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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Date: **MAY 29 2013** Office: HARTFORD

FILE: [REDACTED]

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hartford, Connecticut, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i), due to the Notice and Order of Expedited Removal entered in his case pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1), on July 27, 1997. The applicant was further found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II). He seeks permission to reapply for admission into the United States under sections 212(a)(9)(A)(iii) and 212(a)(9)(C)(ii) of the Act, 8 U.S.C. §§ 1182(a)(9)(A)(iii) and (a)(9)(C)(ii), in order to lawfully reside in the United States.

In a decision dated May 25, 2011, the field office director determined that the applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act for having attempted to reenter the United States without being admitted. The director determined that such an alien is statutorily ineligible for a waiver of inadmissibility under the first sentence of section 212(a)(9)(C)(ii) of the Act unless more than 10 years have elapsed since the date of the alien's last departure from the United States. The director found the applicant is presently residing in the United States and did not remain outside the United States for the requisite period following his July 27, 1997 removal. As such, the director found the applicant statutorily ineligible to apply for permission to reapply for admission.

On appeal, counsel for the applicant first contends that the record does not contain sufficient evidence of the applicant's July 27, 1997 removal order. Counsel avers that even if we find that the applicant was ordered removed in 1997, the circumstances and manner of his entry "in 1999 after being rescued by government officers from a sinking ship offshore" do not support a finding of 212(a)(9)(C) inadmissibility. Counsel further contends that since the applicant filed for adjustment of status on March 13, 2007, he is not inadmissible under section 212(a)(9)(A)(i) of the Act as he applied "well after the five-year period of inadmissibility" under that section.

In support of the Form I-212 application, the record includes, but is not limited to: a statement by the applicant; copies of birth certificates and the applicant's passport; employer reference letters; income tax returns; documentation concerning the applicant's expedited removal; documentation concerning the applicant's administrative removal proceeding before the Hartford Immigration Court; and documentation regarding the applicant's 1999 entry and parole.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

At the outset, we note that counsel listed "I-485" on Page 2 of the Notice of Appeal or Motion (Form I-290B) under the "Application/Petition Form #" appealed. However, the AAO does not have appellate jurisdiction over an appeal from the denial of an application for adjustment of status under section 245 of the Act. 8 C.F.R. § 245.2(a)(5)(ii). The authority to adjudicate appeals is delegated to

the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement (ICE). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or counsel. As such, we will not address the issues presented by counsel with respect to the field office director's conclusions regarding the applicant's denied Form I-485.

The AAO does have jurisdiction over the applicant's inadmissibility under sections 212(a)(9)(A)(i) and 212(a)(9)(C)(ii) of the Act. Section 212(a)(9) of the Act provides, in pertinent part, that:

(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.

....

(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.

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The record reflects that the applicant was apprehended in July 1997 as he attempted to enter the United States through Miami, Florida, by presenting a fraudulent nonimmigrant visa. The applicant

did not possess or present a valid visa, reentry permit, border crossing card or other valid entry document at that time. The applicant was then placed in expedited removal proceedings, was ordered removed on the same day, and was removed from the United States on October 4, 1997.

Counsel contends that the record does not include sufficient evidence of the applicant's 1997 removal order. However, we note that the record of proceedings includes the Notice and Order of Expedited Removal (Form I-860) entered against the applicant on July 27, 1997. The Form I-860 indicates that the applicant was determined inadmissible by Immigration Officer [REDACTED] for having procured admission to the United States through willful misrepresentation and for being present in the United States without a valid visa, reentry permit, border crossing card or other valid entry document. The Form I-860 reflects that based upon this inadmissibility determination, the applicant was found to be inadmissible as charged and was ordered removed pursuant to the authority contained in section 235(b)(1) of the Act. The Form I-860 was signed by Officer Lowry and by [REDACTED] Assistant Port Director in Miami, Florida. *See* 8 C.F.R. § 353.3(b)(7) ("Any removal order entered by an examining immigration officer pursuant to section 235(b)(1) of the Act must be reviewed and approved by the appropriate supervisor before the order is considered final."). Importantly, the Form I-860 includes a certificate of service, which indicates that Officer [REDACTED] personally served the expedited removal order to the applicant on July 27, 1997.

Furthermore, the record of proceedings includes a Notice to Alien Ordered Removed/Departure Verification Form (Form I-296) dated October 1, 1997. The Form I-296 indicates that the applicant, having been ordered removed by an immigration officer in proceedings pursuant to section 235(b)(1) of the Act, was prohibited from entering or attempting to enter the United States for a period of five years from the date of his departure. The Form I-296 bears the signature of the applicant and his right index fingerprint. Moreover, the Form I-296 includes a verification of removal section, signed by Deportation Officer [REDACTED] which provides that the applicant boarded flight UA#983 and was removed from the United States on October 4, 1997. The record therefore contains sufficient evidence of a removal order entered against the applicant, and of service and notice of such an order upon him.

Even though counsel relies on *U.S. v. Castillo-Basa*, 483 F.3d 890 (9th Cir. 2007), for the proposition that there was "no illegal reentry where government cannot prove immigrant was ordered removed," we note that *Castillo-Basa* deals with the application of the Double Jeopardy Clause in the context of an illegal reentry criminal proceeding, not administrative expedited removal orders issued pursuant to section 235 of the Act. Further, Ninth Circuit decisions are not binding in proceedings arising outside that circuit's jurisdiction. The AAO finds the record of proceedings supports a finding that the applicant was ordered removed pursuant to the proceedings and authority set forth in the Act.

Having determined that the applicant was removed from the United States in 1997 pursuant to an expedited removal order, the AAO turns to the applicant's 1999 attempt to enter the United States without first being admitted by an immigration officer. An attempt to reenter the United States without being admitted may be established by the facts and circumstances surrounding the alien's interception by immigration officers. *See generally Matter of Estrada-Betancourt*, 12 I&N Dec. 191, 194 (BIA 1967) (noting that a court is not obliged to accept an alien's claim as to his intention

where the circumstances of his interception contradict his claims). The Supreme Court has stated that attempted reentry requires only “an overt act qualifying as a substantial step” toward entry. *United States v. Resendiz-Ponce*, 127 S. Ct. 782, 787 (2007) (holding that “an indictment alleging attempted reentry under § 1326(a) need not specifically allege a particular overt act”).

In the context of effectuating an “entry” into the United States, courts have specifically held that an intent to evade inspection and admission may be deduced from the fact that an alien sought to enter the United States with the assistance of smugglers. See *Cheng v. INS*, 534 F.2d 1018 (2nd Cir. 1976) (finding “overwhelming” evidence of intent to evade inspection when aliens entered United States from Canada hidden in a van at 3:00 a.m., without headlights, turned away from the nearest inspection point, and where the driver had surreptitiously entered the United States in like manner a week prior); *Xin-Chang v. Slattery*, 859 F. Supp. 708, 714 (S.D.N.Y. 1994) (fact that *Golden Venture* passenger hired smugglers to transport him to United States showed intent to evade inspection); *Matter of Z-*, 20 I&N Dec. 707, 709-11 (BIA 1993) (fact that Chinese alien was smuggled into United States by boat pointed to intent to evade inspection); *Matter of G-*, 20 I&N Dec. 764, 772 n.9 (BIA 1993) (finding that the record evidence reflected that the vessel did not arrive at an inspection station, the captain and crew did not restrict the passengers to the ship pending immigration clearance once the ship grounded, and the crew unlocked the cargo hold and encouraged the 300 or so passengers to jump and flee). Accordingly, the AAO evaluates the circumstances surrounding the applicant’s 1999 apprehension aboard a vessel in Mission Beach, California, to determine if he attempted to reenter the United States without being admitted.

Counsel contends that the applicant was rescued by government officers from a sinking ship offshore, and that avoiding drowning in a sinking ship by accepting aid from government officers does not constitute “seeking admission” within the meaning of section 212(a)(9)(C) of the Act. However, other than this generalized statement, counsel did not furnish documentary evidence supporting these assertions. The applicant did not submit a version of the events corroborating counsel’s assertions nor is there independent evidence in the record supporting counsel’s statements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

However, the record of proceedings includes a Record of Deportable/Inadmissible Alien (Form I-213) dated August 24, 1999 and prepared by [REDACTED] a Special Agent of Legacy Immigration and Naturalization Service (Legacy INS). The Form I-213 provides that the applicant was one of 20 aliens arrested in a 23 foot marine vessel at Mission Beach, California on August 24, 1999. The vessel was initially encountered by the United States Coast Guard (USCG) in waters of Mission Beach, California. Upon boarding, USCG personnel found 13 aliens concealed in the forward compartment of the vessel, including the applicant. During his interview with immigration officials, the applicant admitted to being a Brazilian citizen with no valid documents that would allow him to lawfully enter or seek admission into the United States. The applicant further admitted to making arrangements to be smuggled into the United States in Brazil. The applicant paid approximately \$12,000 to individuals who guided him from Brazil to Chile, Chile to Guatemala, and from Guatemala to Mexico. The day after he arrived in Ensenada, Mexico, the applicant boarded a small

boat that would take him to the United States. In the Form I-213, the applicant was listed as having entered the United States without inspection (EWI). The Form I-213 further reflects that the applicant identified the smuggler through a photographic lineup, and he stated his willingness to testify as a witness in the criminal case against the smuggler.

Upon review of the Form I-213 and its contents, the AAO finds it sufficiently reliable so as to serve as a contemporaneous document of the circumstances surrounding the applicant's interception. For instance, the Form I-213 was prepared on the same day the applicant was apprehended; the information contained in the form is detailed; nothing in the record indicates that the source of the information came from anyone other than the applicant; and the document bears the signature of [REDACTED] a Special Agent. See *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999) (noting that a Form I-213 is reliable where the information on the form is detailed and there is nothing facially deficient about the document). It is well-established that absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and inadmissibility. *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002); *Matter of Barcnas*, 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976). Here, no countervailing evidence or evidence directly contesting the particulars of the Form I-213 was introduced. Likewise, no claim was made that the information on the Form I-213 was obtained through coercion or duress. As such, we perceive no basis for discounting the information contained in the Form I-213 establishing that the applicant possessed no valid immigration documents; that he made arrangements to be smuggled into the United States; and that he attempted to reenter the United States without being admitted, as evidenced by the fact that immigration officers found him concealed in the forward compartment of a vessel in the waters of Mission Beach, California.

Further evidence of the applicant's intent to reenter the United States without being admitted is found in the documentary evidence from federal district court and Legacy INS establishing that the applicant agreed to serve as a witness against his smuggler, that he was subsequently paroled under section 212(d)(5) of the Act to testify against the smuggler, and that that parole was terminated in 2000 after the smuggler pled guilty. Moreover, the applicant was placed in removal proceedings and charged with inadmissibility as an alien who, at the time for application for admission, was not in possession of valid entry documents. On December 14, 2011, Immigration Judge [REDACTED] sustained this ground of inadmissibility and ordered the applicant removed from the United States to Brazil.

In consideration of the above-noted reasons, and the circumstances surrounding the applicant's apprehension, the AAO finds that the record evidence establishes the applicant attempted to reenter the United States after having been ordered removed under section 235(b)(1) of the Act without being admitted. As such, the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

Lastly, we note that the fact that the applicant was subsequently paroled to the United States in the public interest does not excuse his inadmissibility under section 212(a)(9)(C) of the Act. A parole is not an admission. See Section 101(a)(13)(B) of the Act. An alien is subject to section 212(a)(9)(C)(i)(II) of the Act if he has been ordered removed under section 235(b)(1) of the Act and attempts to reenter the United States without being admitted. The USCIS Adjudicator's Field

Manual (AFM) instructs that an alien's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act is fixed as of the date of the alien's entry or attempted reentry without being admitted. AFM Ch. 40.9.2(a)(6)(B). Therefore, the parole of an alien under section 212(d)(5) of the Act after he had already become inadmissible under section 212(a)(9)(C)(i) would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act. *Id.* Here, even though the applicant was taken into custody after apprehension in Mission Beach, California and was later paroled under section 212(d)(5) of the Act, he remains inadmissible under section 212(a)(9)(C)(i)(I) of the Act since the record evidence establishes that he did, in fact, attempt to enter the United States without admission after having been removed pursuant to section 235(b) of the Act.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless the alien has been outside the United States for more than ten years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *see also Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least 10 years ago, the applicant has remained outside the United States *and* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and did not remain outside the United States for the requisite statutory period following his removal. He is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in determining whether the applicant is eligible for an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal under section 212(a)(9)(A)(i) of the Act. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.