U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

H-4

[redacted]

FILE: [redacted] Office: NEWARK, NJ Date: AUG 0 4 2004

IN RE: [redacted]

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:

[redacted]

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

PUBLIC COPY

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, Newark, New Jersey, and was remanded to the district director for review and a new decision on appeal by the Administrative Appeals Office (AAO). On remand, the district director upheld her denial of the application. The application is now certified to the AAO on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who was present in the United States without a lawful admission or parole on November 10, 1990. On August 13, 1991, the applicant was ordered deported in absentia by an immigration judge. An appeal of that decision was sustained by the Board of Immigration Appeals on November 19, 1991, the order of deportation was vacated and the matter was remanded for further proceedings.

On February 6, 1992, the applicant was again ordered deported in absentia to Guatemala by an immigration judge. He failed to depart. Therefore, the applicant 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 record fails to contain evidence that the second order of deportation was vacated.

The record contains a third decision by an immigration judge dated September 5, 1996, in which the applicant was granted voluntary departure from the United States until March 5, 1997. The applicant became the beneficiary of an Immigrant Petition for Alien Worker approved on August 3, 1999, based on his employment as a specialty cook for Manville Pizzeria and Restaurant in Manville, New Jersey from May 1994 through March 1997 and from July 1997 to the present time. The applicant indicated on his Form G-325A that he was in Guatemala from March 1997 through July 1997. 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), in order to reside in the United States and continue his employment.

The district director determined that the unfavorable factors in the application outweigh the favorable factors. The I-212 application was denied accordingly. *Decision of the District Director*, dated July 13, 2001.

On appeal, counsel asserted that the applicant timely filed a request for an extension of his period of voluntary departure until March 30, 1997 by appearing in the Deportation Section of the Newark, New Jersey District Office on February 11, 1997.

The AAO determined that the record was inconclusive regarding whether or not the applicant's request for an extension of voluntary departure was granted. The AAO found that the Immigration and Naturalization Service [now Citizenship and Immigration Services]'s decision on the applicant's request is crucial to the applicant's immigration status and adjudication of his Form I-212 application and therefore, remanded the application to the district director for clarification. *Decision of the AAO*, dated December 21, 2001.

On remand, the district director determined that the applicant's request for an extension of voluntary departure was not adjudicated. The district director found "[w]hile 8 C.F.R. § 244.2 ... mandates a written notice of the District Director's decision on a request for extension, the lack of a written response does not constitute an implied extension of the time to depart." *Decision on Application for Permission to Reapply for Admission Into the United States,* dated October 14, 2003. Based on this determination, the district director

concludes that the applicant's departure from the United States on March 30, 1997 was a departure subsequent to the expiration of the applicant's Voluntary Departure Order, thus pursuant to an Alternative Order of Deportation.

Section 212(a) of the Act, 8 U.S.C. § 1182(a) states in pertinent part:

> (9) Aliens Previously Removed.-
>
> (A) Certain aliens 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 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.
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> (ii) [A]ny alien . . . who-
>
> (I) Has been ordered removed under section 240 or any other provision of law . . . 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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now the Secretary of Homeland Security (Secretary)] has consented to the alien's reapplying for admission.

Approval of a Form I-212 Application for Permission to Apply for Admission after Deportation or Removal requires that the favorable aspects of the applicant's case outweigh the unfavorable aspects.

> In determining whether the consent required by statute should be granted, all pertinent circumstances relating to the applicant which are set forth in the record of proceedings are considered. These include but are not limited to the basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitation, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

Matter of Tin, 14 I&N Dec. 373, 374 (Comm. 1973).

The favorable factor in the application is the applicant's apparent lack of a criminal record.

The unfavorable factors in the application include the fact that the applicant is subject to reinstatement of his removal orders.

Section 241(a) of the Act states in pertinent part:

> (5) Reinstatement of removal orders against aliens illegally reentering. - If the Attorney General [Secretary] 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 this Act*, and the alien shall be removed under the prior order at any time after the reentry. (emphasis added)

The applicant reentered the United States, without inspection, a mere four months after being removed. The applicant failed to apply for permission to reenter prior to his reentry and therefore, is subject to reinstatement under section 241(a)(5) of the Act.

Further, the AAO notes that the applicant misrepresented his deportation record on his Form I-485 Application to Register Permanent Residency or Adjust Status. The applicant's fraudulent misrepresentations to immigration officials render the applicant inadmissible to the United States under section 212(a)(6)(C)(i) of the Act and require the applicant to seek an approved Waiver of Grounds of Excludability (Form I-601).

The AAO notes that an applicant's prior residence in the United States is considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. *See Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). The applicant offers no evidence of reformation or rehabilitation from his disregard for the immigration laws of this country.

The applicant has not established that the favorable factors in his application outweigh the unfavorable factors. The district director's denial of the I-212 application was thus proper.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). The applicant has failed to establish that he warrants a favorable exercise of the Secretary's discretion. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.