

regulation is controlling to the extent that it conflicts with this section.

(b) *The number of documents.* If no one document establishes the alien's physical presence on the required date, he or she may submit several documents establishing his or her physical presence in the United States prior to and after that date.

(c) *Service-issued documentation.* To demonstrate physical presence on a specific date, the alien may submit Service-issued documentation.

Examples of acceptable Service documentation include, but are not limited to, photocopies of:

(1) Form I-94, Arrival-Departure Record, issued upon the alien's arrival in the United States;

(2) Form I-862, Notice to Appear, issued by the Service on or before the required date;

(3) Form I-122, Notice to Applicant for Admission Detained for Hearing before Immigration Judge, issued by the Service on or prior to the required date, placing the applicant in exclusion proceedings under section 236 of the Act (as in effect prior to April 1, 1997);

(4) Form I-221, Order to Show Cause, issued by the Service on or prior to the required date, placing the applicant in deportation proceedings under section 242 or 242A (redesignated as section 238) of the Act (as in effect prior to April 1, 1997); or

(5) Any application or petition for a benefit under the Act filed by or on behalf of the applicant on or prior to the required date that establishes his or her presence in the United States, or a fee receipt issued by the Service for such application or petition.

(d) *Government-issued documentation.* To demonstrate physical presence on the required date, the alien may submit other government documentation. Other government documentation issued by a Federal, State, or local authority must bear the signature, seal, or other authenticating instrument of such authority (if the document normally bears such instrument), be dated at the time of issuance, and bear a date of issuance not later than the required date. For this purpose, the term Federal, State, or local authority includes any governmental, educational, or administrative function operated by Federal, State, county, or municipal officials. Examples of such other documentation include, but are not limited to:

(1) A state driver's license;

(2) A state identification card;

(3) A county or municipal hospital record;

(4) A public college or public school transcript;

(5) Income tax records;

(6) A certified copy of a Federal, State, or local governmental record that was created on or prior to the required date, shows that the applicant was present in the United States at the time, and establishes that the applicant sought in his or her own behalf, or some other party sought in the applicant's behalf, a benefit from the Federal, State, or local governmental agency keeping such record;

(7) A certified copy of a Federal, State, or local governmental record that was created on or prior to the required date, that shows that the applicant was present in the United States at the time, and establishes that the applicant submitted an income tax return, property tax payment, or similar submission or payment to the Federal, State, or local governmental agency keeping such record; or

(8) A transcript from a private or religious school that is registered with, or approved or licensed by, appropriate State or local authorities, accredited by the State or regional accrediting body, or by the appropriate private school association, or maintains enrollment records in accordance with State or local requirements or standards. Such evidence will only be accepted to document the physical presence of an alien who was in attendance and under the age of 21 on the specific date that physical presence in the United States is required.

(e) *Copies of records.* It shall be the responsibility of the applicant to obtain and submit copies of the records of any other government agency that the applicant desires to be considered in support of his or her application. If the alien is not in possession of such a document or documents, but believes that a copy is already contained in the Service file relating to him or her, he or she may submit a statement as to the name and location of the issuing Federal, State, or local government agency, the type of document and the date on which it was issued.

(f) *Other relevant document(s) and evaluation of evidence.* The adjudicator will consider any other relevant document(s) as well as evaluate all evidence submitted, on a case-by-case basis. The Service may require an interview when necessary.

(g) *Accuracy of documentation.* In all cases, any doubts as to the existence, authenticity, veracity, or accuracy of the documentation shall be resolved by the official government record, with records of the Service having precedence over the records of other agencies. Furthermore, determinations as to the weight to be given any particular

document or item of evidence shall be solely within the discretion of the adjudicating authority.

Dated: December 19, 2002.

**John Ashcroft,**  
*Attorney General.*

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## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Part 212

[INS No. 2249-02; AG Order No. 2641-2002]

RIN 1115-AG90

#### Waiver of Criminal Grounds of Inadmissibility for Immigrants

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** On July 9, 2002, the Department of Justice published a proposed rule to implement a law authorizing the adjustment of status for certain aliens from Cambodia, Vietnam, and Laos, and to codify the Attorney General's approach to granting waivers under section 212(h) of the Immigration and Nationality Act of the criminal grounds of inadmissibility. This rule amends the Department of Justice regulations concerning the standards for waivers of the criminal grounds of inadmissibility for immigrants and responds to public comments on the notice of proposed rulemaking published on July 9, 2002. In order to allow the public an additional opportunity for public comment on this change in the regulations, this rule is being published as an interim final rule with a further 30-day comment period.

**DATES:** *Effective date:* This rule is effective January 27, 2003.

*Comment date:* Written comments must be submitted on or before January 27, 2003.

**ADDRESSES:** Please submit written comments to the Director, Regulations and Forms Services Division, Immigration and Naturalization Service, 425 I Street NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference INS Number 2249-02 on the correspondence. Comments may also be submitted electronically at [insregs@usdoj.gov](mailto:insregs@usdoj.gov). When submitting comments electronically, include INS No. 2249-02 in the subject box so that the comments can be properly routed to

the appropriate office. Comments are available for public inspection at the above address by calling (202) 514-3291 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Michael Valverde, Residence and Status Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, Telephone (202) 514-4754.

**SUPPLEMENTARY INFORMATION:** On July 9, 2002, the Department of Justice published a proposed rule in the **Federal Register** at 67 FR 45402 to implement section 586 of Pub. L. 106-429, 8 U.S.C. 1255 note, and to amend the regulations concerning waivers of the criminal grounds of inadmissibility for immigrants, with a 60-day period for public comment. Section 586 provides for adjustment of status to that of lawful permanent resident for 5,000 eligible natives or citizens of Vietnam, Cambodia, and Laos who were paroled into the United States before October 1, 1997, and otherwise meet the standards of the law.

Many provisions of the proposed rule dealt with the process for eligible aliens to apply for adjustment of status under section 586, including the means for applicants to demonstrate that they were physically present in the United States on October 1, 1997. The Department is finalizing those provisions of that proposed rule in a separate rule published elsewhere in this issue of the **Federal Register**.

The procedures for implementing section 586 was not the only issue addressed in the proposed rule. In addition, the proposed rule addressed at some length the related issue of the standards for granting waivers of the criminal grounds of inadmissibility for immigrants under section 212(h) of the Immigration and Nationality Act ("Act") (8 U.S.C. 1182(h)). See 67 FR at 45404, 45407.

Although section 586(c) provides that four grounds of inadmissibility do not apply, and provides special rules for waivers of several other grounds, section 586 does not mention the availability of waivers for criminal aliens. Even so, the Department has determined that criminal aliens who are inadmissible under section 212(a)(2) of the Act (8 U.S.C. 1182(a)(2)) may apply for a waiver under section 212(h) of the Act. The Department is aware that many aliens who might otherwise be eligible under section 586 are inadmissible on criminal grounds.

The Attorney General has determined to exercise the discretion accorded to him under section 212(h) of the Act in connection with applicants under

section 586. Because section 212(h) of the Act is a general provision applicable to waivers for immigrants, it is appropriate to adopt standards for the exercise of discretion in all cases under section 212(h) of the Act, rather than creating a new standard applicable only to the Indochinese population covered by section 586. As was made clear in the title of the July 2002 proposed rule, and in the supplementary information for that rule as well as the proposed regulatory text, the proposed amendment to § 212.7(d), regarding the exercise of discretion under section 212(h) of the Act, was applicable to all aliens seeking waivers under the latter provision.

In response to the July 9, 2002, proposed rule, one commenter urged that the Department address the amendment to § 212.7(d) in a separate rule, because that regulatory change is applicable to all immigrants seeking a waiver of the criminal grounds of inadmissibility. The Department believes that this issue is linked to the implementation of the adjustment provisions in section 586 and that both changes need to be made at the same time. However, in addressing the two sets of issues, the Department has agreed to promulgate the amendment to § 212.7(d) in a separate, companion rulemaking. Although for administrative purposes this interim final rule has been assigned a different tracking number (RIN) than the July 9, 2002, proposed rule, this interim final rule is adopting in final form the proposed amendment to § 212.7(d) that was set forth in the July 2002 proposed rule. This rule will take effect 30 days after publication in the **Federal Register**. It is being issued as an interim rule for the purpose of soliciting additional public comment. After consideration of these additional public comments, the Department will publish a final rule.

In the final rule implementing section 586 (published elsewhere in this issue of the **Federal Register**), the Department has responded to many of the public comments regarding the availability of waivers of inadmissibility to eligible Indochinese applicants for adjustment of status under section 586. The following discussion responds to the public comments that related specifically to the amendment to § 212.7(d) with respect to the Attorney General's exercise of discretion under section 212(h) of the Act to waive the criminal grounds of inadmissibility for any alien applying or reapplying for a visa, seeking admission to the United States, or seeking adjustment of status to that of an alien admitted for permanent residence.

### Comments Regarding the Exercise of Discretion Under Section 212(h) of the Act

#### *The Proposed Regulations Are Outside of the Authority of the Department*

Several commenters argued that the Attorney General does not have the authority to adopt the standard at 8 CFR 212.7(d) regarding waivers of the criminal grounds of inadmissibility under section 212(h) of the Act.

To the contrary, the Attorney General does have the authority to establish, by regulation, standards for the exercise of discretion under section 212(h) of the Act. Section 212(h)(1) of the Act requires a waiver applicant to establish, to the satisfaction of the Attorney General, one of the eligibility criteria set forth in that provision. Once the applicant has established his or her threshold eligibility, the Attorney General must then determine, under section 212(h)(2) of the Act, whether to grant the waiver. This determination is in the sole discretion of the Attorney General. Moreover, the Attorney General has the authority to decide when and how this discretion will be exercised. Section 212(h)(2) of the Act provides that the Attorney General may grant a waiver if he, "in his discretion, and pursuant to such terms, conditions and procedures as he may *by regulations* prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status." 8 U.S.C. 1182(h)(2) (emphasis added).

This interim rule, at 8 CFR 212.7(d), sets forth a general rule for when the Attorney General will exercise his discretion pursuant to his authority under section 212(h)(2) of the Act. Except in extraordinary circumstances, the Attorney General will not exercise discretion in favor of an applicant where the application involves a violent or dangerous crime. Extraordinary circumstances include situations where the alien has established exceptional and extremely unusual hardship, or situations where there are overriding national security or foreign policy considerations. Moreover, depending on the nature and severity of the underlying offense that renders the applicant inadmissible, the Attorney General retains the discretion to determine that the mere existence of extraordinary circumstances is insufficient to warrant the grant of a waiver. This standard was set forth in *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002), in the context of a discretionary waiver under section 209(c) of the Act (8 U.S.C. 1159(c)) pertaining to refugees,

and for applicants for asylum under section 208 of the Act (8 U.S.C. 1158).

With this interim rule, the Department is now codifying these same principles in connection with other aliens who seek discretionary relief under section 212(h) of the Act from the criminal grounds of inadmissibility. This interim rule extends the standard the Attorney General articulated in *Matter of Jean* and makes it applicable to criminal aliens applying or reapplying for a visa, seeking admission to the United States, or seeking adjustment of status. This action is in accord with the provisions of section 212(h)(2) of the Act, which provides that the Attorney General has authority by regulation to set standards for discretion for aliens seeking waivers for the criminal grounds of inadmissibility.

One of the threshold bases for establishing eligibility for a waiver under section 212(h) of the Act is to demonstrate "to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien." Section 212(h)(1)(B) (8 U.S.C. 1182(h)(1)(B)). Some commenters suggested that the language of the proposed rule in § 212.7(d) conflicts with the statutory standard of "extreme hardship" in section 212(h)(1)(B) of the Act.

The Department disagrees with this contention. The standard in 8 CFR 212.7(d) for the exercise of the Attorney General's discretion does *not* relate to the threshold eligibility requirement of "extreme hardship" in section 212(h)(1)(B) of the Act. Satisfying one of the statutory standards for determining an alien's threshold eligibility for seeking a waiver is only the first part of the waiver process. Even after the waiver applicant has met the required showing of "extreme hardship," or one of the other threshold standards, the law also provides, in section 212(h)(2) of the Act, that the Attorney General has the discretion whether to grant affirmatively the requested relief to each alien. The regulation at 8 CFR 212.7(d) governs only the exercise of discretion under section 212(h)(2) of the Act, *after* the alien has met the threshold requirements of section 212(h)(1) of the Act.

Moreover, simply because an alien has established "extreme hardship" under section 212(h)(1)(B) of the Act, such a determination does not bind the Attorney General in exercising his discretion under section 212(h)(2) of the Act. See *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30–31 (1996) (in determining whether to waive deportation of aliens

deportable for entry fraud, Attorney General could decide not to grant waiver because of the fraud, even though committing entry fraud made alien eligible for waiver; Attorney General could take such conduct into account when deciding whether or not to grant waiver because the statute "establishes only the alien's *eligibility* for the waiver. Such eligibility in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace.") (emphasis in original).

The standard in 8 CFR 212.7(d) is also grounded in cases interpreting the Act. As discussed in the proposed rule, in assessing whether an applicant has met the burden that a waiver is warranted in the exercise of discretion, the adjudicator must balance adverse factors evidencing inadmissibility as a lawful permanent resident with the social and humane considerations presented to determine if the grant of relief appears to be in the best interests of the United States. *Matter of Mendez-Moralez*, 21 I. & N. Dec. 296 (BIA 1996) (involving a waiver under section 212(h)(1)(B) of the Act). Establishment of extreme hardship and eligibility for a waiver requiring a showing of such hardship does not create an entitlement to the relief sought. *Id.*; *Matter of Cervantes-Gonzalez*, 22 I. & N. Dec. 560 (BIA 1999). Extreme hardship, once established, is but one favorable discretionary factor to be considered. *Id.*; *Matter of Mendez-Moralez*, 21 I. & N. Dec. 296 (BIA 1996).

In view of these considerations, this rule will codify the regulations proposed at 8 CFR 212.7(d), with one technical amendment to conform the language more closely to the text of section 212(h)(2) of the Act.

#### *Other Issues Relating to the Discretion of the Attorney General to Grant Waivers*

The Department received three comments raising other issues relating to the Attorney General's discretion to grant waivers of criminal grounds of inadmissibility.

One commenter suggested that the final regulations clarify that the waiver referred to in the proposed rule 8 CFR 212.7(d) is available only to aliens who are applying to adjust status under section 209 of the Act (8 U.S.C. 1159). The commenter stated that clarification of this point is necessary in order to prevent adjustment applicants who are not refugees from erroneously concluding that there is a broad waiver of certain criminal grounds of inadmissibility available to them, when

in fact the statute expressly restricts the Attorney General's authority to grant such waivers to inadmissible aliens in accordance to section 212(h) of the Act (8 U.S.C. 1182(h)) except in very narrow circumstances.

The Department agrees with the commenter that the statutory language authorizing a waiver of the criminal grounds of inadmissibility found in section 212(a)(2) of the Act (8 U.S.C. 1182(a)(2)) in connection with an application for adjustment of status under section 209 of the Act is broader than that found in section 212(h) of the Act, which authorizes waivers of criminal grounds of inadmissibility in connection with applicants for adjustment of status under other provisions of the immigration law. The Attorney General's decision in *Matter of Jean* already governs the standards under which a criminal ground of inadmissibility waiver may be granted as a matter of discretion in a section 209 adjustment case. However, the amendments contained in this interim rule harmonize the exercise of discretion to grant criminal waivers among applicants for adjustment of status by extending the *Matter of Jean* standards to those applications for the waiver of criminal grounds of inadmissibility made under section 212(h)(2) of the Act, including, but not limited to, adjustment of status under section 586 of Pub. L. 106–429 or section 245(a) of the Act (8 U.S.C. 1255(a)).

Similarly, one commenter requested that the final rule be amended to clarify that the Attorney General is not compelled to grant any available waiver of a ground of inadmissibility. Rather, stated the commenter, all such grants fall within the discretion of the Attorney General. Moreover, the commenter contended that the regulations should be amended to state that the Attorney General will not grant waivers of criminal grounds of inadmissibility to adjustment applicants under section 209 of the Act who are convicted of aggravated felonies.

The Department agrees with the commenter that the Attorney General has complete discretion to grant a waiver under section 209(c) of the Act and section 212(h) of the Act. The Department also agrees that, in general, individuals convicted of aggravated felonies would not warrant the Attorney General's use of this discretion. In fact, the proposed regulations stated that even if the applicant can meet the "exceptional and extremely unusual hardship" standard for the exercise of discretion, depending upon the severity of the offense, this might "still be

insufficient" to obtain the waiver. *See* 67 FR at 45407. That language would substantially limit the circumstances under which an individual convicted of an aggravated felony would be granted a waiver as a matter of discretion. Therefore, the Department believes that this language achieves the goal of the commenter while not unduly constraining the Attorney General's discretion to render waiver decisions on a case-by-case basis.

Finally, one commenter stated that the final rule should clarify that only the Immigration and Naturalization Service ("Service") has the discretionary authority to grant waivers under section 209(c) of the Act, and not the Board of Immigration Appeals or Executive Office for Immigration Review (EOIR). This is a matter outside the scope of this rulemaking action because the proposed amendment to 8 CFR 212.7(d) does not relate to the granting of waivers under section 209(c) of the Act with regard to refugees. Nevertheless, the Department notes that it does not agree with this comment. The Act and the Department's regulations both provide the alien with the opportunity to renew his or her application for adjustment in removal proceedings. *See* 8 CFR 209.1(e). Because the alien is renewing his or her case before the immigration judge, the alien may seek the same waivers of grounds of inadmissibility made available to him or her by the section of law under which the application for adjustment of status was filed. *See Matter of H-N-*, 22 I. & N. Dec. 1039 (BIA 1999).

The commenter is correct in that the Act does require the alien to demonstrate that he or she is not inadmissible under section 212 of the Act. *See* section 240(c)(2) of the Act (8 U.S.C. 1229a(c)(2)). However, the waiver available at section 209(c) of the Act (8 U.S.C. 1159(c)) provides a means for eligible aliens, in the discretion of the Attorney General, to obtain a waiver of certain grounds of inadmissibility. *See* section 209(c) of the Act. As such, these waivers are available to an alien seeking to demonstrate that he or she is not inadmissible before the Service and in immigration proceedings.

#### Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule only affects aliens who are subject to inadmissibility on criminal grounds by

amending Department of Justice standards for waivers of the criminal grounds for inadmissibility for immigrants under section 212(h) of the Act. This rule will have no effect on small entities as that term is defined in 5 U.S.C. 601(6).

#### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

#### Executive Order 12866

This rule is considered by the Department of Justice, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

#### Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Pub. L. 104-17, all departments are required to submit to the Office of Management and Budget, for review and approval, any reporting requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### List of Subjects in 8 CFR Part 212

Administrative practice and procedure, Aliens, Passports and visas, Immigration, Reporting and recordkeeping requirements.

Accordingly, part 212 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The authority citation for part 212 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227; 8 CFR part 2.

2. Section 212.7(d) is added, to read as follows:

#### § 212.7 Waiver of certain grounds of inadmissibility.

\* \* \* \* \*

(d) *Criminal grounds of inadmissibility involving violent or dangerous crimes.* The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

Dated: December 19, 2002.

**John Ashcroft,**

*Attorney General.*

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