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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]

FILE:

Office: SAN FRANCISCO, CA

Date: JUN 29 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, 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, San Francisco, California, denied 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 Uzbekistan who, on June 27, 2000, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States after her nonimmigrant status expired on December 26, 2000. On August 13, 2001, the applicant filed an Application for Asylum and Withholding of Removal (Form I-589). On October 5, 2001, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings for overstaying her nonimmigrant status. On January 26, 2005, the immigration judge made an adverse credibility finding against the applicant. The immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture and granted her voluntary departure until March 28, 2005. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On April 6, 2006, the BIA upheld the immigration judge's finding of adverse credibility, dismissed the applicant's appeal and reinstated voluntary departure for a period of 60 days. The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On May 5, 2006, the applicant also filed a stay of removal with the Ninth Circuit, which was granted until resolution of the petition for review. On July 15, 2007, the applicant married her naturalized U.S. citizen spouse, [REDACTED] in Las Vegas, Nevada. On July 23, 2007, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On August 7, 2007, the Ninth Circuit's decision to deny the applicant's petition for review was mandated. The applicant's period of voluntary departure expired on September 7, 2007. 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 October 28, 2007, the applicant departed the United States and returned to Uzbekistan.

On January 24, 2008, the applicant filed the Form I-212, along with an Application for Waiver of Grounds of Inadmissibility (Form I-601).¹ 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) for a period of ten years. 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 reside in the United States with her U.S. citizen spouse and a U.S. citizen child.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated September 8, 2008.

On appeal, counsel contends that the field office director erred in ignoring evidence that the applicant failed to comply with voluntary departure due to ineffective assistance of counsel.² Counsel contends

¹ The AAO notes that the Form I-601 was transferred to the U.S. Consulate in Moscow, Russia on March 5, 2008.

² The AAO note that counsel contends that the applicant failed to comply with voluntary departure and was deprived of the opportunity to remand her case to the BIA, which would have permitted her to adjust her status, due to the ineffective assistance of counsel. Counsel contends that the applicant would also not be subject to inadmissibility under section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182 (a)(9)(B)(i). While counsel contends that the applicant has met her burden to prove ineffective assistance of counsel, the AAO has no authority to review the decision to remove the applicant. The

that the field office directive ignored favorable factors and failed to give consideration to the applicant's after-acquired equities. Counsel contends that the field office director made an improper balancing of negative or positive equities in adjudicating the Form I-212. *See Counsel's Brief*, dated 327 to 2009. In support of his contentions, counsel submits the referenced brief, declaration from counsel, supplemental brief, a recommendation letter, documentation regarding the return of a misfiled Form I-589, a birth certificate for the applicant's daughter and copies of case law. 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-

AAO also has no authority to render the applicant exempt from the requirement that the applicant apply for a waiver under section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(i). The only issue before the AAO is whether the applicant, who departed the United States while an order of removal was outstanding in 2007 and is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, is eligible for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

(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 and the applicant assert that the applicant has remained outside the United States and lived in Uzbekistan since she departed on October 28, 2007.³

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 180 days and less than one year, from December 26, 2000, the date on which the applicant's nonimmigrant status expired, and August 13, 2001, the date on which the applicant's Form I-589 was correctly filed, and is seeking admission within three years of her last departure on October 28, 2007. 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 a Form I-601.

³ The AAO notes that if it is later confirmed that the applicant illegally reentered the United States at any time after her 2007 departure, she is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until she 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).

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.⁴ 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.

⁴ The AAO notes that counsel has previously contended in regards to the transfer of the Form I-601 that the applicant's Form I-601 was filed only in reference to seeking permission to reapply for admission under section 212 (a)(9)(A)(iii) of the Act. While 8 CFR §212.2 (d) only makes reference to waiver applications under sections 212 (g), (h) and (i) of the Act, any applicant who requires both permission to reapply for admission and a waiver requiring the filing of a Form I-601, if she resides abroad, must apply for both permission to reapply for admission and the waiver at the U.S. Consulate having jurisdiction over her residence.