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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER
(RELATES)

Date: **MAR 11 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)

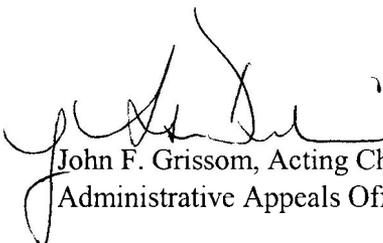
ON BEHALF OF APPLICANT:

[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 Acting Director, Vermont Service Center, 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 Nicaragua who, on March 23, 1989, was placed into immigration proceedings after he had entered the United States without inspection. The applicant failed to give immigration officers his true identity. On October 11, 1989, the immigration judge ordered the applicant removed *in absentia*, under the name ‘[REDACTED].’ The applicant filed a motion to reopen with the immigration judge. On November 30, 1989, the immigration judge denied the applicant’s motion to reopen. On July 18, 1990, a warrant for the applicant’s removal was issued under the name “ [REDACTED] ” The applicant failed to depart the United States.

On March 26, 1994, the applicant married his then lawful permanent resident spouse, [REDACTED], in Reading, Pennsylvania. On July 29, 1994, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 28, 1995, [REDACTED] became a naturalized U.S. citizen. On July 6, 1995, the Form I-130 was approved. On February 9, 1996, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On March 13, 1996, the applicant was issued an Advance Parole Document (Form I-512). On April 25, 1996, the applicant utilized this document to reenter the United States. On May 7, 1996, the applicant appeared at legacy Immigration and Naturalization Services’ (INS) Philadelphia, Pennsylvania District Office. The applicant testified that he had never been in immigration proceedings or before an immigration judge. The applicant denied having an alternative A-number or using a different name. Only after the applicant was confronted with information that he had been ordered removed under the name “ [REDACTED] ” did he admit to the 1989 removal order. On May 7, 1996, the Form I-485 was returned to the applicant because the district office did not have jurisdiction.

On October 11, 1996, the applicant was placed into immigration proceedings. On October 15, 1996, the applicant’s parole was terminated. On November 8, 1996, amended charges against the applicant were filed with the immigration court. On April 23, 1997, the immigration judge ordered the applicant removed from the United States. On June 13, 1997, the applicant was removed from the United States and returned to Nicaragua, where counsel claims he has since resided. On July 11, 2003, [REDACTED] filed a second Form I-130. On August 8, 2003, [REDACTED] filed a Petition for Alien Fiancé(e) (Form I-129F) on behalf of the applicant, which was approved on November 24, 2003. On January 28, 2004, the second Form I-130 was approved. On May 17, 2005, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i), for a period of twenty years. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. citizen spouse and two U.S. citizen children.

The acting director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The acting director determined that the applicant was ineligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten

years and denied the Form I-212 accordingly. *See Acting Director's Decision*, dated January 24, 2006.

On appeal, counsel contends that the denial of the applicant's application for permission to reapply for admission contains factual and legal errors. *See Counsel's Brief*, dated March 15, 2006. In support of his contentions, counsel submits only the referenced brief. 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. [Emphasis added]

....

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.- Any alien who-
 - (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 contends that the acting director erred in stating that the applicant was ordered "removed," rather than "deported" in 1989 and "excluded" in 1997. The AAO finds that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), removed the distinctions between exclusions and deportation hearings and that the term "removal" may refer to either type of removal order. Section 212(a)(9)(A)(ii) of the Act applies to exclusion or deportation orders issued prior to April 1, 1997, even to those applicants who had remained outside the United States for the required one or five years under pre-IIRIRA law; however, the record reflects that, while the applicant was placed into immigration proceedings prior to April 1, 1997, the immigration judge did not order the applicant removed from the United States until April 23, 1997. Accordingly, since the applicant was denied admission and ordered removed (excluded) on/or after April 1, 1997, he is subject to inadmissibility under section 212(a)(9)(A)(i) of the Act. Counsel contends that it has been more than five years since the applicant was removed from the United States and he no longer requires permission to reapply for admission. The AAO finds, however, that while the applicant is subject to section 212(a)(9)(A)(i) of the Act, he is inadmissible for a period of *twenty years* because his 1997 removal was a second or subsequent removal. Therefore the applicant requires permission to reapply for admission.

The acting director determined that the applicant reentered the United States illegally in April, 1996, by presenting fraudulent documentation. The acting director then found the applicant to be

inadmissible pursuant to section 212(a)(9)(C) of the Act. Counsel contends that the applicant did not commit fraud by reentering the United States utilizing the Form I-512. The AAO finds that the applicant did not commit fraud by presenting the Form I-512 in order to enter the United States on April 25, 1996. Nor did the applicant obtain the Form I-512 by fraud. The Application for Travel Document (Form I-131) submitted by the applicant only inquired as to whether the applicant was currently in immigration proceedings and the applicant did not appear before an immigration official for an interview in regard to this application. Since the applicant had already been ordered removed he was no longer in proceedings. Additionally, in order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have unlawfully reentered the United States or attempted unlawful reentry after April 1, 1997, the effective date of the provision. Counsel asserts that the applicant has remained outside the United States and lived in Nicaragua since he was removed on June 13, 1997.¹

The AAO notes that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to obtain immigration benefits by fraud in 1996. While the AAO agrees with counsel that the applicant did not commit fraud by obtaining or utilizing the Form I-512 to reenter the United States in 1996, the AAO finds that the applicant attempted to conceal his prior removal order in an attempt to obtain adjustment of status. During the interview in regard to his Form I-485, the applicant testified that he had never been in immigration proceedings or before an immigration judge. The applicant denied having an alternative A-number or using a different name. Only after the applicant was confronted with information that he had been ordered removed under the name "[REDACTED]" did he admit to his 1989 removal order.² To seek a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).

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

¹ The AAO notes that the applicant has failed to provide evidence to establish that he has remained outside the United States since his removal in 1997. If it is later confirmed that the applicant illegally reentered the United States at any time after his 1997 removal, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until he 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).

² While counsel may attempt to contend that the immigration judge found that the applicant did not commit fraud, the AAO notes that the immigration judge's findings were limited to the charges placed before him or her on the charging document. The charging document only asserts that the applicant committed fraud by presenting the Form I-512 in order to reenter the United States; therefore, the applicant's testimony before an immigration officer in regard to his Form I-485 was not before the immigration judge. Additionally, even if the immigration judge made such a finding, the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

residence. 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.