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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:

Office: NEWARK, NJ

Date:

SEP 21 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 \$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 Field Office Director, Newark, New Jersey, 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 Colombia who, on April 22, 1997, 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 then U.S. citizen spouse. On October 2, 1998, the Form I-130 was terminated and the applicant withdrew the Form I-485. On October 2, 1998, the applicant was placed into immigration proceedings. On May 18, 1999, the applicant filed a Petition for Amerasian, Widower or Special Immigrant (I-360). On August 3, 1999, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States.

The applicant filed a motion to reopen with the immigration judge. On May 12, 2000, the immigration judge denied the applicant's motion to reopen finding that the applicant failed to provide evidence of the emotional distress he claimed prevented him from attending his immigration hearing. The applicant again failed to depart the United States.

On November 8, 2006, the applicant filed a motion to reopen and a motion for stay of removal with the immigration judge. On November 21, 2006, the immigration judge vacated the stay of removal and denied the applicant's motion to reopen finding that the evidence provided by the applicant was insufficient to establish the emotional distress he claimed prevented him from attending his immigration hearing. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On March 16, 2007, the BIA dismissed the applicant's appeal. On March 22, 2007, the applicant was removed from the United States and returned to Colombia where he claims he has since resided.

On November 23, 2007, the applicant married his current naturalized U.S. citizen spouse. On April 7, 2008, the applicant's spouse filed a Form I-130 on behalf of the applicant, which was approved on March 16, 2009. On October 19, 2009, the applicant filed the Form I-212 indicating that he resided in Colombia. 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). The applicant requests 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.

The field office director determined that the applicant is inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), as an alien who seeks admission within 5 years of the alien's removal subsequent to failing to attend an immigration hearing without reasonable cause. 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 November 12, 2009.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(6)(B) of the Act because he had reasonable cause in failing to appear for his immigration hearing.<sup>1</sup>

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<sup>1</sup> While counsel contends that the evidence submitted establishes the applicant's emotional distress leading to his failure to attend his immigration hearing, the AAO finds that the applicant's medical and psychological documentation is

Counsel contends that former counsel's ineffective assistance caused the applicant to be removed from the United States.<sup>2</sup> Counsel contends that the field office director failed to adequately weigh the factors in the applicant's case. Counsel contends that the applicant is grandfathered pursuant to section 245(i) of the Act.<sup>3</sup> See *Counsel's Brief*, dated December 9, 2009. In support of his contentions, counsel submits the referenced brief, medical and psychological documentation, and disciplinary records not pertaining to the applicant's specific case. 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. [emphasis added]

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inadequate and reflects that the applicant's attendance of and compliance with medical/psychological appointments only coincides with the dates on which he sought to obtain motions to reopen.

<sup>2</sup> The AAO finds that evidence submitted by counsel fails to meet the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

<sup>3</sup> The AAO notes that, in order to be eligible under section 245(i) of the Act, an applicant must be present in the United States.

. . . .

(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—

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

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

The applicant claims that he has remained outside the United States since his March 22, 2007 removal.<sup>4</sup>

The AAO finds 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, from October 2, 1998, the date on which his Form I-485 was withdrawn, until November 8, 2006, the date on which a stay of removal was granted, and is 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.

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<sup>4</sup> The AAO notes that, if it is later found 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); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

§ 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.