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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



PUBLIC COPY

[Redacted]

Hy

Date: Office: LOS ANGELES, CA

FILE: [Redacted]

MAR 21 2012

IN RE: Applicant: [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, Los Angeles, 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 record reflects that the applicant is a native and citizen of Canada who was ordered removed on June 5, 2003, but remained until she departed the United States on April 4, 2007. 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). 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 in the United States.

The field office director determined that the applicant did not have an underlying petition for immigrant visa, adjustment of status application, or other application that confers status. The director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated January 7, 2010.

On appeal, counsel for the applicant asserts that the Field Office Director erred in denying the applicant's Form I-212 for lack of an underlying visa as the applicant is a derivative beneficiary of an approved Form I-130 Petition for Alien Relative filed by her grandmother on behalf of her mother. Counsel further states that the applicant is in the process of applying for an H-1B visa. Finally, counsel states that the Field Office Director erred in balancing the equities in this case. *Brief in Support of Appeal*.

The record contains copies of two birth certificates for siblings of the applicant, a copy of a Form I-130, Petition for Alien Relative, and approval notice for the Form I-130 which was filed on behalf of the applicant's mother.

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 has consented to the alien's reapplying for admission.

The record reflects that the applicant was ordered removed from the United States on June 5, 2003, but remained beyond that time until she departed on April 4, 2007. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

In addition, the AAO notes that the applicant is inadmissible under section 212(a)(9)(B) of the Act which states, in pertinent part:

(B) ALIENS UNLAWFULLY PRESENT.-

- (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who- ...
 - (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

As the applicant has accrued more than one year of unlawful presence, from June 5, 2003 until her departure on April 4, 2007, and is now seeking admission within ten years of her departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Counsel asserts on appeal that the applicant is a derivative beneficiary of the Form I-130 filed on behalf of her mother, which was approved on December 13, 2001. However, as noted by the Field Office Director, the record does not reflect that the applicant derived any status from the petition

filed by her grandmother on behalf of her mother. The viability of the Form I-212 is dependent on an immigrant visa application or adjustment application that is, in turn, based on an approved Form I-130. In the absence of an underlying application for immigrant visa, adjustment of status application, or other application that status, the Form I-212 must be denied.

Further, as noted above, the applicant is inadmissible under section 212(a)(9)(B). Counsel states that and that her Form I-212 constitutes an application to waive her inadmissibility under section 212(a)(9)(B)(i)(II). However, counsel is incorrect. An application for a waiver of inadmissibility under section 212(a)(9)(B) must be filed using Form I-601, Application for Waiver of Inadmissibility. A waiver of inadmissibility under section 212(a)(9)(B)(i)(II) is available pursuant to section 212(a)(9)(B)(v) which states:

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

In the instant case, the record does not reflect that the applicant is the spouse or daughter of a United States citizen or alien lawfully admitted for permanent residence and thus does not meet the requirements for a waiver under section 212(a)(9)(B)(v) of the Act.

In *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) it was held that an application for permission to reapply for permission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) and is not eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v), the AAO further finds that no purpose would be served in granting the applicant's application for permission to reapply for admission.

In proceedings for application for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. .

ORDER: The appeal is dismissed.