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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 11 2013 OFFICE: NEW YORK, NEW YORK 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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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.

Thank you,

Ron Rosenberg
Acting 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. The applicant, through prior counsel, appealed the District Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal. The applicant, through counsel, motioned the AAO to reopen and reconsider the dismissal of her appeal. The AAO denied the applicant's motion. On July 24, 2012, the applicant filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted and the underlying application will be approved.

The record reflects that the applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States 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 having been ordered removed from the United States and seeking admission within the proscribed period of the order date of removal.[1] The District Director concluded that the applicant had failed to establish that she warrants the favorable exercise of the Secretary of Homeland Security's discretion, and denied her Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) accordingly. The AAO affirmed the District Director's decision on appeal, and denied the applicant's motion to reopen and reconsider its decision.

On motion, counsel contends that fair play and substantial justice require that the applicant's hardship waiver be decided on the merits as: the applicant's initial motion was closed and sent to the archives in error, and thereby, it took almost two years to receive the decision that the AAO was dismissing the motion on a mere and minor technicality; the unfavorable decision has not been and is not the subject of any judicial proceeding; the non-judicial order of removal at issue is no longer issued by the U.S. Citizenship and Immigration Services (USCIS), and current, prosecutorial discretion policy is terminating such removal proceedings; and the applicant has met her "heavy burden" by producing documentary evidence that shows that the hardship in her case outweighs the adverse factors.

Section 212(a)(9) of the Act states, in relevant part:

> (A) Certain aliens previously removed.-
>
> ...
>
> (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,

[1] *See Decision of the AAO*, dated August 3, 2010.

> 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 admitted to the United States as a B-2 Visitor on July 12, 1994, valid until January 11, 1995. The applicant did not timely depart from the United States; thereby, the legacy Immigration and Naturalization Service (INS) issued a Voluntary Departure Notice (Form I-210) on January 24, 1995. The Form I-210 indicated that the applicant was required to depart the United States on or before February 23, 1995. The applicant did not timely depart; thereby, the voluntary departure became a final order of removal. The record reflects that the applicant has remained in the United States to date. The applicant's removal order will, therefore, render her inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act upon her departure from the United States, and she will require permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

In *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212:

> The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

The favorable factors in this matter include: the applicant's residence in the United States for over 18 years; the filing of income taxes; maintaining strong ties with her U.S. citizen and lawful permanent resident siblings; providing assistance to her mother-in-law, who is undergoing weekly chemotherapy treatment for progressive rectal cancer; maintaining strong community ties as evidenced by her activities at her church; the general hardship that her husband and mother-in-law would suffer because of her inadmissibility; and the lack of a criminal record. The unfavorable factors are: the applicant's failure to depart pursuant to the Voluntary Departure Notice, thereby, resulting in a final order of removal; and periods of unauthorized presence and employment in the United States.

Although the applicant's violation of immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden, the previous AAO decision will be withdrawn, and the underlying application will be approved.

ORDER: The motion is granted and the underlying application is approved.