U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 10 2006

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The Director's decision will be withdrawn, and the matter will be remanded to him for further action.

The applicant is a native and citizen of Poland who entered the United States without a lawful admission or parole on February 7, 2000. On the same date Border Patrol Agents apprehended the applicant and a Notice to Appear (NTA) for a removal hearing before an immigration judge was served on him. The applicant was placed in custody and on February 25, 2000, he was released on a $4,000 bond. On June 6, 2000, an immigration judge found the applicant removable pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i), for having been present in the United States without being admitted or paroled, and granted him voluntary departure until October 4, 2000, in lieu of removal. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to October 4, 2000, changed the voluntary departure order to an order of removal. On February 27, 2001, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear at the Hartford, Connecticut sub-office in order to be removed from the United States. The applicant failed to surrender for removal or depart from the United States. On May 8, 2003, an immigration judge denied the applicant's Motion to Reopen (MTR) the removal order. On May 24, 2003, the applicant was apprehended and consequently he was removed from the United States on June 30, 2003. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to travel to the United States and reside with his U.S. citizen spouse and child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Director's Decision* dated May 24, 2005.

Section 212(a)(9)(A) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
>
> > (ii) Other aliens. - Any alien not described in clause (i) who-
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> > > (I) has been ordered removed under section 240 or any other provision of law, or
> > >
> > > (II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.
> >
> > (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the

> Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief in which she states that the applicant is residing in Poland, is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued unlawful presence in the United States for a period of one year or more and, therefore, is required to file an Application for Waiver of Grounds of Inadmissibility (Form I-601). Counsel further states that when Forms I-601 and I-212 are required and an applicant is applying for an immigrant visa overseas both forms must be filed with the American consul having jurisdiction over the applicant's place of residence. Counsel refers to the regulations at 8 C.F.R. 212.2(d). In addition, counsel states that the Director did not consider all pertinent favorable factors and he characterized as negative multiple factors that were neither positive nor negative. Additionally, counsel states that the applicant's favorable factors outweigh the unfavorable ones because he is the beneficiary of an approved Form I-130, his wife and child are both suffering psychologically from the separation, they both depend upon him for financial support, he has no criminal record, he has a job offer in the United States and he has remained outside the United States since the date of his removal. Finally, counsel requests that the AAO either reverse the Director's decision and approve the Form I-212 or vacate the decision for lack of jurisdiction and allow the applicant to file both applications for waivers with the American consulate in Warsaw, Poland.

Before the AAO can weigh the discretionary factors in this case, it must first determine if the Form I-212 was filed with the proper office. To recapitulate, the applicant entered the United States without inspection on February 7, 2000, and was removed on June 30, 2003. The applicant accrued unlawful presence in the United States for a period of one year or more. Therefore, the applicant is clearly inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, and is required to file Form I-601 pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Section 212(a)(9)(B) of the Act states in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

> (v) Waiver. – The Secretary has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Secretary that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The regulation at 8 C.F.R. 212.2(d) states in pertinent part:

> Except as provided in paragraph (g)(3) of this section, an applicant for an immigrant visa who is not physically present in the United States and who requires permission to reapply must file Form I-212 with the district director having jurisdiction over the place where the deportation or removal proceedings were held. If the applicant also requires a waiver under section 212(g), (h), or (i) of the Act, Form I-601, Application for Waiver of Grounds of Excludability, must be filed simultaneously with the Form I-212 with the American consul having jurisdiction over the alien's place of residence. The consul must forward these forms to the appropriate Service office abroad with jurisdiction over the area within which the consul is located.

The regulation at 8 C.F.R. 103.2 states in pertinent part:

> Applications, petitions, and other documents.
>
> > *(a) Filing-(1) General.* Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

The applicant is presently residing in Poland. He requires waivers of grounds of inadmissibility under sections 212(a)(9)(B)(v) of the Act, and 212(a)(9)(A)(iii) of the Act. Pursuant to the regulation at 8 C.F.R. 212.2(d) he must file Forms I-601 and I-212 with the American consul having jurisdiction over his place of residence.

The AAO finds that the Form I-212 was not filed with the office that had jurisdiction to adjudicate it. In view of the foregoing, the previous decision of the Director will be withdrawn. The application is remanded to him in order to advise the applicant to file Forms I-212 and I-601 with the American Consulate overseas.

ORDER: The Director's decision is withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.