

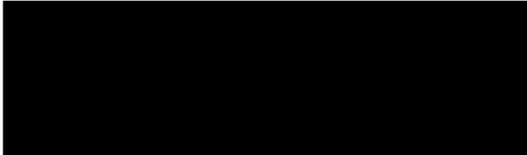
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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



FILE

Office: Vermont Service Center

Date **JUL 21 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)

ON BEHALF OF APPLICANT:



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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a motion to reopen. The motion will be granted. The order dismissing the appeal will be withdrawn, and the appeal will be sustained.

The applicant is a native and citizen of Peru who was admitted to the United States on April 1, 1994, as a nonimmigrant visitor with authorization to remain until September 10, 1994. He remained longer than authorized without applying for or obtaining an extension of temporary stay.

The applicant married [REDACTED] a U.S. citizen, on June 14, 1996, and a Petition for Alien Relative filed on his behalf was denied on February 24, 1999. The applicant's marriage to Ms. [REDACTED] was terminated on April 13, 2000.

On November 23, 1999, he was served with a Notice to Appear. On February 10, 2000, an immigration judge ordered the applicant removed *in absentia*. On March 30, 2000, the applicant was granted a motion to have his case reopened.

The applicant married [REDACTED] on June 27, 2000, while in removal proceedings. A Petition for Alien Relative filed on his behalf by Ms. [REDACTED] was denied on October 19, 2000. On March 1, 2001, an immigration judge granted the applicant until June 29, 2001, to depart voluntarily in lieu of removal. The applicant failed to depart by that date. Therefore, he is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii).

The applicant is the beneficiary of a second Petition for Alien Relative filed by Ms. [REDACTED] and approved on October 23, 2002. He 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 unfavorable factors outweighed the favorable ones and denied the application accordingly. The AAO affirmed that decision on appeal.

On motion, counsel submits evidence that the applicant had a flight scheduled for June 29, 2001, but he missed the flight and had to depart one day later. This evidence was not submitted with the initial appeal.

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 [now Secretary of Homeland Security] has consented to the alien's reapplying for admission.

A review of the documentation in the record reflects that the applicant did attempt to depart voluntarily by the date mandated by the immigration judge. However, by departing one day later he still became subject to the provisions of section 212(a)(9)(A)(ii) of the Act.

The favorable factors in this matter are the applicant's family ties, the absence of a criminal record, the approved visa petition, the fact that his order of removal was changed on appeal to voluntary departure, his initial attempt to depart by the date provided by the court, and the prospect of general hardship to his wife.

The unfavorable factors in this matter include the applicant's remaining longer than authorized, his unlawful presence, and his failure to appear at a hearing and being ordered removed *in absentia*.

Since the applicant has now provided evidence that he did attempt to depart by the date afforded him by the court, it is concluded that the applicant has now 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 established that a favorable exercise of the Attorney General's discretion is



warranted. Accordingly, the motion will be granted. The order dismissing the appeal will be withdrawn, and the applicant will be approved.

ORDER: The motion is granted. The order of January 8, 2003, dismissing the appeal is withdrawn. The appeal is sustained, and the application is approved.