of a decision.

(a) Review of Application and Supporting Documentation (If Any). Review the application for fee, jurisd
completeness, and signature. There are no particular supporting documents which must be attached t
application, although the instructions on the back of the I-212 describe what documentation may be su
with the application. Essentially, supporting documentation should establish the relationship(s) or comp
factors which the alien wishes you to consider when you adjudicate the application. If a relative petition
previously been approved in behalf of the alien, it will not be necessary to request documentation to es
relationship again unless you have reason to believe that some aspect of that relationship or a prior rel
was not considered. Frequently the applicant fails to submit documentation to establish the relationship
U.S. citizen children or siblings; however, if the relationship is to be considered as a favorable factor, it
documented. If the alien wishes you to take into consideration the illness of a close relative, that illness
condition must be documented by a statement from the attending physician describing in some detail t
diagnosis, prognosis, history, treatment being given, and any need for the applicant, other than for mo
Frequently, such letters will state only that the patient has been under the doctor's care and the patien
the applicant; a letter of that nature is useless for any immigration purposes, particularly where the clai
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 obtai
you can adjudicate the request. You may be able to locate the file number or location by checking t
system or the Central Index System. Your file room can check the local indices or Central Office ir
you. Sometimes the file may be charged to the Administrative Appeals Unit (AAU) on a Legalizatior
the file is not readily available for transfer, you may wish to contact the AAU to verify the informatio
in the file and whether any of the information would influence your decision regarding the pending a
If a file cannot be located, you must have a substitute file opened or a new file created before comp
action on the application. Frequently the applicant will not know the file number or will improperly co
form as to the reason it is required. However, sometimes the alien may be in possession of the dep
documentation. If the file is not available, you may want to request a copy of these documents and
you may think are necessary for the proper adjudication of the case. If you are unable to locate an
record on the alien you may accept the alien's statement on the application concerning a deportatio
removal, have a new A-file created, and approve the request, if the alien is otherwise eligible. In tha
you should endorse the remarks block: "No relating file located. Application granted only on alien's
of prior deportation." In addition to material located in relating A- files, a record of the revocation of l
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 u
Section 212(a)(9)(A). It is not unusual for an alien to file Form I-212 even if it is not required. In ord

determine whether the application is required, you must review the alien's file to determine what tra in reviewing the A-file, you determine that the alien is not inadmissible under section 212(a)(9)(A) o the application is not required. In that event, make brief notations in the remarks block to explain yo check the appropriate block on the I-272, (or select the appropriate approval text in CLAIMS) and application as a statistical denial. Form I-272 (or CLAIMS notice) is then routed as in approval case

- Removal (Including Deportation) under a Formal Order. An alien who was deported or remove a deportation or removal hearing before an immigration judge requires consent to reapply withi of the date of removal. If the alien was actually arrested and deported, the file will usually conta Warrant of Deportation/Removal (Form I-205). Generally, if a warrant was not issued and exec consent to reapply is not required: however, in the case of an alien who departed after the volu departure period set forth in the decision of the immigration judge, the file may not contain an e Warrant of Deportation/Removal. Nevertheless, because the judge's deportation order became the day after the expiration of voluntary departure authorization, the alien's departure after the deportation pursuant to 8 CFR 241.1(f), and the alien does require consent to reapply. Occasio alien who departed the U.S. under voluntary departure will believe that such departure constitu deportation, and will file a Form I-212. If the relating A- file does not contain an executed Warra Deportation or an indication that departure was effected after the voluntary departure date gra 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 w taken into custody and deported by the Immigration and Naturalization Service establishes tha "arrested and deported" within the meaning of section 212(a)(17) of the Act [now section 212(a the Act]. The burden is on the respondent to prove that, following her deportation, she applied f received consent to reapply for admission to the U.S. from the Attorney General or his designa nonimmigrant waiver of inadmissibility under section 212(d)(3)(B) of the Act may not be grante tunc in deportation proceedings. This interim decision superseded a number of others, includin *P-*, 8 I&N Dec. 302 (Asst. Comm. 1959); and *Matter of M-*, 8 I&N Dec. 285 (R.C., Asst. Comm.

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

  Note: In ***Matter of Di Santillo,*** 18 I&N Dec. 407 (BIA 1983) it was held that an alien who is de pursuant to the summary procedures contained in section 252(b) of the Act is not relieved of th requirements of obtaining consent from the Attorney General to reapply for admission under se 212(a)(17) of the Act [now section 212(a)(9)(A) of the Act]. The revocation of an alien's D-1 co landing permit and his removal from the U.S. pursuant to the provisions of section 252(b) of the constituted an arrest and deportation for purposes of section 212(a)(17). Therefore, his deport under section 241(a)(1) was established by this failure to obtain consent from the Attorney Ge reapply for admission as a lawful permanent resident.

- Expedited Removal An alien who was removed from the U.S. under the provisions of section 2 Act ("expedited removal") needs consent to reapply within 5 years of such removal. Consent t

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 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 exclusion hearing, an A-file would have been created whether the decision was in the alien's favor 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 aft fallen into distress" only if he or she makes a formal application on Form I-243, and the reques approved. The A-file will contain the application, the decision, and verification of the alien's remo the country. If ten years have not elapsed since such alien's removal, consent to reapply is rec

- Removed as Enemy Alien. If the applicant was removed as an enemy alien, and 10 years have elapsed since such removal, consent to reapply is required. Removal under these circumstanc requires a formal order of removal issued by ICE or DHS and the alien's file should contain tha There have been no removals of enemy aliens in many years, and such applications are rarely seen. If the alien repatriated voluntarily, without any formal order for removal, consent to reapp required.

- Removed at Government Expense. If the applicant was granted voluntary departure in lieu of c for the convenience of the government and transportation was paid entirely by the government determination that the alien was financially unable to depart at his own expense, consent to rea required, unless ten years have elapsed since his or her departure. If removal was for the con the government without regard to the alien's ability to pay, consent to reapply is not necessary. Prior to May 16, 1969, no consideration was given to the ability of most Mexican nationals to pa the majority of Mexican nationals granted voluntary departure at government expense prior to t consent to reapply is not required. However, if the file reflects that such a determination of abili was made, formal removal proceedings probably took place (usually following the Mexican alie apprehension in a region other than the Southern Region--at that time the Southwest Region), a consent to reapply is required.]

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

(3) Determining Whether Alien Has Complied with Requirement to Remain Outside the U.S. for a S Period of Time. **Section 212(a)(9)(A)** of the Act only refers to passage of time (5 years for arriving found inadmissible, 10 years for other aliens removed, 20 years for an alien with a second or subs removal, and indefinite for any aggravated aliens), it doesn't specify where that time must be spent **212.2(a)** specifies that the time must be spent outside the U.S. Once the time period has elapsed, t no longer in a position of needing consent to reapply under section 212(a)(9)(A), he or she is instea position of being inadmissible under section 212(a)(9)(A) if part or all of that time was spent in the U he or she first obtained the necessary consent to reapply. Moreover, if an alien did not spend the e outside the U.S., **section 212(a)(9)(C)** of the Act also applies and the alien is inadmissible to the U basis, unless the alien's presence in the U.S. had been authorized under section 212(d)(3) or 212(Act. Section 212(a)(9)(C) carries an even stronger prohibition, in that (except for certain victims of

violence) the alien must acquire ten years outside the U.S. before even being able to request cons 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 rea only be granted prior to the date of the alien's embarkation or re-embarkation at a place outside the U.: attempt to be admitted from foreign contiguous territory. If a previously removed alien is already back i he or she is barred from receiving consent to reapply and the I-212 application must be denied. (**Note** does not pertain to an alien who is under an order of removal, will be departing from the U.S. to apply f 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 parole U.S.) he or she is barred by section 241(a)(5) from receiving any benefits under the Act (including cor reapply) and is subject to reinstatement of the prior removal order (see Chapter 15.7 of the Deportatio 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 reapply filed by such an alien, you should determine whether its approval would enable to alien to be a the U.S. If even after approval of consent to reapply the alien would not be admissible, the application s denied as its approval would serve no purpose. For example, if the alien is presently inadmissible und 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, provic particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applic (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, t consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the F 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 sections 212(a)(17) and (20) of the Immigration and Nationality Act cannot establish combined eligibilit pro tunc consent to reapply for admission and a waiver of inadmissibility pursuant to section 241(f) of t where she is not separately eligible for either form of relief. [Sections 212(a)(17) and (20) of the Act as 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 conse reapply must meet statutory threshold eligibility requirements depends on the section of law under whi is sought:

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

(2) Under Section 212(a)(9)(C)(ii) of the Act. Before weighing the positive and negative discretiona relating to an application for consent to reapply under section 212(a)(9)(C)(ii) of the Act, you must 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 mo years have elapsed since the date of his or her **last** departure from the U.S. This is not neces date of the alien's formal deportation or removal. If the alien returned to the U.S. one or more tir having been deported or removed, and then departed after such return(s), a new "10-year clo

ticking with the last departure. If more than 10 years **have elapsed** since that last departure, th
must weigh the positive and negative discretionary factors (see paragraph (f)). If more than 10
have not elapsed since the alien's last departure (and the alien cannot meet the domestic viol
requirement), the application must be denied.

(B) The Domestic Violence Provision. In order to be apply for consent to reapply under this pro
alien must:

- Be the beneficiary of an approved self-petition (see **Chapter 21** of this field manual) filed ar following sections of law relating to spouses and child who have been the victims of batterir 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 r the U.S.

  The nature of this connection is not specified in the statute. It could be as direct as the alier had to take the action in order to escape from life- threatening abuse, as indirect as a simpl "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
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
approved and that there is a connection between the alien having been battered or subjected t
cruelty, then you must weigh the positive and negative discretionary factors (see paragraph (f)
alien **is not able** to establish either or both of these requirements (and 10 years have not elap
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 m
the unfavorable factors against the favorable factors and be guided by published precedent decisions
similar factors were considered. In cases where the alien is mandatorily excludable on some other gro
denial must include all grounds considered for the denial. In cases where there are precedent decisior
similar cases, you would cite the appropriate precedent decisions on which you are basing your denia
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 Reap
two which stand out are ***Matter of Carbajal***, 17 I&N Dec. 272 (BIA 1978) and ***Matter of Lee***, 17 I&N D
(BIA 1978):

- In ***Matter of Carbajal*** the Board weighed the favorable factor of the needs of the U.S. employer wl petitioned for an alien against negative factor of the alien having repeatedly violated immigration lav occasions of illegal entry), and found the favorable factor to be more persuasive. The Board did no prior grants of voluntary departure indicated bad moral character, since good moral character is o

requirements for being granted voluntary departure.

- In ***Matter of Lee*** the Board found that a record of immigration violations standing alone will not cor support a finding of lack of good moral character. Recency of deportation can only be considered ‹ is a finding of a poor moral character based on moral turpitude in the conduct and attitude of a pers evinces a callous conscience. In such circumstances, there must be a measurable reformation of over a period of time in order to properly assess an applicant's ability to integrate into our society. I instances when the cause for deportation has been removed and the person now appears eligible 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 use 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 relati 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 responsibiliti
- 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 reco
- 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 wo 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 v 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

(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, o completing the form I-272 (if CLAIMS is not available). Either method specifies the reason for the a tells the applicant and/or attorney where the application was sent. If the CLAIMS notice is generate 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 "Cor granted" in the decision block. If a CLAIMS notice is generated, note in the remarks area of the I-2 approval notice sent". Update the case in CLAIMS as an approval and pick the appropriate approv (if CLAIMS notice generated). If the applicant is applying through a Consular Office abroad for an ir nonimmigrant visa, a copy of the approved I-212 should be forwarded to the location indicated by tl the application. If the alien is a nonimmigrant who will not require a visa, retain both I-212's in the fil 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 applic 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 b Form I-212 to explain your finding, check the appropriate block on the I-272, (or select the appropr approval text in CLAIMS) and count the application as a statistical denial. Form I-272 (or CLAIMS r then routed as in approval cases.

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

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

Go to the Ne