

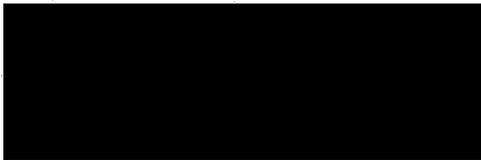
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U.S. Citizenship
and Immigration
Services



HL

FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **NOV 18 2004**

IN RE:

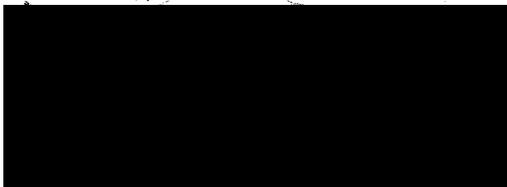
Applicant:



APPLICATION:

Application for Permission to Reapply for Admission after Removal into the United States after Deportation 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 Nicaragua who was present in the United States without a lawful admission or parole on March 25, 1987, and on June 29, 1989, he applied for asylum. On October 11, 1989, his application for asylum was denied and an Order to Show Cause was issued. On August 8, 1990, an Immigration Judge found the applicant deportable and granted him voluntary departure until June 8, 1991, in lieu of deportation. The applicant applied multiple times for an extension of his voluntary departure order, which were granted until August 26, 1993. The applicant filed a motion to reopen and motion to stay deportation that was denied by an Immigration Judge on September 29, 1993. An appeal with the Board of Immigration Appeals (BIA) was dismissed on February 10, 1994. On June 25, 1994, a Warrant of Deportation was issued. The applicant's failure to depart on or prior to August 26, 1993, changed the voluntary departure order to an order of deportation. 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 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) in order to remain in the United States and reside with his Lawful Permanent Resident (LPR) mother 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 March 2, 2004.

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

(A) Certain alien 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 alien's reapplying for admission.

On appeal, counsel submits a brief, in which he states that the applicant takes care of his LPR mother and children, he is a person of good moral character and does not have any criminal record since his entry into the United States. Counsel states that if the applicant were not permitted to adjust his status in the United States his family would suffer extreme hardship. In addition counsel states that the applicant is eligible to adjust his

status through both the NACARA program and a petition filed on his behalf by his LPR mother. Furthermore counsel states that the applicant's actions do not show disregard or abuse of the laws of the United States.

Counsel states that the applicant's last extension to time in which to depart the United States was granted to him until March 8, 1993. The record or proceedings show that the applicant was granted an extension to depart the United States until August 26, 1993.

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 is denied. No evidence has been provided to substantiate the claim that the applicant is the sole provider for his LPR mother or his children and that his financial contribution is critical to his mother's and children's lifestyle or well-being.

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 AAO finds that the favorable factors in this case are the applicant's family ties to LPR's, mother and children, the absence of a criminal record and the approval of a petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States on or about March 25, 1987, his failure to depart the United States after he was granted voluntary

departure, his failure to depart after a final removal order was issued, his employment without authorization 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.