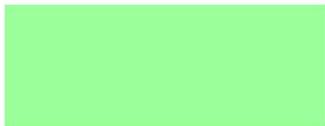


(b)(6)

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

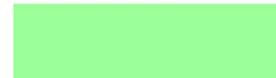


U.S. Citizenship
and Immigration
Services

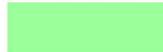


DATE: **JUL 24 2013** OFFICE: NEW YORK

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:

SELF-REPRESENTED

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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application will be remanded to the District Director for further action consistent with this decision.

The applicant is a native and citizen of Bangladesh 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 stated use of fraud or material misrepresentation to procure admission to 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 April 1, 2011, the District Director denied the application for a waiver of inadmissibility based on non-payment of the fee for the application. On appeal, counsel for the applicant did not contest the applicant's inadmissibility and did not address the fee-payment issue, and the appeal was dismissed accordingly on November 6, 2012.

On motion, the applicant submits new documentation regarding his case to illustrate that previous counsel provided ineffective assistance of counsel and he requests that his application be reopened and that his waiver application be approved.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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 applicant filed a timely motion to reopen stating that prior counsel provided ineffective assistance of counsel by not paying the fee for the underlying Form I-601, where the non-payment of fee was the basis of the District Director's decision denying the application for the waiver and the basis for the dismissal of the appeal on the waiver denial. On motion, the applicant submitted fees for the underlying I-601 and for the motion to reopen.¹ The applicant also made efforts to substantially comply with the evidentiary requirements for making a claim of ineffective assistance of counsel as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). In *Lozada*, the Board of Immigration Appeals (BIA) held that an alien seeking to establish ineffective assistance of counsel must (1) provide an affidavit attesting to the relevant facts, including a detailed description of the agreement with former counsel, (2) establish that former counsel has been informed of the allegations and provided with an opportunity to respond, and (3) indicate

¹ Although the record indicates that the applicant attempted to submit a fee for the underlying I-601 application, it is not clear whether that fee was accepted.

whether a complaint has been filed with the appropriate disciplinary authority, and if not, why not. 19 I&N Dec. at 639. The record contains evidence to establish that the applicant has complied with the first and third requirements. There is no specific statement that the prior attorney has been informed of the specific allegations being made against him or that he has been given an opportunity to respond. However, we note that under the procedures for filing a complaint before the Departmental Disciplinary Committee for the First Judicial Department of the New York Supreme Court, Appellate Division, the Committee itself provides such notice to the attorney.² Considering the totality of the circumstances presented, including the evidence submitted on motion, we will grant the motion and remand to the District Director for further proceedings. The District Director will accept payment of the fee, if this has not already occurred, and issue a new decision on the underlying application, Form I-601, Waiver of Grounds of Inadmissibility.

The AAO notes that the applicant and his spouse in their affidavits on motion, state that the applicant's previous statements that he was admitted to the United States on a passport and visa issued to another individual were misrepresentations and that, in fact, the applicant was not admitted or paroled into the United States but rather entered the United States without inspection through Buffalo, New York. This issue should be addressed by the District Director on remand, insofar as it relates to the grounds of inadmissibility in this case and the applicant's eligibility for adjustment of status. If the applicant is ineligible for adjustment of status, his application for a waiver of inadmissibility is moot, regardless of any ineffective assistance of counsel. If the waiver application is moot, the District Director should issue a new decision on that basis and the matter need not be certified for review to the AAO pursuant to 8 C.F.R. § 103.4.

If the District Director determines that the applicant is eligible for adjustment of status and remains inadmissible to the United States, the District Director shall issue a new decision on the waiver application. If that decision is adverse to the applicant, it shall be certified for review to the AAO; however, as stated previously, if the adverse decision is due to ineligibility for adjustment of status, the decision should not be certified for review to the AAO pursuant to 8 C.F.R. § 103.4.

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

² See <http://www.courts.state.ny.us/courts/ad1/Committees&Programs/DDC/#howtofile>.