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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 14 2004

IN RE: Applicant: [redacted]

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:

[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.

PUBLIC COPY

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 Guatemala who entered the United States on September 16, 1988, as a non-immigrant visitor for pleasure. The applicant applied for asylum sometime in 1988 with the Immigration and Naturalization Service (now known as Citizenship and Immigration Services, (CIS)). He was granted work authorization based on that application in 1991. The record reveals that a second application for asylum was filed on November 22, 1995, and this application was referred to an Immigration Judge on January 2, 1996. The applicant was placed in removal proceedings and on May 31, 1996, he was granted voluntary departure until November 30, 1996. He filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on December 30, 1998. He was granted voluntary departure until January 29, 1999. On January 21, 1999, the applicant filed a motion to vacate final order to and to remand proceedings to the Immigration Judge so that he might apply for relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA). On November 1, 1999, the BIA reopened the proceedings and remanded them to the Immigration Judge for that purpose. On June 13, 2001 the BIA vacated its decision because it was determined that the applicant had departed the United States on March 9, 1999, prior to his motion being forwarded to the BIA on March 12, 1999. Since the applicant was out of the country at the time the BIA received his motion to reopen the BIA stated that they did not have jurisdiction to grant it.

As noted above the applicant was granted voluntary departure until January 29, 1999, and by departing on March 9, 1999, he executed the deportation order. He 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 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 unfavorable factors in the applicant's case outweighed the favorable factors, and denied the application accordingly. *See Director's Decision* dated October 19, 2001. Subsequently the applicant filed an appeal, which was received by the Vermont Service Center on November 21, 2001. As the appeal was one day late, the Director treated it as a motion to reconsider, and after a review of the record of proceedings the previous decision was affirmed. *See Director's Decision* dated January 18, 2003.

On appeal, counsel states that the applicant entered the United States legally, made legal applications, remained in the United States because he was authorized by law and by the District Director. Counsel further states that the applicant left the county after a deportation officer erroneously advised him to leave without advising him of the implications of section 212(a)(9)(A)(ii) of the Act.

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 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 application for asylum shortly after being admitted in the United States in possession of a valid tourist visa and his failure to depart the country after his was granted voluntary departure. In addition, the director states that the applicant filed an appeal with the BIA, was granted a new voluntary departure date until January 29, 1999, and did not depart until March 9, 1999 after having resided illegally in the United States for more than 10 years. Furthermore the director states that when the applicant came to the United States in 1988 it was apparent that his intentions were to remain indefinitely and he used almost any available means to prolong his stay in the United States while 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 fact that the applicant had a Petition for Immigrant Worker (Form I-140) approved on his behalf

Any alien has the right to file a non-frivolous asylum application. The AAO finds that the applicant's application for asylum and subsequent denial of his asylum application are not unfavorable factors as noted in the director's decision. The AAO further finds that the applicant was entitled to exhaust all means available to him by law and therefore applying for benefits under the Act in an effort to legalize his status in the United States is not an unfavorable factor. Nor does the AAO find that he was living in the U.S. illegally for 10 years. His various applications and appeals conferred on him a status that allowed him to remain in the U.S. while they were pending.

In his decision the director indicates only one favorable factor for the applicant, the existence of an approved Form I-140. The AAO finds that the director failed to consider the other favorable factors including the fact that the applicant has no criminal history, has filed tax returns, as required by law, since 1989 and has presented favorable recommendations attesting to his good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of his authorized stay and his failure to depart the country after he was granted voluntary departure.

While the applicant's overstay of his initial authorized period of stay 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.