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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

**PUBLIC COPY**

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FILE: [Redacted] Office: NEW YORK, NY

Date: SEP 09 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 \$585. 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 April 16, 2001, appeared at Chicago O'Hare International Airport. The applicant was placed into secondary inspection. The applicant admitted that he did not have valid documentation to enter the United States. The applicant claimed fear of returning to China and was scheduled for a credible fear interview. On April 23, 2001, the applicant was placed into immigration proceedings. On February 27, 2003, the immigration judge denied the applicant's applications for asylum and withholding of removal, and protection under the convention against torture. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On May 7, 2004, the BIA dismissed the applicant's appeal. The applicant filed a petition for review with the Second Circuit Court of Appeals (Second Circuit). On December 27, 2005, the Second Circuit dismissed the applicant's petition for review.

On February 7, 2007, the applicant married his naturalized U.S. citizen spouse in New York. On July 17, 2007, 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 his behalf by his spouse. On May 1, 2008, the applicant filed a motion to reopen with the BIA and a motion for stay of removal. On the same day, the BIA denied the applicant's motion for stay of removal. On May 5, 2008, the applicant filed a motion for stay of removal and a motion to reinstate the applicant's petition with the Second Circuit. On the same day, the Second Circuit denied the motion for stay of removal and motion to reinstate the applicant's petition. On May 29, 2008, the BIA denied the applicant's motion to reopen. On May 30, 2008, the Form I-130 was denied for failure to prove a bona fide marriage. On the same day, the Form I-485 was terminated. On June 6, 2008, the applicant was removed from the United States and returned to China, where he claims he has since resided.

On August 4, 2009, the applicant filed the Form I-212, indicating that he resided in China. 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 and U.S. citizen child.<sup>1</sup>

On November 24, 2009, 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 November 24, 2009.

On appeal, counsel contends that the district director abused her discretion in denying the applicant's Form I-212. *See Counsel's Letter*, dated December 21, 2009. In support of his contentions, counsel submits the referenced letter, financial documentation, copies of case law and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

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<sup>1</sup> The AAO notes that there is no birth certificate in the record for the applicant's child. The only evidence in the record is a doctor's note indicating that the applicant's spouse was pregnant and due on June 29, 2008.

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.

....

(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 China since June 6, 2008.<sup>2</sup>

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 April 16, 2001, the date on which he attempted to enter the United States, until June 6, 2008, the date on which he departed the United States, and is seeking admission within ten years of his last departure.<sup>3</sup> 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

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<sup>2</sup> The AAO notes that, if it is later found that the applicant illegally reentered the United States *at any time* after his 2008 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).

<sup>3</sup> 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 established that the applicant has been employed in various positions in the United States from May 2001 until at least April 16, 2008. The applicant was issued employment authorization valid from February 7, 2002 until May 9, 2002. As such, the applicant engaged in unauthorized employment between May 2001 and February 7, 2002 and May 9, 2002 until at least April 16, 2008.

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.