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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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DEC 23 2004



FILE:

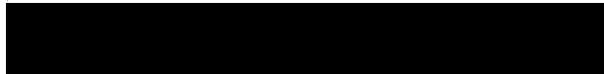


Office: VERMONT SERVICE CENTER

Date:

IN RE:

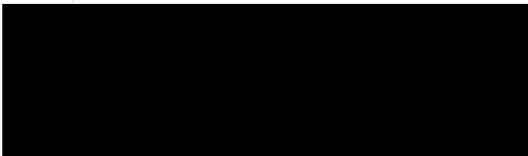
Applicant:



APPLICATION:

Application for Permission to Reapply for Admission after Removal into the United States after Deportation 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, Vermont Service Center, and is now before the Administrative Appeals Office (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 December 28, 1993. The applicant applied for asylum in March 1994 with the Immigration and Naturalization Service (INS, now known as Citizenship and Immigration Services, (CIS)). On July 25, 1994, the applicant was interviewed by the INS for asylum status and he was referred to an Immigration Judge for a court hearing. The record reflects that on February 5, 1996, an Immigration Judge granted the applicant voluntary departure until March 5, 1996. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on December 12, 1997. On January 12, 1998, he filed an appeal with the United States Court of Appeals for the Fourth Circuit, which affirmed the BIA's decision on September 1, 1998. The applicant failed to surrender for removal or 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). He is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140). 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) in order to remain in the United States.

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the application accordingly. See *Director's Decision* dated July 30, 2002

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

(A) Certain alien previously removed.-

.....

(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 alien 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 alien's 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.

On appeal, counsel submits a brief, letters of recommendation from friends regarding the applicant's character and copies of the applicant's children's birth certificates. In his brief counsel states that the applicant is the beneficiary of a Form I-140 and that he is the father of a U.S. citizen child and stepfather of three U.S. citizen children who would suffer extreme hardship if the waiver application were denied. In addition counsel that

the applicant is a person of good moral character and does not have any criminal record since his entry into the United States.

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 deportation; the recency of the deportation; 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 applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

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.*

The Director's decision states that the unfavorable factors in the applicant's case include his entry without inspection in 1993, his failure to depart the country after he was granted voluntary departure, the fact that he fathered a U.S. citizen child out of wedlock, placing the child's welfare in jeopardy in view of his illegal status in the United States and that while the applicant has been residing illegally in the United States many thousand of aspiring immigrants remained abroad waiting their turn to immigrate legally to the United States

The Director concluded that these factors outweighed the applicant's family ties in the United States, (one U.S. citizen child and three U.S. citizen stepchildren) and the approval of a Form I-140 on his behalf.

The AAO does not find that the applicant has been living in the United States illegally for such a long period time. The applicant filed a non-frivolous asylum application and although it was subsequently denied he was entitled to exhaust all means available to him by law in an effort to legalize his status in the United States. His various applications and appeals conferred on him a status that allowed him to remain in the United States while they were pending. The AAO further finds that there is no evidence in the record that the applicant's U.S. citizen child's welfare is in any jeopardy, current or future.

In his decision the director indicates two favorable factors for the applicant, the existence of an approved Form I-140 and the existence of a U.S. citizen child. The AAO finds that the Director failed to consider the other favorable factors including the fact that the applicant has three U.S. citizen stepchildren, he has no criminal history since entering the United States and has presented favorable recommendations attesting to his good moral character. Additionally the applicant applied for and received Temporary Protective States (TPS), and was issued an employment authorization card valid until March 9, 2005.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection and his failure to depart the country after he was granted voluntary departure.

While the applicant's entry without inspection in the United States and his subsequent failure to depart the United States after being granted voluntary departure cannot be condoned, the AAO finds that given all of the circumstances of 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.

ORDER: The appeal of the denial of the Form I-212 is sustained and the application approved.