

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

A4

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



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



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: APR 08 2004

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, was denied by the Director, California Service Center. The matter is now before the AAO on appeal. The appeal will be sustained and the application approved.

The applicant is a native and a citizen of El Salvador who was present in the United States without a lawful admission or parole on November 20, 1987. The applicant was placed in removal proceedings and on June 6, 1988, she was granted voluntary departure until July 6, 1988. The applicant failed to depart from the United States and is therefore inadmissible pursuant to 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 an approved petition for alien relative filed by her Lawful Permanent Resident (LPR) spouse. 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).

The director determined that the applicant was inadmissible due to her accumulation of unlawful presence in the United States for over one year and although she had favorable factors on her behalf, denied the application accordingly. See *Director Decision* dated May 5, 2003.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis of removal; the recency of the removal; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and others; and the need for the applicant's services in the United States.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

On appeal counsel states that the director's decision to deny the Form I-212 application is not supported by law. Additionally counsel states that the director's denial based on the applicant's inadmissibility due to unlawful presence for more than one year is not relevant in this case since she has not departed the United States in order to trigger her unlawful presence.

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

(B) Aliens Unlawfully Present.-

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

.....
(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 or removal from the United States, is inadmissible.

To recapitulate, the record clearly reflects that the applicant entered the United States on or about November 20, 1987 and remained in the United States without a lawful admission or parole. The applicant applied for Temporary Protective States (TPS) on July 31, 2001, and was issued an employment authorization card valid until September 9, 2003. The applicant has not left the United States since her original entry in 1987. She is not inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act until she actually departs the

United States. The AAO finds that the director erred in denying the I-212 application based on the fact that the applicant is inadmissible under section 2121(a)(9)(B)(i)(II) of the Act.

The purpose of this proceeding is to adjudicate the application for permission to reapply for admission after removal, not a waiver application under section 212(a)(9)(B)(v) of the Act. The applicant may file an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act when she departs the United States and applies for an immigrant visa at the U.S. Consulate abroad.

On appeal counsel further states that the director did not properly weigh the favorable factors in this case and therefore the appeal should be sustained and the application approved.

The favorable factors in this case include the applicant's family ties, (four U.S. citizen children and an LPR spouse), an approved I-130 relative petition, an approved TPS application with employment authorization, the absence of any criminal record since entering the United States in 1987, the potential of hardship if returned to El Salvador, a country which has been designated for temporary protected status, her service to the community and the numerous favorable recommendations from relatives and friends attesting to her good moral character.

The unfavorable factors in this case include the applicant's failure to depart the country after she was granted voluntary departure and her period of unlawful presence and unauthorized employment in the United States prior to being approved for TPS.

While the applicant's failure to depart the United States after being granted voluntary departure and her illegal stay and employment in the United States are very serious matters that cannot be condoned, the AAO finds that given all of the circumstances in the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.