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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER, VT Date:

MAR 01 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]

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

PUBLIC COPY

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 Ethiopia admitted to the United States with a nonimmigrant visa on February 18, 1991 and remained in the United States beyond his authorized stay. The applicant applied for asylum on May 18, 1991, with the Immigration and Naturalization Service (now, Citizenship and Immigration Services, (CIS)). His application was denied on December 30, 1993 and an order of deportation was issued at that time. The applicant filed an appeal with the Board of Immigration Appeals, which was dismissed on August 31, 2000. He 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). The applicant married a naturalized U.S. citizen on November 29, 1995. On April 1, 1997 his spouse filed an I-130, Petition for Alien Relative and on March 17, 1999 the applicant filed an I-485, Application to Register Permanent Residence or to Adjust Status. The I-485 application was denied on March 9, 2001 as not properly filed since the applicant was under deportation proceedings and the Baltimore District office did not have jurisdiction over the I-485 application. 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 unfavorable factors in the applicant's case outweighed the favorable factors, and denied the application accordingly. *See Director Decision* dated February 24, 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 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.*

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.*

The director's decision states that the unfavorable factors in the applicant's case included his illegal entry to the United States on February 18, 1991, his failure to depart the country after a removal order was issued, his illegal stay and employment in the United States, his application for asylum, the denial of his asylum application and his marriage while in removal proceedings. The director concluded that the applicant's record exhibited a callous attitude toward violating immigration laws and that these factors outweighed the fact that the applicant had an approved Form I-130, is the father of a U.S. citizen child and has been residing in the United States for almost 13 years with no criminal history.

The record reflects that the applicant was admitted into the United States on February 18, 1991, in possession of a valid nonimmigrant visa and therefore the AAO finds that the director erred in his statement that the applicant entered the United States illegally and it should not be considered as an unfavorable factor. Furthermore, the applicant had a right to file a non-frivolous asylum application and the AAO finds that his application for asylum and the subsequent denial of his asylum application are not unfavorable factors as noted in the district director's decision.

The AAO thus finds that the favorable factors in this case include the fact that the applicant is the father of a U.S. citizen child, has an approved I-130 relative petition approved on his behalf and has no criminal record since entering the United States in 1991.

The AAO finds that the unfavorable factors in this case include the applicant's failure to depart the country after a final removal order was issued and periods of unlawful presence and unauthorized employment.

While the applicant's failure to depart the U.S. after a final removal order was issued and his 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 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.