U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

JUL 07 2009

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: [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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied a motion to reopen the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Haiti who, on July 2, 1996, filed an Application for Asylum and Withholding of Deportation (Form I-589), indicating that he had entered the United States without inspection on May 15, 1996. On November 5, 1996, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On March 4, 1997, the applicant withdrew his applications for asylum and withholding of removal and the immigration judge granted him voluntary departure until March 4, 1998. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On July 11, 1997, the applicant married his U.S. citizen spouse, [redacted], in Upper Marlboro, Maryland. On August 18, 1997, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the a licant, which was terminated for failure to appear on June 17, 1998. On January 19, 1999, [redacted] filed a second Form I-130. On February 10, 2004, the Form I-130 was denied for fraud. On February 4, 2006, the applicant was removed from the United States and returned to Haiti. On March 3, 2006, the applicant filed a Form I-212, indicating that he resided in Haiti. On March 8, 2006, [redacted] filed a third Form I-130, indicating that the applicant resided in Haiti. On May 1, 2006, the applicant filed a second Form I-212, indicating that he resided in the United States. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside in the United States with U.S. citizen spouse.

On August 27, 2007, the director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision,* dated August 27, 2007. On September 27, 2007, the applicant filed a motion to reopen the Form I-212, along with evidence that the third Form I-130 had been filed and approved. Counsel contended that the approval of the Form I-130 was new evidence to be considered on a motion to reopen. On April 7, 2008, the director found that the applicant presented facts that could have been presented for consideration with the original Form I-212 and were therefore not "new," for purposes of making a motion to reopen. The director denied the motion to reopen accordingly. *See Director's Decision,* dated April 7, 2008.

On appeal, counsel contends that the director erred as a matter of fact and law by finding the approval of the Form I-130 to not meet the requirements of a motion to reopen by stating new facts. *See Form I-290B,* dated May 2, 2008. In support of his contentions, counsel submits the referenced Form I-290B and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) 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.

(ii) Other aliens.-Any alien not described in clause (i) who-

(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 who 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 on a 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 Secretary has consented to the alien's reapplying for admission.

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

Counsel, the applicant and [redacted] assert that the applicant has remained outside the United States and lived in Haiti since he departed on February 4, 2006.[1]

The AAO notes that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for being unlawfully present in the United States for more than one year, from March 4, 1998, the date on which the applicant's voluntary departure expired, and February 4, 2006, the date on which the applicant departed the United States, and is seeking admission within ten years of his last departure. To seek a waiver of this ground of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), an applicant must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).

As required by 8 C.F.R. § 212.2(d), an immigrant visa applicant who is outside the United States and requires both a waiver and permission to reapply for admission must simultaneously file the Form I-601 and the Form I-212 with the U.S. Consulate having jurisdiction over the applicant's place of residence. As the applicant has not complied with the regulatory requirements for filing the Form I-212, the application in this matter was improperly filed. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.

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[1] The AAO notes that there are various inconsistencies in the documentation as to whether the applicant resides in the United States or in Haiti. Most documentation in the record indicates that the applicant resides in Haiti; however, the applicant's second Form I-212 indicated that the applicant resided in the United States, while subsequent submissions of Notices of Entry of Appearance of Attorney or Representative (Form G-28) indicate that the applicant resides in Haiti. The applicant will be required to show proof that he has resided outside the United States since his 2006 removal at the time of his immigrant visa interview. If it is later confirmed that the applicant illegally reentered the United States at any time after his 2006 departure, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007).