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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

H4

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 18 2004

IN RE: Applicant: [redacted]

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:

[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 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 Ecuador who was present in the United States without a lawful admission or parole on June 29, 1979. On June 30, 1979, the applicant was served an Order to Show Cause for a hearing before an Immigration Judge and he was released on a $2,000 bond. On September 25, 1979, the applicant was granted voluntary departure in lieu of deportation until November 25, 1979. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation was issued on February 4, 1980. The applicant's failure to depart on or prior to November 25, 1979, changed the voluntary departure order to an order of deportation. On November 18, 1984, the applicant was removed from the United States at JFK International Airport. The record reflects that the applicant reentered the United States in March 1986, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of Act, 8 U.S.C. § 1326. Furthermore the record reveals that the applicant departed the United States in February 1987 and reentered in April 1988, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of Act. The applicant is a beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen father. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He now 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 and reside with his family.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated November 14, 2003.

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

(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, 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 aliens' 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, in which he states that the positive factors in the applicant's case outnumber the negative ones. Counsel states that the applicant's initial entry into the United States was in 1979 at which time the applicant was only 18 years of age and that his failure to depart the United States after he was granted voluntary departure was because he had requested an extension but did not receive a response from the Immigration and Naturalization Service ((INS) now Citizenship and Immigration Services (CIS)). In addition counsel states that the applicant traveled to Ecuador in 1987 in order to visit his terminally ill mother and that although he was convicted for disorderly conduct, under New York State Penal Law this is classified as a "violation" which is less than a misdemeanor. Furthermore counsel states that the Director erred in stating that the applicant failed to notify INS of his change of address because he has been at the same address for the past eight years.

The facts in this matter are that the applicant entered without inspection in 1979, he failed to depart after he was granted voluntary departure and he reentered illegally twice after INS removed him. Counsel did not submit any documentation to show that the applicant had indeed applied for an extension of his voluntary departure order. The record of proceeding reveals that the applicant has at least three different addresses recorded in his Service file but did not inform the Service of the changes as required pursuant to section 241(a)(3)(A) of the Act.

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 favorable factors in this case include the applicant's family tie to a U.S. citizen, his father, and the approval of a petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States in June 1979, his failure to depart the United States after he was granted voluntary departure by an Immigration Judge, his illegal re-entry subsequent to his November 18, 1984, removal, his unlawful reentry without permission in April 1988, after he visited his sick mother, his conviction for disorderly conduct, his employment without authorization, his lengthy presence in the United States without a lawful admission or parole and his continued disregard and abuse of the laws of this country. 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 he 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.