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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H4

Date: FEB 2 1 2012 Office: BUFFALO, NY FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Buffalo, New York, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The denial was appealed to the Administrative Appeals Office (AAO). The appeal was dismissed. The applicant filed a motion to reopen and reconsider the AAO decision, which is now before the AAO. The motion will be granted and previous decisions of the field office director and AAO will be affirmed.

The record reflects that the applicant is a native and citizen of Canada who was expeditiously removed pursuant to section 235(b)(1) of the Act. 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). She 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 seek employment and reside in the United States.

The field office director determined that the applicant had failed to establish she warranted a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated November 3, 2009.

The record contains a brief from counsel; a copy of the applicant's Form I-860, dated June 28, 2009, which found her inadmissible under section 212(a)(7); and documents previously filed in relation to her Form I-212 application and appeal.

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 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that the applicant was expeditiously removed the applicant pursuant to section 235(b)(1) of the Act on June 28, 2009. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

On Motion, counsel states that the decision of the AAO was *ultra vires* and that the AAO acted beyond its legal authority in finding that the applicant is inadmissible under section 212(a)(6)(C) of the Act. Specifically, counsel states that the AAO may not rule on an issue not before it on appeal and not decided in the first instance by the entity responsible for rendering a decision. Counsel also states that the AAO may not engage in factfinding in the course of deciding appeals, and that the determination that the applicant was inadmissible under section 212(a)(6)(C) of the Act was "a classic factual determination."

In support of his assertions, counsel cites *Baker v. Dorfman*, 239 F.3d 415 (2nd Cir. 2000), in which the court stated "a federal appellate court does not consider an issue not passed upon below." [redacted] (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The AAO is not a federal appellate court, and thus is not bound by any jurisdictional limitations imposed on federal appellate courts. Further, the AAO notes that the court in *Baker v. Dorfman* also stated this general rule "is one of prudence and not appellate jurisdiction. We retain broad discretion to consider issues not raised initially in the District Court." Id. at 420 (quoting *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir.1996)). Thus, even if the case were applicable to the AAO, it does not support counsel's assertion that an appellate body cannot consider an issue not passed on below.

Counsel also cites cases by the Board of Immigration Appeals in which the Board declined to rule on issues not raised before an Immigration Judge or before Customs and Border Protection. However, as these cases relate to the BIA and not the AAO, they are not applicable in this case.

Counsel further states that, in finding the applicant inadmissible under section 212(a)(6)(C) of the Act, the AAO engaged in impermissible fact finding. In support of this contention, counsel cites to 8 C.F.R § 1003.1(d)(3)(iv) which states, in part, "the Board will not engage in factfinding in the course of deciding appeals." This regulation applies to the Board of Immigration Appeals, not the AAO. There is no regulation that prohibits the AAO from engaging in fact finding. Further, contrary to

counsel's assertion, the AAO's finding of inadmissibility under section 212(a)(6)(C) was not a "classic factual determination." The AAO did not dispute the facts as found by the Field Office Director or Customs and Border Protection. Instead, the AAO made a legal determination, based on the facts in the record, that the applicant is inadmissible under section2 12(a)(6)(C) of the Act.

As stated in the previous decision, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). *See also Siddiqui v. Holder*, 2012 WL 130447, (7th Cir 2012). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Field Office 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).

The AAO previously found that the applicant is inadmissible under section 212(a)(6)(C) of the Act and the record supports that finding. The applicant is, therefore, mandatorily inadmissible to the United States. As noted by the Board of Immigration Appeals (BIA) in *Matter of Martinez-Torres*, 10 I&N Dec. 776 (BIA 1964), no p[urpose is served in granting an application for permission to reapply for admission into the United States to an applicant who is mandatorily inadmissible to the United States. Accordingly, the AAO's prior decision is affirmed.

ORDER: The prior decisions of the AAO are affirmed