

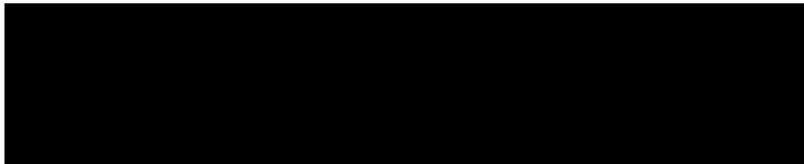
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



H4

FILE: [REDACTED] Office: NEW YORK, NY

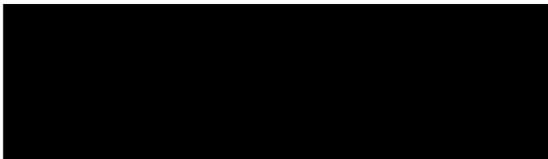
Date:

DEC 27 2010

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:

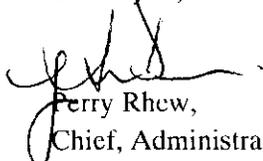


INSTRUCTIONS:

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,


Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, 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 China who, on October 18, 1994, appeared at John F. Kennedy International airport. The applicant was not in possession of valid documentation to enter the United States as an immigrant or nonimmigrant. The applicant was placed into secondary inspection. The applicant admitted that he did not have valid documentation to enter the United States and claimed a fear of return to China. The applicant failed to provide his true identity to immigration officers. On October 18, 1994, the applicant was placed into immigration proceedings under the name [REDACTED]. On October 24, 1995, the immigration judge made an adverse credibility finding against the applicant and denied the applicant's applications for asylum and withholding of removal. The immigration judge ordered the applicant removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On January 16, 1997, the BIA dismissed the applicant's appeal. The applicant failed to surrender for removal or depart from the United States.

On June 5, 1998, the applicant pled guilty to and was convicted of conspiracy to commit the crime of cheating and gambling. The applicant was sentenced to 36 months in jail, which was suspended for the 72 days in jail the applicant had already served plus three years of probation. On July 8, 1998, the applicant was removed from the United States and returned to China.

On August 9, 1999, the applicant was admitted to the United States as a nonimmigrant fiancé under the name [REDACTED].¹ On August 19, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on the applicant's behalf by [REDACTED]. On February 22, 2001, [REDACTED] filed a letter requesting withdrawal of the Form I-130, indicating that the applicant had engaged in marriage fraud for immigration purposes, failed to consummate the marriage and failed to reside with [REDACTED] at any time after the marriage. [REDACTED] indicated that she believed the applicant to already be married in China. On March 15, 2001, the Form I-485 was terminated. On July 27, 2001, [REDACTED] divorced the applicant. On August 7, 2004, the Form I-485 was also denied.

On September 8, 2006, the applicant married his current naturalized U.S. citizen spouse, [REDACTED]. On February 2, 2007, the applicant filed a second Form I-485 based on a Form I-130 filed on his behalf by [REDACTED]. On August 2, 2007, the Form I-130 was approved. On the same day, the Form I-485 was denied and the applicant was placed into immigration proceedings for entering the United States by fraud and having been convicted of a crime involving moral turpitude. On September 11, 2007, the immigration judge granted the applicant voluntary departure until October 11, 2007. On September 28, 2007, the applicant was returned to China where he claims to have since resided.

[REDACTED] filed a second Form I-130, which was approved on April 20, 2009. On October 29, 2009, the applicant filed the Form I-212, indicating that he resided in China. The

¹ The record reflects that, on the nonimmigrant visa application, the applicant failed to inform the U.S. Consulate abroad of his prior presence in and removal from the United States.

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 and two U.S. citizen children.

On May 10, 2010, the district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision*, dated May 10, 2010.

On appeal, counsel contends that the applicant has never been ordered removed from the United States because, in 1995, he was ordered excluded from the United States, subsequently legally reentered and then complied with the terms of voluntary departure.² Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated June 9, 2010. In support of his contentions, counsel submits the referenced brief, letters of recommendation, and psychological, financial and medical documentation. 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.

² Counsel's contentions are unpersuasive. First, the applicant did not legally reenter the United States since his nonimmigrant visa was obtained by fraud. Second, the provision holding aliens inadmissible for a period of ten years applies to exclusion or deportation orders issued both before and after April 1, 1997, even to those applicants who had remained outside the United States for the required one or five years under the pre-Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), law.

- (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 China since his 2007 removal.³

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 in the United States during the following periods: from April 1, 1997, the date on which unlawful presence provisions were enacted, until July 8, 1998, the date on which he departed the United States; and from March 15, 2001, the date on which the applicant's affirmative Form I-485 was terminated, until February 2, 2007, the date on which he filed a second affirmative Form I-485. The applicant is also 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 and admission by fraud. To seek a waiver 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. 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.

³ The AAO notes that, if it is later found that the applicant reentered the United States without admission or parole *at any time* after his 2007 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); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).