

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



H4

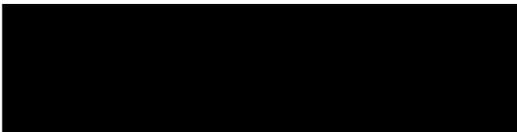
FILE: [REDACTED] Office: NEW YORK, NY

Date: JAN 24 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:



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 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 India who, on November 14, 1992, appeared at the Lewiston Bridge, New York port of entry. The driver of the vehicle stated that the applicant was her U.S. citizen son and presented a U.S. Birth Certificate bearing the name [REDACTED]. The applicant was placed into secondary inspection. After being separated from the driver of the vehicle the applicant stated that his name was [REDACTED] the driver of the vehicle was his mother and that he was a U.S. citizen. Even after being confronted with his Indian passport, which was discovered during inspection of the vehicle, the applicant continued to insist that he was [REDACTED]. The driver of the vehicle subsequently admitted that the applicant was not her son and that he was a citizen of India. The applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to gain admission to the United States by fraud. On November 14, 1992, the applicant was placed into immigration proceedings. On July 1, 1993, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States.

On November 29, 1996, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589), indicating that he had entered the United States without inspection on February 14, 1996. On January 17, 1997, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On October 16, 1997, the immigration judge granted the applicant voluntary departure until April 16, 1998. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On May 18, 2004, the applicant filed a motion to reopen with the immigration judge. The immigration judge granted a stay of removal. On June 10, 2004, the immigration judge denied the applicant's motion to reopen. The applicant filed an appeal of the denial of the motion to reopen with the Board of Immigration Appeals (BIA). On September 8, 2004, the BIA dismissed the applicant's appeal of the denial of the motion to reopen. On September 12, 2005, the applicant was removed from the United States and returned to India where he claims he has since resided.

On July 20, 2008, the applicant filed the Form I-212, indicating that he resided in India.¹ On May 18, 2009, the applicant's naturalized U.S. citizen spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on August 13, 2009. 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), for a period of twenty years. 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 two U.S. citizen children.

On January 4, 2010, 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 January 4, 2010.

¹ In response to a request for further evidence, the applicant indicates that he continues to reside in India.

On appeal, counsel contends that the district director erred in denying the Form I-212 without giving proper weight to the applicant's positive equities. *See Counsel's Brief*, dated February 1, 2010. In support of his contentions counsel submits the referenced brief, affidavits, and psychological, medical and financial documentation. 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]

The record reflects that the applicant has remained outside the United States and lived in India since his removal.²

² The AAO notes that, if it is later found that the applicant illegally reentered the United States *at any time* after his 2005 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).

The AAO notes that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to gain admission to the United States by fraud in 1992. The applicant is also inadmissible under 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, 1998, the date on which voluntary departure expired, until May 18, 2004, the date on which the immigration judge granted a stay of removal, and from June 10, 2004, the date on which the immigration judge denied the applicant's motion to reopen terminating the stay of removal, until September 12, 2005, 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 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).

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.

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 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 reflects that the applicant was employed in the United States from 1996 through at least 2004. The applicant was never issued employment authorization.