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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:

Office: VERMONT SERVICE CENTER

Date: DEC 27 2010

IN RE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The 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 Ethiopia and landed immigrant of Canada who, on September 3, 1998, was admitted to the United States as a nonimmigrant. The applicant remained in the United States past his authorized stay, which expired on March 3, 1999. On March 8, 1999, the applicant filed an Application for Asylum and Withholding of Removal (Form I-589). On April 15, 1999, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into removal proceedings for overstaying his nonimmigrant status. On October 24, 2001, the immigration judge denied the applicant's applications for asylum, withholding of removal, protection under the convention against torture and voluntary departure. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On August 27, 2003, the BIA dismissed the applicant's appeal. The applicant filed a motion to reopen with the BIA. On November 12, 2003, the BIA denied the applicant's motion to reopen. On December 8, 2003, the applicant departed the United States and entered Canada, where he claims he has since resided.

On April 30, 2004, the applicant married his naturalized U.S. citizen spouse in Toronto, Canada. On June 16, 2004, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on April 8, 2005. On November 10, 2005, the applicant filed an application for an immigrant visa based on the approved Form I-130.¹ On July 27, 2006, the applicant was issued an immigrant visa. On September 4, 2006, the applicant appeared at the Peace Bridge port of entry. During secondary inspection it was discovered that the applicant had been previously removed from the United States, had failed to inform the U.S. consulate of his removal and had not obtained the required waiver. The applicant was denied admission and the immigrant visa was cancelled.

On November 3, 2006, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that he resided in Canada. On July 2, 2007, the Form I-212 and Form I-601 were both denied. The applicant filed a motion to reopen the Form I-212, which was approved on January 14, 2008. On January 6, 2009, the applicant was informed that the Form I-212 had been approved in error and was being reopened. On February 6, 2009, the applicant appeared at Toronto, Canada pre-inspection. The applicant presented his passport and the approval for the Form I-212. The applicant was placed into secondary inspection. The applicant was informed that the approval of the Form I-212 was insufficient for admission to the United States and was permitted to withdraw his application for admission. On October 27, 2009, the Form I-212 was denied. 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 naturalized U.S. citizen spouse.

On October 27, 2009, the director determined 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

¹ The AAO notes that the applicant failed to inform the U.S. Consulate abroad of his removal from the United States as required on the Form DS-230.

unlawful presence in the United States, from September 3, 1999, the date on which his nonimmigrant status expired, until December 8, 2003, the date on which he departed the United States, and is seeking admission within ten years of his last departure. The director determined that the applicant was ineligible for a waiver under section 212(a)(9)(B)(v), 8 U.S.C. §1182(a)(9)(B)(v), and no purpose would be served in adjudicating the Form I-212. The director denied the Form I-212 accordingly. *See Director's Decision*, dated October 27, 2009.

On appeal, counsel contends the Form I-212 was denied solely on the basis that the Form I-601 had been denied. Counsel contends that the Form I-601 was not required because the applicant had a valid application for asylum pending during the duration of his stay and did not accrue unlawful presence. *See Form I-290B*, dated January 24, 2009. In support of his contentions, counsel submits the referenced Form I-290B, a letter and copies of documentation already in the record. 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 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 [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

The record reflects that the applicant has remained outside the United States and lived in Canada since December 8, 2003.²

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, for accruing more than one year of unlawful presence in the United States, from September 3, 1999, the date on which his nonimmigrant status expired, until December 8, 2003, the date on which he departed the United States, and is seeking admission within ten years of his last departure.³ The AAO also finds 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 obtaining a visa by fraud.⁴ To seek waivers of these grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 1182(i), an applicant must file an Application for Waiver of Grounds 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 residence. While the applicant filed a Form I-601, he filed the Form I-601 with the Vermont Service Center. Moreover, the Form I-601 was denied and the applicant failed to file a timely appeal or motion to reopen the Form I-601. 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.

² The AAO notes that, if it is later found that the applicant illegally reentered the United States *at any time* after his 2003 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); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

³ The AAO finds that, while an application for asylum halts the accrual of unlawful presence during the period of time that it is pending and on appeal, in the applicant's case, since he engaged in unauthorized employment before and during the pendency of the application for asylum, the asylum application does not stop the accrual of unlawful presence. See *Section 212(a)(9)(B)(iii)(II)*. The record reflects that the applicant was employed in the United States from June 2000 through December 2003. The applicant was issued employment authorization valid from April 3, 2000 until April 3, 2001; and December 13, 2001 until November 29, 2003. The AAO notes that the employment authorization was automatically revoked when the BIA dismissed the applicant's appeal. As such, the applicant engaged in unauthorized employment between April 3, 2001 and December 13, 2001; and from August 27, 2003 through December 2003.

⁴ The AAO finds that the applicant made a willful misrepresentation of a material fact when he concealed his prior removal order at the time he applied for the immigrant visa at the U.S. Consulate.