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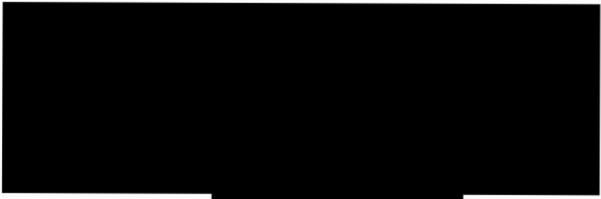
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEWARK, NJ

Date: **SEP 24 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: Self-represented

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, Newark, New Jersey, denied an 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 India who, on April 15, 1993, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, which expired on July 14, 1993. On September 19, 1994, the applicant filed an Application for Asylum (Form I-589). On July 3, 1995, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On March 12, 1996, the immigration judge granted the applicant voluntary departure until December 12, 1996. On August 16, 1996, the applicant's U.S. citizen spouse, [REDACTED], filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. The applicant filed a motion to reopen with the immigration judge. On January 8, 1997, the motion to reopen was denied.

On January 14, 2005, the Form I-130 was denied. On September 20, 2007, the applicant was removed from the United States and returned to India. On December 17, 2007, the applicant filed the Form I-212, indicating that he resided in India. 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). He 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 his new spouse and U.S. citizen son.

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 May 28, 2009.

On appeal, the applicant contends that he is not an alien, that his stay in the United States was legal and that he warrants a favorable exercise of discretion.¹ *See Letter Accompanying Form I-290B*. In

¹ The applicant contends that he is not an alien because (1) an illegal stay without having an immigrant visa does not mean that he is an alien; (2) he has never committed any offense or acted contrary to the law, residing in the United States for a period of fourteen years, which in itself establishes that he is a law-abiding citizen and he may not be treated as an alien. The applicant's contentions are unpersuasive and illogical. An individual is classified as an alien if he or she is not a citizen or national of the United States. Section 101(a)(3) of the Immigration and Nationality Act (the Act). As such, since the applicant is not a citizen or national of the United States, he is an alien. The applicant contends that his stay in the United States was legal because (1) he was lawfully doing business in the United States due to his status as a 50% shareholder in a convenience store; (2) he did not require an immigrant visa because he had remained in the United States for such a long period of time; (3) the government accepted income tax from 1997 until 2005 which creates the legality of his stay in the United States; (4) he applied for lawful permanent residence based on his marriage to a United States citizen in 1996, which nullifies all prior orders and converts his status to that of a married person to a United States citizen; and (5) he filed a motion to reopen the original immigration proceedings which was never rejected on the basis of his marital status. Despite the applicant's claims, once his voluntary departure became a removal order, the applicant's status in the United States became unauthorized and illegal. The applicant accrued unlawful presence in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted, until his departure on September 20, 2007.

support of his contentions, the applicant submits only the referenced letter and copies of documentation previously provided. 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 of Homeland Security] has consented to the alien's reapplying for admission.

....

(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.

The applicant asserts that he has remained outside the United States and lived in India since his removal from the United States on September 20, 2007.²

The AAO notes that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for accruing more than one year of unlawful presence the United States and seeking admission within ten years of his last departure. 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 an Application for Waiver of Grounds of Inadmissibility (Form I-601).³

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. 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.

² If it is later confirmed that the applicant illegally reentered the United States *at any time* after his 2007 departure, 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).

³ The record reflects that the applicant claims to be currently married to [REDACTED], a native and citizen of India. The record does not contain documentation establishing the applicant's termination of his marriage to [REDACTED] (either a divorce record or death certificate) and his marriage to [REDACTED] (marriage certificate). The AAO notes that if the applicant is married to a native and citizen of India who is not a lawful permanent resident or U.S. citizen, he does not have a qualifying family member in order to qualify for a waiver under section 212(a)(9)(B)(v) of the Act and the applicant's Form I-601 and Form I-212 should be denied.

ORDER: The appeal is dismissed.