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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H4

FILE: [redacted] Office: SAN JOSE, CA Date: FEB 01 2011

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:

[redacted]

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 Field Office Director, San Jose, California, 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 India who, on December 28, 2001, filed an Application for Asylum and for Withholding of Removal (Form I-589), indicating that he had entered the United States without inspection on August 13, 2001. On January 5, 2002, the applicant married his then lawful permanent resident spouse in [redacted] On March 6, 2002, the applicant's Form I-589 was referred to the immigration judge and the applicant was placed into immigration proceedings for entering the United States without inspection on August 13, 2001. On March 28, 2005, the immigration judge made an adverse credibility finding against the applicant and denied the applicant's applications for asylum, withholding of removal and protection under the convention against torture. The immigration judge ordered the applicant removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On April 6, 2006, the BIA found that the applicant had admitted to providing false testimony to the asylum officer and that the immigration judge's finding of adverse credibility was warranted. The BIA dismissed the applicant's appeal. The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On October 1, 2007, the Ninth Circuit found that the immigration judge's finding of an adverse credibility was warranted. The Ninth Circuit denied the applicant's petition for review. On October 19, 2007, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, indicating that he resided in the United States. On September 30, 2008, the applicant was removed from the United States and returned to India.

On February 27, 2009, the Form I-130 was denied. On May 5, 2009, the applicant filed the Form I-212, indicating that he resided in India. On May 20, 2009, a motion to reopen was granted and the Form I-130 was approved. On July 31, 2009, the Form I-212 was denied. On October 30, 2009, a motion to reopen the Form I-212 was granted. On December 17, 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 now naturalized U.S. citizen spouse, his U.S. citizen child and three derivative U.S. citizen step-children.

In her July 31, 2009 decision, the field office director determined that that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for seeking admission within ten years of his last departure after having accrued more than one year of unlawful presence in the United States. In her December 17, 2009 decision, the field office director determined that the applicant was required to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) and a Form I-212 simultaneously with the U.S. Consulate abroad. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decisions,* dated July 31, 2009 and December 17, 2009.

On appeal, counsel contends that officer at the U.S. Consulate abroad found the applicant inadmissible pursuant to section 212(a)(9)(A) of the Act and instructed the applicant to file the Form I-212 in the

United States only.[1] Counsel contends that even though it does not appear that the field office director analyzed the applicant's Form I-212 under section 212(a)(9)(C) of the Act it should be noted that the applicant is not required to meet the requirements under section 212(a)(9)(C) of the Act.[2] Counsel contends that the field office director erroneously denied the Form I-212 for filing at an improper location.[3] *See Form I-290B,* dated August 31, 2009. In support of his contentions, counsel submits only the referenced Form I-290B. 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.-
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> > (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-
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> > > (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

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[1] The refusal worksheet issued by the U.S. Consulate abroad does erroneously indicate that the applicant was only inadmissible pursuant to section 212(a)(9)(A) of the Act and could not file the Form I-212 abroad; however, as discussed below, the applicant is inadmissible pursuant to section 212(a)(9)(B) of the Act and is also required to file a Form I-601 with the U.S. Consulate abroad. The record does not contain a copy of the Forms DS-230s, which would indicate the information about his residence in the United States that the applicant provided to the consular official.

[2] The field office director did not make a finding that the applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act and did not indicate that the applicant was required to meet 212(a)(9)(C) of the Act requirements.

[3] The AAO notes that counsel's contentions are unpersuasive. Counsel should be aware that the regulations at 8 C.F.R. § 212.2(d) have not be altered since prior to enactment of the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), in which Congress enacted inadmissibility grounds based on unlawful presence under section 212(a)(9)(B) of the Act. As such, while the regulations do not specifically refer to a waiver under section 212(a)(9)(B)(v) of the Act, the regulations are explicit in requiring that an applicant required to file a Form I-601 should file the Form I-601 concurrently with the Form I-212 with the U.S. Consulate abroad and not in the United States. Furthermore, instructions to the Form I-212 make it clear that an applicant required to file a Form I-601 should file the Form I-601 concurrently with the Form I-212 with the U.S. Consulate abroad and not in the United States. While the officer at the U.S. Consulate appears to have been unaware of the applicant's inadmissibility under section 212(a)(9)(B) of the Act, counsel, in representing the applicant and reviewing the pertinent information, should have been aware that the applicant was required to file the Form I-601. Finally, as discussed below, the AAO also finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

> 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.
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> . . . .

The record reflects that the applicant claims that he has remained outside the United States and lived in India since September 30, 2008.[4]

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 August 13, 2001, the date on which he entered the United States without inspection, until September 30, 2008, the date on which he departed the United States, and is seeking admission within ten years of his last departure.[5] Additionally, the AAO finds that there is sufficient evidence in the record to find that the applicant made willful misrepresentations of material fact in connection with his asylum application and is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).[6] 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).

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[4] Counsel fails to submit evidence to establish that the applicant is currently outside the United States and has remained outside the United States since his removal. 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).

[5] 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 has been employed in various positions from October 2002 until at least October 2007. The applicant was issued employment authorization valid from September 19, 2002 until September 18, 2003; September 30, 2003 until September 29, 2004; November 16, 2004 until November 15, 2005; February 16, 2006 until February 15, 2007; and February 21, 2007 until February 20, 2008. As such, the applicant engaged in unauthorized employment at least between September 18, 2003 to September 30, 2003; September 29, 2004 to November 16, 2004; November 15, 2005 to February 16, 2006; and February 15, 2007 to February 21, 2007.

[6] The applicant admitted to providing false testimony to the asylum officer. While the applicant stated that he gave this false testimony due to the fact that he had dreams and these dreams caused him to make up these facts, the record does not reflect that the applicant suffered from a mental condition which would render his testimony against his will or knowledge. As such, the AAO finds that the applicant's false testimony was given knowingly and willfully.

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.