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

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: ROME, ITALY Date: JUN 1 4 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Rome, Italy 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 appeal will be dismissed. The application will be denied.

The applicant is a native and a citizen of Italy who entered the United States under the Visa Waiver Program on July 2, 2002 and remained after her authorized period of stay ended on September 30, 2002. The applicant was removed from the United States on January 21, 2004. On February 12, 2004, the applicant's U.S. citizen spouse filed the Form I-130, Petition for Alien Relative, on her behalf. Citizenship and Immigration Services (CIS) approved the petition on November 9, 2004. The applicant is inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) for seeking admission to the United States within ten years of her 2004 removal. 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 rejoin her U.S. citizen spouse.

The district director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and, further, that a favorable exercise of discretion regarding the Form I-212 would serve no purpose as the Form I-601, Application for Waiver of Ground of Inadmissibility, filed by the applicant had already been denied. Accordingly, he denied the Form I-212. *Decision of the District Director,* dated October 4, 2005.

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

> (A) Certain aliens previously removed.-
>
> . . .
>
> (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 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 aliens 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 appeal, counsel contends that the district director erred in citing the applicant's unlawful presence of more than one year as a negative factor in his weighing of the positive and negative factors in the applicant's case,

that the applicant's unlawful presence in the United States for more than one year was the fault of the Department of Homeland Security (DHS). Counsel also asserts that the district director abused his discretion in denying the Form I-212.

The AAO notes that the issue of whether the applicant is subject to the provisions of section 212(a)(B)(i)(II) of the Act may not be raised in this proceeding, which relates only to the applicant's inadmissibility under section 212(a)(9)(A)(ii). Counsel may not appeal a finding of unlawful presence under section 212(a)(9)(B)(i) by filing the Form I-212. A determination of unlawful presence may be appealed only by filing the Form I-601. Accordingly, the AAO will not consider counsel's assertions that the applicant's unlawful presence in the United States of more than one year was the result of DHS actions and should not, therefore, be viewed as a negative factor in considering the Form I-212. The AAO notes, however, that nothing in the record on appeal indicates that the applicant attempted to limit her unlawful presence in the United States by contacting DHS to have her passport returned to her or made any attempt to leave the United States prior to DHS' confiscation of her passport.

The AAO now turns to counsel's assertion that the district director abused his discretion in denying the Form I-212.

While the AAO notes counsel's discussion of the exercise of discretion in Form I-212 proceedings, it will not address this aspect of the applicant's appeal. The AAO has, in a separate decision, dismissed the applicant's appeal of the denial of the Form I-601, which the applicant filed in relation to her inadmissibility for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act. When an inadmissible alien files both the Form I-601 and the Form I-212, the *Adjudicator's Field Manual* provides the following guidance:

> Chapter 43 Consent to Reapply After Deportation or Removal
>
> 43.2 Adjudication Processes:
>
> (c) Of course, an alien might be applying for both consent to reapply and a waiver of inadmissibility, provided the particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose.

In that the AAO has determined that the applicant is not eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act and has dismissed her appeal of the Form I-601 denial, no purpose would be served in granting her application for permission to reapply for admission. Accordingly, the appeal of the district director's denial of the Form I-212 is dismissed and the application is denied.

ORDER: The appeal is dismissed. The application is denied.