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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 29 2014 OFFICE: HIALEAH FILE:

IN RE:

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.

Thank you,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Hialeah, Florida, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the denial was appealed to the Administrative Appeals Office (AAO). On appeal, we remanded the matter to the Field Office Director to consider whether the applicant qualifies for *nunc pro tunc* permission to reapply for admission. The matter is now before the AAO on certification. The decision of the Field Office Director will be withdrawn and the appeal will be sustained.

The record reflects that the applicant is a native and citizen of Jamaica who was found to be inadmissible 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), for having entered the United States without remaining outside the United States for five years after her removal. The applicant 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 her spouse.

The Field Office Director determined that the applicant was ineligible to apply for permission to reapply for admission to the United States because she did not remain outside the United States for five years after her removal on August 2, 2002, and did not obtain permission to reapply prior to her reentry to the United States on February 17, 2007. The Field Office Director denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, accordingly. *See Decision of Field Office Director*, dated January 17, 2014.

On August 18, 2014, we remanded the decision to the Field Office Director to consider whether the applicant qualified for *nunc pro tunc* permission to reapply for admission to the United States. The case has now been certified to the AAO for review. We find that the applicant qualifies for permission to reapply for admission to the United States *nunc pro tunc* to the date she was admitted to the United States based on the reasons set forth in our decision to remand.

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 in section 235(b)(1) proceedings on August 1, 2002 for attempting to enter the United States with a fraudulent stamp in her passport. The applicant was removed from the United States on August 2, 2002. On February 17, 2007, the applicant was admitted to the United States pursuant to an IR1 visa as a spouse of a U.S. citizen. There is no indication that the applicant filed a Form I-212 prior to her entry into the United States or that she remained outside the United States for five years after her removal. Accordingly, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(A)(i) of the Act for having entered the United States without remaining outside the United States for five years after her removal and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

As noted above, the applicant was admitted to the United States pursuant to an IR1 visa as a spouse of a U.S. citizen on February 17, 2007. Although she did not file a Form I-212 when applying for her immigrant visa, she disclosed on her application that she had been ordered removed within the last five years and filed a Form I-601, Application for Waiver of Ground of Inadmissibility, for attempting to enter the United States with a fraudulent stamp in her passport, and the waiver application was approved on June 9, 2006.

On appeal, we noted that the Board of Immigration Appeals (BIA) has held that *nunc pro tunc* permission to reapply for admission is available in limited circumstances where a grant of such relief would effect a complete disposition of the case, such as where the only ground of inadmissibility would thereby be eliminated. *See Matter of Garcia-Linares*, 21 I&N Dec. 254 (BIA 1996); *Matter of Roman*, 19 I&N Dec. 855, 857 (BIA 1988); *Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). We found that as the applicant has no ground of inadmissibility other than the basis for her submission of a Form I-212, consideration of whether she qualified for *nunc pro tunc* permission to reapply for admission as a matter of discretion was warranted.

In *Matter of Tin,* the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

> 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.

14 I&N Dec. 371, 373-4 (Reg. Comm. 1973).

On appeal, the applicant submitted evidence to establish that her spouse suffers from diabetes and a heart condition and would experience hardship if he is separated from her. The applicant also submitted a statement expressing remorse for her immigration violations and letters of reference on her behalf. She asserts that her husband relies on her for emotional support and assistance with his care for diabetes and other medical conditions. She further states that she was unaware that she needed to submit a Form I-212 when applying for her immigrant visa and would have timely submitted the application had she been aware.

The favorable factors for the applicant include the length of time that has passed since her immigration violations, which took place between 2001 and 2002, and the remorse that the applicant has expressed for her immigration violations; the applicant's U.S. citizen spouse, who is diabetic, suffers from atrial fibrillation and relies upon the applicant to provide medical and emotional support; lack of criminal history for the applicant; and letters of support concerning the applicant's charitable activities in her community. The record also supports the applicant's contention that her failure to file a Form I-212 prior to her last entry to the United States was inadvertent and reflects that the applicant was forthcoming concerning her expedited removal from the United States on August 2, 2002.

The unfavorable factors for the applicant are immigration violations, including an overstay in the United States following an authorized period of stay and presenting a passport with a fraudulent Jamaican immigration stamp in order to conceal this overstay.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. After a careful review of the record, we conclude that the applicant qualifies for permission to reapply for admission *nunc pro tunc* to her date of admission in February 2007 and has established that a favorable exercise of the Secretary's discretion is warranted.[1] Accordingly, the decision of the Field Office Director will be withdrawn and the appeal will be sustained.

ORDER: The decision of the Field Office Director is withdrawn and the appeal is sustained.

[1] The Field Office Director found that under 8 CFR § 212.2(i), retroactive approval of a Form I-212 is only available at the port of entry prior to admission or in conjunction with an application for adjustment of status. However, this regulation does not control the applicant's Form I-212 application, as she is not seeking admission at a port of entry and the form was not filed in conjunction with an adjustment application. Rather, her *nunc pro tunc* I-212 application seeks to cure her failure to obtain such permission prior to reentry after deportation pursuant to BIA decisions finding this administrative practice permissible "in a few well-defined instances."