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



**U.S. Citizenship
and Immigration
Services**



115

DATE: **AUG 16 2012** OFFICE: NEW YORK FILE:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, 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 any 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,

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the District Director for entry of a new decision.

The applicant is a native and citizen of China who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), due to his use of fraud or material misrepresentation to procure admission into the United States. The applicant seeks a waiver of inadmissibility (Form I-601) under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his U.S. citizen spouse.

In a decision dated October 6, 2009, the District Director concluded that the applicant did not meet his burden of proof to illustrate that his U.S. citizen spouse would suffer extreme hardship and the application for a waiver of inadmissibility was denied accordingly. A Form I-290B, Notice of Appeal or Motion, was timely filed on November 3, 2009. That appeal and the related record were received by the AAO on August 13, 2012.

On appeal, counsel for the applicant states that the hardship that would result to the applicant's U.S. citizen spouse is extreme.¹ Additionally, counsel states that the applicant is not inadmissible under section 212(a)(9)(ii) of the Act, presumably referring to the District Director's finding of inadmissibility under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A). The applicant's inadmissibility under section 212(a)(9)(A) of the Act is not the subject of this appeal.²

In support of the waiver application, the record includes, but is not limited to legal arguments by counsel for the applicant, biographical information for the applicant, his spouse, and their families, letters of support, medical records for the applicant's parents, medical records for the applicant's spouse, country conditions information on China, and documentation concerning the applicant's immigration history.

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 was reviewed and considered in rendering a decision on the appeal.

The record indicates that the applicant was ordered excluded by the Immigration Judge and removed from the United States on June 4, 1996. The applicant was again removed from the United States on October 30, 1998, after an expedited removal order was entered in his case. On December 10, 2001 the applicant was subsequently admitted to the United States using a Chinese passport and U.S. visitor visa issued in the name of another individual. The applicant applied for adjustment of status on June 25, 2009. The District Director found the applicant to be inadmissible to the United States under section 212(a)(6)(C) of the Act as a result of the

¹ The AAO notes that since the filing of the appeal, the applicant has changed the counsel of record.

² An Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) is the appropriate form to address inadmissibility under section 212(a)(9)(A) of the Act.

applicant's use of fraud or material misrepresentation in order to procure admission to the United States. The applicant applied for a waiver of section 212(a)(6)(C) of the Act pursuant to section 212(i) of the Act. The waiver application was denied by the District Director. After the issuance of the District Director's decision, a reinstatement of removal order was entered against the applicant pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) as a result of the applicant's illegal reentry on December 10, 2001 after his October 30, 1998 removal order.

Section 241(a)(5) of the Act provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under the Act, and the alien shall be removed under the prior order at any time after the reentry.

The record reflects that on October 6, 2009, as a result of the applicant's prior removal order and subsequent illegal reentry, the applicant was served with Form I-871, Notice of Intent/Decision to Reinstatement Prior Order. The applicant now appears to be subject to section 241(a)(5) of the Act and therefore ineligible for any relief under the Act.³

Because the Form I-871, Notice of Intent/Decision to Reinstatement Prior Order was issued after the District Director's decision on the waiver application, we remand the case to the District Director for issuance of a new decision on this matter addressing the new finding. If the decision is adverse to the applicant, it shall be certified for review to the AAO.

ORDER: The matter is remanded to the District Director for action consistent with this decision.

³ The AAO notes that the applicant's removal has been withheld in accordance with 8 C.F.R. § 241.8(e), which allows an exception for withholding of removal where an applicant has established reasonable fear of persecution or torture pursuant to 8 C.F.R. § 208.31. The Immigration Judge granted the applicant's request for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), on April 4, 2012.