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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: [REDACTED]

Office: SAN FRANCISCO, CA

Date OCT 06 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:

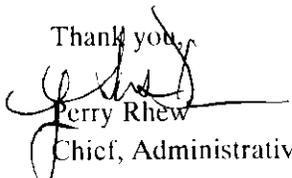
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INSTRUCTIONS:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Houston, Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The AAO dismissed a subsequent motion to reopen and reconsider. The matter is now before the AAO on a second motion to reopen and reconsider. The second motion to reopen and reconsider is granted and the appeal is dismissed.

The applicant is a native and citizen of India who, on June 17, 2001, was admitted to the United States as a nonimmigrant. The applicant applied for and was granted an extension of his nonimmigrant status until January 16, 2002. On December 4, 2001, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On March 7, 2002, the applicant's Form I-589 was referred to the immigration judge and the applicant was placed into immigration proceedings. On May 30, 2002, the immigration judge denied the applicant's applications for asylum, withholding of removal and relief under the convention against torture, making a finding of adverse credibility against the applicant. The immigration judge ordered the applicant removed from the United States. The applicant appealed to the Board of Immigration Appeals (BIA). On November 6, 2003, the BIA dismissed the applicant's appeal. The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On July 11, 2006, the Ninth Circuit upheld the immigration judge's adverse credibility finding and denied the applicant's petition for review. On December 12, 2006, the applicant was removed from the United States and returned to India.

On July 31, 2007, the applicant filed the Form I-212, indicating that he resided in India. The applicant is inadmissible under 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 U.S. citizen spouse.

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 February 25, 2008.

On April 24, 2009, the AAO dismissed the applicant's appeal because the record contained evidence suggesting that the applicant had reentered the United States and the applicant was, therefore, 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 AAO determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. *Decision of AAO*, dated April 24, 2009.

In her first motion to reopen or reconsider, counsel contended that the AAO denied the applicant's Form I-212 based on a mistaken determination that the applicant had illegally reentered the United States after having been removed. *See Counsel's Motion to Reopen and Reconsider*.

On January 12, 2010, the AAO dismissed the applicant's motion to reopen or reconsider, finding that counsel had failed to submit sufficient evidence to establish that the applicant had not reentered the United States since being removed from the United States. *See AAO's Decision*, dated January 12, 2010.

In her second motion to reopen or reconsider, counsel contends that the AAO denied the applicant's Form I-212 based on a mistaken determination that the applicant had illegally reentered the United States after having been removed. *See Counsel's Motion to Reopen and Reconsider*, dated February 10, 2010. In support of her motion to reopen or reconsider, counsel submits a letter from the applicant's dentist with accompanying patient notes and a letter from the applicant's dental insurance carrier. The entire record was reviewed in rendering a decision in this case.

The regulation at 8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) Requirements for motion to reopen.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) Requirements for motion to reconsider.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In support of her motion to reconsider, counsel contends that the AAO's decision was in error since the record contained overwhelming evidence to establish that the applicant had not returned to the United States. While counsel contends that the evidence placed before the AAO was sufficient to establish that the applicant's dentist had incorrectly billed the applicant for a dental appointment on January 9, 2007, and that the applicant was present outside the United States for blood work on

January 7, 2007, the evidence was incomplete and not original.¹ The AAO finds that the concerns this office had in regard to various documents presented in the first motion to reopen or reconsider were valid and the AAO's decision was correct based on the evidence placed before this office in the first motion to reopen or reconsider.

The AAO finds, however, that, in the second motion to reopen or reconsider, counsel has submitted sufficient evidence to establish that the evidence in the record incorrectly reflected that the applicant attended a dental appointment in the United States on January 9, 2007. The evidence consists of a letter from the applicant's dentist office, reflecting a name consistent with prior documentation evidencing the billing of the appointment, verified by a copy of patient notes reflecting that the applicant failed to attend the dental appointment on January 9, 2007, and that the appointment was incorrectly billed. A second letter from the applicant's dental provider reflects that a request to correct the incorrect billing has been requested. As such, the AAO finds that counsel has submitted sufficient new evidence to establish that the applicant was not present in the United States on January 9, 2007, which warrants a motion to reopen.

In light of the new evidence before this office, the AAO withdraws its finding that the applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act based on evidence that the applicant was present in the United States on January 9, 2007.

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-
 - (II) has been ordered removed under section 240 or any other provision of law, or
 - (III) 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

¹ While counsel contends that the documents submitted were originals, the documents before the AAO were either photocopies or were incomplete.

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.

....

(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.

- (iii) Waiver

The [Secretary], in the [Secretary's] discretion, may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

- (1) the alien's battering or subjection to extreme cruelty; and

- (2) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The record reflects that the applicant has remained outside the United States and lived in India since December 12, 2006.²

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 in the United States, from January 16, 2002, the date on which his nonimmigrant status expired, until December 12, 2006, the date on which he departed the United States, and is seeking admission within ten years of his last departure.³ 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).

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.

² The AAO notes that, if it is later found that the applicant illegally reentered the United States *at any time* after his 2006 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 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 2002 until at least August 15, 2005. The applicant was issued employment authorization valid from June 20, 2002 until June 19, 2002; July 25, 2003 until July 24, 2004; September 14, 2004 until September 13, 2005; and October 26, 2005 until October 25, 2006. As such, the applicant engaged in unauthorized employment between June 19, 2002 and July 25, 2003; and July 24, 2004 and September 14, 2004.