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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:

Office: VIENNA, AUSTRIA

Date: FEB 14 2011

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 \$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, Vienna, Austria, 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) rejected a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen is granted. The appeal will be dismissed.

The applicant is a native and citizen of Romania who, on July 11, 2002, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past her authorized stay, which expired on January 10, 2003. On September 12, 2003, the applicant filed an Application for Asylum and Withholding of Removal (Form I-589). On January 7, 2004, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings for having overstayed her nonimmigrant status. On July 9, 2004, the immigration judge made an adverse credibility finding against the applicant and denied her applications for asylum, withholding of removal and protection under the convention against torture. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On July 12, 2005, 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 her behalf by her U.S. citizen spouse. On October 26, 2005, the BIA dismissed the applicant's appeal. The applicant filed a petition for review before the Ninth Circuit Court of Appeals (Ninth Circuit). On December 14, 2005, the applicant divorced her U.S. citizen spouse. On May 7, 2006, the applicant departed the United States and returned to Romania where she claims to have since resided.

On January 7, 2006, the Form I-130 was withdrawn. On February 3, 2006, the Form I-485 was withdrawn. On September 16, 2006, the applicant married her current naturalized U.S. citizen spouse in Romania. On October 1, 2007, the Ninth Circuit found sufficient evidence to support the adverse credibility finding and denied the applicant's petition for review. On May 4, 2009, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that she continued to reside in Romania. On August 24, 2009, the Form I-601 was administratively closed. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). She 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 with her naturalized U.S. citizen spouse, a U.S. citizen child and a U.S. citizen stepchild.

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 August 24, 2009.

On appeal, counsel contended that the applicant warranted a favorable exercise of discretion. *See Counsel's Brief*, dated September 21, 2009. In support of his contentions, counsel submitted the referenced brief and copies of ticket stubs.

On June 3, 2010, the AAO rejected the applicant's appeal as untimely filed. *Decision of AAO*, dated June 3, 2010.

In the motion to reopen and reconsider, counsel contends that the appeal was timely filed. *See Counsel's Motion*, dated June 25, 2010. In support of his motion to reopen and reconsider, counsel

submits the referenced motion, copies of a UPS tracking summary, ticket stubs and educational documentation. 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 the motion to reopen, counsel contends that the appeal was timely filed. The AAO notes that the only evidence of receipt in the file at the time the AAO rendered its decision was the Vienna Field Office's receipt date stamp indicating receipt on September 26, 2009. The evidence submitted by counsel reflects that the appeal was timely received on September 23, 2009. As such, the AAO grants counsel's motion to reopen.

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 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.

The record reflects that the applicant has remained outside the United States and lived in Romania since May 7, 2006.<sup>1</sup>

The AAO notes that, while the applicant was inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for accruing more than 180 days but less than one year of unlawful presence in the United States, from January 10, 2003, the date on which her nonimmigrant status expired, until September 12, 2003, the date on which she filed the Form I-589, and is seeking admission within three years of her last departure, the applicant is no longer inadmissible under this section of the Act and is not required to file the Form I-601.<sup>2</sup> Moreover, the AAO notes that, at the

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<sup>1</sup> The AAO notes that, if it is later found that the applicant illegally reentered the United States *at any time* after her 2006 departure, she is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until she 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>2</sup> An application for asylum halts the accrual of unlawful presence during the period of time that it is pending and on appeal unless the applicant engages in unauthorized employment before or during the pendency of the application for asylum. The record reflects that the applicant has not been employed in the United States.

time the field office director rendered her decision the applicant was not required to file a Form I-601.

As required by 8 C.F.R. § 212.2(d), an immigrant visa applicant who is outside the United States and only requires permission to reapply for admission must file the Form I-212 with the district or field office having jurisdiction over the place where the applicant's removal proceedings were held. As the field office director did not have jurisdiction and 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 motion to reopen is granted and the appeal will be dismissed.

**ORDER:** The motion to reopen is granted. The appeal is dismissed.