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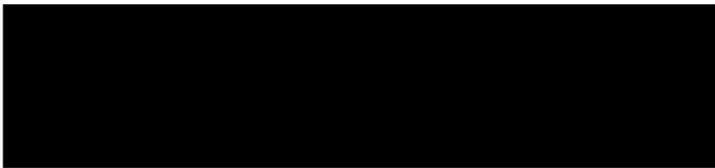


FILE:  Office: CALIFORNIA SERVICE CENTER Date: AUG 22 2007

IN RE: Applicant: 

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:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal will be dismissed as moot.

The applicant is a native and citizen of Iran who, on November 22, 2001, entered the United States on a B-2 visitor's visa, valid until May 21, 2002. On May 17, 2002, the applicant filed the Form I-589, Application for Asylum and/or Withholding of Removal with the legacy Immigration and Naturalization Service (INS). The applicant's Form I-589 was subsequently denied and his case referred to the immigration judge. On January 30, 2003, the immigration judge ordered the applicant removed in absentia pursuant to section 237(a)(1)(B) of the Act for having remained in the United States for a period longer than permitted. A warrant of deportation was issued on February 18, 2003. On the date he was ordered removed, the applicant had already departed the United States, returning to Iran where he has since resided. On September 18, 2006, the applicant filed the Form I-212.

The director found the applicant to be inadmissible to the United States under section 212(a)(9)(A) as an alien ordered removed from the United States who is seeking admission within ten years of his date of departure. He denied the Form I-212 based on his determination that the positive factors in the applicant's case were outweighed by the applicant's failure to appear for his January 30, 2003 hearing before the immigration judge. *See Director's Decision*, dated February 12, 2007.

On appeal, counsel contends that the applicant is not inadmissible to the United States under section 212(a)(9)(A) of the Act. Counsel further asserts that the director failed to address the overwhelming number of positive factors in the applicant's case and the lack of any negative factors. *Form I-290B, Notice of Appeal to the Administrative Appeals Office*, dated March 2, 2007.

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

On May 1, 1997, the legacy INS issued a memorandum providing general guidance for applying section 212(a)(9) of the Act. This guidance stated the following regarding section 212(a)(9)(A):

It should be noted that . . . section 212(a)(9)(A) of the Act applies only if the alien has departed or been removed from the United States *subsequent* [emphasis added] to issuance of an order. [Memorandum from Louis D. Crocetti, Jr., Associate Commissioner, Office of Examinations, Immigration and Naturalization Service, *Processing of section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications*, HQ50/5.12-96Act.034 (May 1, 1997).]¹

In the present case, the record establishes that the applicant departed the United States on October 29, 2002, three months prior to the date on which the immigration judge ordered him removed. The applicant has submitted copies of his airline passenger receipt, dated October 29, 2002; the boarding passes for his trip; and pages from his passport showing admission stamps for Turkey and Iran, dated October 30, 2002. In that he has demonstrated that he left the United States prior to the date on which he was ordered removed, the applicant is not inadmissible to the United States under section 212(a)(9)(A)(ii). Accordingly, he is not required to file the Form I-212 to seek an exception under section 212(a)(9)(A)(iii) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. In the present matter, the applicant has met that burden. Therefore, the director's decision will be withdrawn and the appeal will be dismissed as moot.

ORDER: The director's decision is withdrawn and the appeal is dismissed as moot.

¹ A March 31, 1997 INS memorandum also states that only those individuals who have been removed or have departed the United States after the issuance of a removal order are subject to the provisions of section 212(a)(9)(A)(ii). Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service, *Implementation of section 212(a)(6)(A) and 212(a)(9) grounds of inadmissibility*, HQIRT 50/5.12-96act.026 (March 31, 1997).