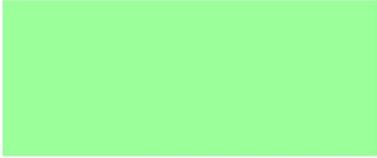


(b)(6)

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

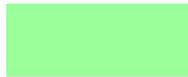


U.S. Citizenship
and Immigration
Services

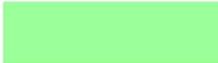


Date: **JUN 12 2014**

Office: WASHINGTON, DC

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 (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,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Washington, DC, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of China. On May 12, 1997, an Immigration Judge granted the applicant voluntary departure with an alternate order of deportation. The applicant failed to depart the United States. The applicant is married to a U.S. citizen and seeks advance permission to reenter the United States after deportation in order to reside with his wife and children in the United States.

The field office director found that the applicant remains inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to obtain an immigration benefit and that the applicant has not filed a Form I-601 waiver application. The field office director denied the Form I-212 as no purpose would be served by approving the application in light of the fact that the applicant remains inadmissible to the United States.

On appeal, counsel contends the field office director erred in not considering the Form I-212 on the merits. According to counsel, the field office director's reliance on *Matter of J-F-D*, 10 I&N Dec. 694 (Reg. Comm. 1963), and *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964), is erroneous because in those cases, the applicants were "mandatorily inadmissible" as a result of their criminal convictions for which a waiver is not available. Counsel claims the applicant is not mandatorily inadmissible because he is eligible to apply for a waiver.

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.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) provides, in pertinent part:

- (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien

In this case, the record shows, and counsel does not contest, that the applicant entered the United States in January 1994 using a passport belonging to someone else. The record further shows that the applicant filed an asylum application in February 1994. The applicant was issued an Order to Show Cause, placing him in deportation proceedings. An Immigration Judge denied the applicant's request for asylum and withholding of removal, but granted the applicant voluntary departure with an alternate order of deportation if the applicant failed to timely depart the United States. The applicant did not depart as ordered and continues to reside in the United States. In addition, the record shows that fourteen years later, in April 2008, the applicant filed a motion to reopen which the Immigration Judge denied as untimely on May 30, 2008. The Board of Immigration Appeals upheld the Immigration Judge's decision on September 8, 2009, and the applicant filed a petition for review to the Second Circuit Court of Appeals. The record does not indicate whether the Court has yet issued a decision on the case.

Therefore, the record establishes that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit as

well as section 212(a)(9)(A) of the Act as an alien who has been ordered removed. The applicant requires both a waiver of inadmissibility pursuant to section 212(i) of the Act and requires the Secretary's permission to reenter the United States. Counsel concedes both counts of inadmissibility on appeal.

After a careful review of the record, we find that the field office director did not err in denying the Form I-212 as the applicant remains inadmissible to the United States and, therefore, no purpose would be served in the favorable exercise of discretion. In his brief, counsel contends that the applicant will apply for an immigrant visa when he returns to China.

The regulation relevant to the applicant's case is 8 C.F.R. § 212.2(d) which requires the Form I-212 and Form I-601 to be filed simultaneously. According to 8 C.F.R. § 212.2(d):

Applicant for immigrant visa. Except as provided in paragraph (g)(2) of this section, an applicant for an immigrant visa who is not physically present in the United States and who requires permission to reapply must file the waiver request on the form designated by USCIS. Except as provided in paragraph (g)(2) of this section, *if the applicant also requires a waiver under section 212(g), (h), or (i) of the Act, he or she must file both waiver requests simultaneously* on the forms designated by USCIS with the fees prescribed in 8 C.F.R. § 103.7(b)(1) and in accordance with the form instructions.

(Emphasis added). Similarly, the Form I-212 instructions make clear that an applicant who applies for a visa from abroad must file both the Form I-212 and Form I-601 simultaneously. Section 3(B) of the instructions state:

Applicant for Immigrant Visa who is Outside the United States and Who Also Requires a Waiver of Inadmissibility (Form I-601): You may request both the waiver and consent to reapply for admission to the United States after you have attended your visa interview at a U.S. consulate and after a consular officer has found you inadmissible. *You must file Form I-212 together with Form I-601, Application for Waiver of Grounds of Inadmissibility. . . .*

(Emphasis added). As the regulation at 8 C.F.R. § 103.2(a)(1) makes clear, the form instructions have the weight of regulations. See 8 C.F.R. § 103.2(a)(1) ("Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.").

To be clear, in the instant case, the applicant has *not* submitted an application for adjustment of status, but rather, will apply for a visa from abroad. Compare 8 C.F.R. § 212.2(d) (applicant for immigrant visa) to 8 C.F.R. § 212.2(e) (applicant for adjustment of status). As an applicant for an immigrant visa, he must file his Form I-212 simultaneously with his Form I-601, application for a waiver of inadmissibility. 8 C.F.R. § 212.2(d). Under these circumstances, no purpose would be served in granting the Form I-212 application since the applicant remains inadmissible to the United States

under section 212(a)(6)(C)(i) of the Act and has not applied for a waiver as required. We therefore dismiss the appeal of the denial of the Form I-212 as a matter of discretion as its approval would serve no purpose considering the applicant remains inadmissible to the United States and must apply for both permission to reapply for admission and a waiver of inadmissibility at the time of his application for a visa abroad.

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.

ORDER: The appeal is dismissed.