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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



Date: **DEC 12 2013**

Office: NEWARK, NJ

FILE: 

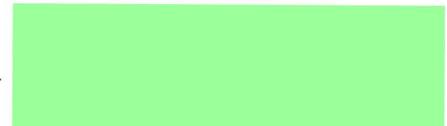
IN RE:

APPLICANT: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
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). The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed. The underlying application remains denied

The record reflects that the applicant is a native and citizen of Egypt who was removed from the United States on February 8, 2007 pursuant to a final order of removal. 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 U.S. citizen spouse.

The Field Office Director determined that the applicant did not merit a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated January 12, 2009. The AAO found the applicant was also inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and had not filed a Form I-601 Waiver of Grounds of Inadmissibility as required. *See AAO Decision*, August 16, 2010. The AAO consequently dismissed the appeal. *Id.*

On motion, submitted on September 16, 2010 and received by the AAO on September 1, 2013, counsel submits a Form I-290B, Notice of Appeal or Motion, and a statement from the applicant. In the Form I-290B statement, counsel contends the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) because he had an asylum application pending, and that the applicant had met his burden of proof. The applicant indicates in his statement that he did appear for his deportation on January 22, 2007, even though there were communication errors and medical emergencies.

The motion fails to meet the requirements for a motion to reopen as delineated in 8 C.F.R. § 103.5(a)(2). This regulation states, in pertinent part, that "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." Although counsel indicates the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) and the applicant contends he was present for his January 22, 2007 hearing, the applicant has failed to submit affidavits or other documentary evidence.

As such, the motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).

Nevertheless, the AAO affirms that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. Section 212(a)(9) of the Act provides, 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.-

....

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United 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.

The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions, until he filed an asylum application in July 11, 1997. Furthermore, although the applicant filed a motion to reopen with the BIA and petitions for review and rehearing in federal court, the record reflects that the applicant was employed without authorization for time periods between 2000 and February 2007. See applicant's Form G-325A, *Biographic Information*. As noted in the AAO's decision on appeal, 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). Given these facts, the AAO affirms that the applicant accrued more than one year of unlawful presence and is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. To seek a waiver of this ground of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §

1182(a)(9)(B)(v), an applicant must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).

The instructions for Form I-212, and 8 C.F.R. § 212.2(d), as published at the time the applicant filed his Form I-212, require an applicant who is outside the United States, is inadmissible under section 212(a)(9)(A)(ii) and also requires a waiver of inadmissibility, to simultaneously file both the Form I-601 Waiver of Grounds of Inadmissibility and the Form I-212 together after an immigrant visa interview with a U.S. consular officer. As the applicant has not complied with the regulatory requirements for filing the Form I-212, the application in this matter was improperly filed.

Furthermore, *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission 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 stated above, the applicant is also inadmissible under section 212(a)(9)(B)(i)(II) of the Act. As the applicant has failed to file a waiver of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is otherwise inadmissible to the United States, the Form I-212 was properly denied by the Field Office Director.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the motion is dismissed.

**ORDER:** The motion is dismissed.