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U.S. Citizenship
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JUL 20 2004

FILE:



Office: VERMONT SERVICE CENTER

Date:

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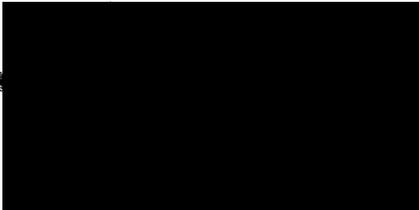
Applicant:



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 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 dismissed.

The applicant is a native and a citizen of the Dominican Republic who was present in the United States without a lawful admission or parole on or about October 4, 1986. On February 20, 1987, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act). 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 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) in order to travel to the United States and reside with his U.S. citizen spouse and children.

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 August 12, 2003.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens 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 . . . [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) 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.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal counsel submits a brief and an affidavit from the applicant's son. In his brief counsel asserts that Citizenship and Immigration Services (CIS) abused its discretion in denying the Form I-212 and failed to consider all the favorable factors, which outweigh the single negative factor of illegal entry in 1986.

Additionally in the brief and in the affidavits submitted it is stated that if the applicant were not permitted to reside in the United States his U.S. citizen spouse and children would suffer extreme hardship. Furthermore counsel asserts that CIS applied the wrong standard in the applicant's case because the Vermont Service Center failed to consider that the applicant departed the United States in 1999 and that his criminal offenses were dismissed and did not result in a conviction, and therefore do not denote poor moral character.

The AAO agrees with counsel and finds that since the applicant's arrests did not result in a conviction they should not be used as an adverse factor.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied.

On appeal, counsel submits a brief in which he states that the applicant's spouse [REDACTED] and children would suffer extreme hardship if the waiver application were denied. [REDACTED] states in an affidavit that she and her children would suffer extreme hardship if the applicant were not permitted to travel to the United States at this time. In addition she states that her health is failing because she has to work very hard to provide for her children and she suffers emotionally due to the pressure she is under in order to survive. Furthermore [REDACTED] states that her children are suffering emotionally and developmentally due to the applicant's absence from the United States and she is having a difficult time financially. No evidence has been provided to substantiate the claim that [REDACTED] health is in danger or that the applicant's financial contribution is critical [REDACTED] and her children's lifestyle or well-being.

The record of proceedings does not make it clear whether [REDACTED] and her children will relocate to the Dominican Republic if the Form I-212 is not approved. If [REDACTED] and her children were to relocate to the Dominican Republic to reside with the applicant it would be expected that some economic, linguistic and cultural difficulties would arise. No evidence exists that [REDACTED] and her children would not be able to adjust to life in the Dominican Republic if they were to relocate with the applicant.

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 the applicant's family 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.*

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.*

Counsel and [REDACTED] state that the applicant is presently in the Dominican Republic having departed in November 1999.

Based on this information the AAO finds that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more.

The record indicates that the applicant entered the United States without inspection in October 4, 1986. The applicant states that he departed the United States in November 1999. It was this departure that triggered his inadmissibility for unlawful presence. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until November 1999 when he departed the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Section 212(a)(9)(B) of the Act states, in pertinent part, that:

(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 of 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.

The AAO finds that the favorable factors in this case are the applicant's family ties to U.S. citizens (spouse and children) and the prospect of general hardship to the family.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States on or about October 4, 1986, his failure to depart the United States after a deportation order was issued by an Immigration Judge and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. The applicant has not 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 failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.