U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CLEVELAND, OHIO Date: MAR 1 2 2007

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 District Director, Cleveland, Ohio, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Palestine and citizen of Venezuela who on September 20, 1991, at the Rainbow Bridge, Buffalo, New York, Port of Entry applied for admission into the United States as a returning lawful permanent resident along with his spouse. The applicant was found excludable pursuant to section 212(a)(6)(E)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly encouraged and assisted an individual to try to enter the United States in violation of law. The applicant was placed in exclusion proceedings and on June 14, 1993, an immigration judge ordered the applicant excluded and deported from the United States. In addition, the immigration judge denied the applicant's application for a waiver under section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11). The applicant filed an appeal with the Board of Immigration Appeals (BIA). On November 30, 1999, the BIA found no reason to disturb the immigration judge's determination, nevertheless they remanded the case to the immigration judge in order to allow the applicant an opportunity to pursue relief under section 212(c) of the Act. On February 11, 2003, the immigration judge administratively closed the case. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen mother. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 remain in the United States and reside with his spouse and U.S. citizen children.

The District Director determined that the applicant is not eligible for any exemption or waiver under section 212(a)(6)(E)(i) of the Act. In addition, the District Director determined that the applicant did not submit an Application for Waiver of Grounds of Inadmissibility (Form I-601) simultaneously with the Form I-212 with the American Consul abroad or the Immigration Judge as required by the regulation at 8 C.F.R. 212.2(d). The District Director then denied the Form I-212 accordingly. *See District Director's Decision* dated August 12, 2004.

On appeal, counsel states that the District Director improperly denied the Form I-212 pursuant to section 212(a)(6) of the Act. Counsel further states that the applicant is in exclusion proceedings and therefore, under the old exclusion rules. In addition, counsel states that in her February 7, 2003, decision the immigration judge properly found that the District Director had jurisdiction to review the Form I-212. On the Notice of Appeal to the AAO (Form I-290B) counsel also states that she will be submitting a brief and/or evidence to the AAO within 30 days. On November 28, 2006, the AAO forwarded a fax to counsel informing her that this office had not received a brief or evidence related to this matter and unless counsel responded within five business days the appeal may be summarily dismissed. Counsel has not responded to the AAO's fax. The appeal was filed on September 9, 2004, and to this date, over two years later, no documentation has been received by the AAO. Therefore, the AAO will adjudicate the appeal based on the documentation contained in the record of proceeding.

The AAO finds that the District Director erroneously denied the Form I-212 pursuant to the regulation at 8 C.F.R. § 212.2(d). The regulation at 8 C.F.R. § 212.2(d) pertains to applicants for immigrant visas who are not physically present in the United States. The applicant, in the present matter, is physically present in the United States and applied for adjustment of status. Therefore, the regulation at 8 C.F.R. § 212.2(e) relates to

him, and he is permitted to file a Form I-212 with the district office that has jurisdiction over his place of residence.

The AAO notes that the record of proceeding does not contain a decision by an immigration judge dated February 7, 2003, and counsel did not provide a copy the decision. The record of proceeding reflects that on February 13, 2003, an immigration judge administratively closed the case. Several sections of the Act were added and amended by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Sections 212(a)(9)(A)(i) and (ii) of the Act roughly correspond to former sections 212(a)(6)(A) and (6)(B) of the Act. According to the reasoning in *Matter of Soriano,* 21 I&N Dec. 516 (BIA 1996) the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of the legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996, and since that date all aliens are considered to be in removal proceedings regardless of the date of the original notice.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

To recapitulate, on June 14, 2003, the applicant was ordered excluded and deported from the United States. Therefore, the applicant is clearly inadmissible under sections 212(a)(9)(A) of the Act and must receive permission to reapply for admission.

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

> (A) Certain aliens previously removed.-
>
> > (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien 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.

In *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

> The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that:

> [T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . . In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The record of proceeding reflects that on May 7, 1997, in the Cleveland Municipal Court, Criminal Branch, the applicant was convicted of the offense of trafficking in food stamps.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen children and mother, and an approved Form I-130.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to smuggle his spouse into the United States, and his criminal record.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.