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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: SAN ANTONIO, TEXAS Date: MAR 29 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.

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 Interim District Director, San Antonio, Texas, 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 Mexico who was admitted to the United States as a lawful permanent resident on March 18, 1963. On August 6, 1996, the applicant was convicted in the 38th Judicial District Court of Medina County, Texas of the offense of driving while intoxicated ("DWI") and was sentenced to confinement for a period of 7 years. The applicant was placed in removal proceedings and an Immigration Judge determined that based on the evidence provided the applicant had been convicted of an aggravated felony and he was statutorily ineligible for any form of relief under the INA. The applicant was order removed to Mexico under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), and was removed on October 13, 2000. The applicant is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 Interim District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the application accordingly. *See Interim District Director Decision* dated April 14, 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.*

On appeal counsel asserts that the applicant is not removable under section 237(a)(2)(A)(iii) of the Act as an aggravated felon and that his application to reapply for admission into the United States after removal should be approved. Counsel cites *Matter of Ramos* 32 I&N Dec. 336 (BIA 2002) which overruled *Matter of Puente,* Interim Decision 3412 (BIA 1999) in which the individual was convicted under the enhanced offenses and penalties provision of section 49.09(b) of the Texas Penal Code Annotated, which rendered a misdemeanor DWI offense a felony in the third degree.

In the instant case the applicant was convicted under section 49.09(b) of the Texas Penal Code Annotated and therefore based on the above facts it is clearly shown that the applicant is not inadmissible under section 237(a)(2)(A)(iii) of the Act.

The director's decision states that the unfavorable factor in the applicant's case is his unwillingness to abide by and follow the laws of the Untied States. The director concluded that the applicant's record exhibited a callous attitude toward violating United States laws and regulations and that this factor outweighed the fact that the applicant is involved in an informal marriage with a U.S. citizen since 1979 and had been residing in the United States for almost 37 years prior to his removal to Mexico.

The AAO finds that the favorable factors in this case include the fact that the applicant has been a lawful permanent resident for 37 years and has no criminal record other than his conviction for DWI. Other favorable facts are the applicant's 24-year-old informal marriage to a U.S. citizen, his extensive family ties in

the United States and his willingness to follow immigration law and regulations in order to be able to return to the United States.

The AAO finds that the unfavorable factors in this case is the applicant's convictions of DWI, which although they should not be condoned, do not render the applicant an aggravated felon.

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. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.