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

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2009

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Columbus, Ohio denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) sustained the subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion to reopen will be granted, the order granting the application will be withdrawn and the application declared moot.

The applicant is a native and citizen of Russia who, on December 4, 1998, entered the United States as the K-1 nonimmigrant fiancée of [redacted]. On February 20, 1999, the applicant married [redacted], a U.S. citizen. On April 14, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on her admission as a K-1 fiancée of a U.S. citizen. On March 28, 2000, the applicant was issued an Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advanced parole authorization to depart and return to the United States on July 2, 2000. On April 9, 2001, the applicant divorced [redacted]. On April 18, 2001, the applicant married her current U.S. citizen spouse, [redacted]. On July 12, 2001, the applicant filed a second Form I-485 based on a Form I-130 filed on her behalf by Mr. [redacted]. On August 27, 2001, both of the applicant's Form I-485s were denied. The district director denied the first because she was no longer married to [redacted] and the second because she was no longer seeking adjustment based on [redacted], the individual whose petition had brought her to the United States as a K-1 fiancée, as required by section 245(d) of the Immigration and Nationality Act (the Act). On January 31, 2003, the Form I-130 filed on the applicant's behalf by [redacted] was approved. On September 30, 2004, the applicant was placed into proceedings. On September 30, 2005, the immigration judge denied the applicant's application for adjustment of status and ordered her removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On April 13, 2006, the applicant filed the Form I-212. On December 6, 2006, the BIA dismissed the applicant's appeal. On December 28, 2006, the applicant filed an appeal and motion to stay removal with the Ninth Circuit Court of Appeals (Ninth Circuit). The Ninth Circuit granted the applicant's motion to stay removal. The applicant filed a motion to reopen with the BIA. On February 21, 2007, the BIA denied the applicant's motion to reopen. The director found the applicant inadmissible under section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A) and the applicant 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 with her U.S. citizen spouse.

The director determined that a favorable exercise of discretion was not warranted because the applicant, once she departed the United States to process her immigrant visa through a U.S. consulate, would become inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for accruing more than one year of unlawful presence and seeking admission within ten years of her last departure from the United States. The director noted that as the applicant would be required to file an Application for Waiver of Grounds of Inadmissibility (Form I-601), she could submit the Form I-212 at that time. The director denied the Form I-212 accordingly. *See Director's Decision* dated February 20, 2007.

On October 23, 2008, the AAO sustained the applicant's appeal because the favorable factors in the applicant's case outweighed the unfavorable factors.[1] *Decision of AAO,* dated October 23, 2008.

In his motion to reopen, counsel requests that the AAO's decision be amended by withdrawing reference to unlawful presence. *See Counsel's Motion to Reopen,* dated November 11, 2008. In support of his contentions, counsel submits the referenced motion to reopen and a copy of the Ninth Circuit Court of Appeals (Ninth Circuit) decision in the applicant's case. 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.-
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> (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.
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> (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 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.

8 C.F.R. § 103.5(a) provides, in pertinent part:

> (2) *Requirements for motion to reopen.*
> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition

[1] The AAO notes that at the time of the AAO's decision, the applicant's appeal had not yet been mandated by the Ninth Circuit and counsel had failed to inform the AAO of the decision.

denied due to abandonment must be filed with evidence that the decision was in error because:

a. The requested evidence was not material to the issue of eligibility;
b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) *Requirements for motion to reconsider.*
A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel does not contend that he is making a motion to reconsider.

In support of his motion to reopen, counsel submits a copy of the Ninth Circuit's decision and October 23, 2008 mandate in the applicant's case. The Ninth Circuit held that the plain language of section 245(d) of the Act does not suggest that an application that was valid when submitted should be automatically invalid when the petitioner's marriage ends by divorce. The Ninth Circuit therefore concluded that the BIA's reading of section 245(d) of the Act was incorrect and granted the applicant's petition for review and remanded the case to the BIA for further proceedings consistent with the Ninth Circuit's decision.

Counsel contends that the AAO should amend it's decision in which this office found that the applicant began to accrue unlawful presence on August 27, 2001, the date on which her Form I-485 was denied, because the immigration court and BIA found that there was no basis for her appeal of the denial of the Form I-485. Counsel contends that such language should be removed from the AAO's decision because the Ninth Circuit held in the applicant's favor; however, the AAO notes that the finding of unlawful presence was predicated on the finding that the applicant did not have a right to appeal the denial of the Form I-485 and that this office's decision contained language making it clear that the applicant was only to be found inadmissible and subject to unlawful presence provisions ***if*** the Ninth Circuit found her to be ineligible to adjust status. Since the Ninth Circuit has held in the applicant's favor, there is no need for the AAO to adjust the language in this office's decision, as the point is moot.

The AAO, however, does find that, since counsel has provided evidence in his motion to reopen that the Ninth Circuit remanded the applicant's case to the BIA for further proceedings, that there is now insufficient evidence in the record to find the applicant inadmissible under section 212(a)(9)(A) of the Act. Since the applicant's case has been remanded to the BIA, the BIA's order is no longer final. As such, the AAO therefore finds that the applicant is currently not required to apply for permission to reapply for admission to the United States because there is no evidence in the record that the applicant has ever been removed from the United States and she is no longer subject to a final order of removal.

Accordingly, while the motion to reopen will be granted, the order granting the application will be withdrawn and the permission to reapply for admission application will be declared moot.

ORDER: The motion to reopen is granted. The order granting the application will be withdrawn and the permission to reapply for admission application will be declared moot.