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Immigration and Naturalization Service

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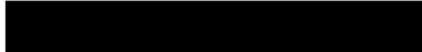
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: 

Office: California Service Center

Date: FEB 05 2003

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)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT: Self-represented

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn, and the application will be adjudicated de novo. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole on April 18, 1988. On December 1, 1990, his status was adjusted to that of an alien lawfully admitted for temporary residence under section 210 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1160, as a special agricultural worker. On May 10, 1991, the applicant entered the United States without inspection. On May 13, 1991, the applicant was convicted of a violation of 8 U.S.C. 1325, and was sentenced to 30 days in jail. An Order to Show Cause was served on him on May 14, 1991. He was ordered deported by an immigration judge on July 30, 1991, and he was removed from the United States on July 30, 1991. Therefore he is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii).

On December 3, 1993 the applicant was again present in the United States without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of the Act, 8 U.S.C. 1326 (a felony). He was apprehended and charged with reentry after deportation. Prosecution was declined, and he was returned to Mexico on December 14, 1993.

A prior application for permission to reapply was denied on June 20, 1995, and an appeal of that decision was dismissed on September 10, 1996.

The applicant submitted a second application in March 1999 and indicated that he has remained in Mexico since December 14, 1993. 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). to

The director determined that the applicant had been unlawfully present in the United States for an aggregate period of more than 1 year prior to December 14, 1993. The director denied the application after finding the applicant inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B).

On appeal, the applicant explains the circumstances that caused him to return to the United States.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

(i) Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States, whether or

not pursuant to section 244(e), prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure from the United States, is inadmissible.

Because the effective date of sections 212(a)(9)(B)(i)(I) and (II) was April 1, 1997, no one will have accrued 180 days of unlawful presence before September 27, 1997, and no one will have accrued 1 year of unlawful presence until April 1, 1998. Because the applicant indicates that he has remained outside the United States since December 14, 1993, he could not have accrued any unlawful presence under section 212(a)(9)(B) of the Act. Therefore, he is not subject to the exclusionary grounds of section 212(a)(9)(B) of the Act and the director's decision will be withdrawn. The application will be adjudicated de novo.

Section 212(a)(9)(A) of the Act provides, in part, that:

(i) 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 5 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) Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 of the Act 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) 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 Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). Section 212(a)(9)(A)(i) of the Act provides that aliens who have been ordered removed from the United States through expedited removal proceedings or removal proceedings initiated on the alien's arrival in the United States and who have actually been removed (or departed after such an order) are inadmissible for 5 years. Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under section 242 or 217 of the Act or ordered excluded under section 236 of the Act and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgements or decisions under certain sections of the Act, created a new expedited removal proceeding, and established major new grounds of inadmissibility. Nothing could be clearer than Congress's desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration law. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

Although guidelines for considering permission to reapply for admission applications were promulgated in Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973), and in Matter of Lee, 17 I&N Dec. 275 (Comm. 1978), these holdings were rendered long before Congress amended the Act from 1981 through the present 1996 IIRIRA amendments and beyond. It is specifically noted that the Commissioner in Matter of Lee, referred to the intent of Congress in enacting former sections 212(a)(16) and (17) of the Act, 8 U.S.C. § 1182(a)(16) and (17), in the conclusions and recommendations of the Senate Committee on the Judiciary in their report dated 1950. The Committee also reviewed section 3 of the 1917 Act in their study.

Even though the decisions in Tin and Lee have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in their intent, and in the legislation and in their decisions, that individuals who violate immigration law are viewed unfavorably. The later statutes and judicial decisions have effectively negated most precedent case law rendered prior to 1981. Such case law is still considered but less weight is given to favorable factors gained after the violation of immigration laws following statutory changes and judicial decisions.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws.

Evidence of serious disregard for law is viewed as an adverse factor. Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

The favorable factor in this matter is the applicant's remaining in Mexico since 1993.

The unfavorable factors in this matter include the applicant's unlawful entry in 1991, his conviction for unlawful entry, his deportation, his felonious reentry without permission, and his subsequent departure.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Attorney General's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.