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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **AUG 15 2005**

IN RE:

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:

SELF-REPRESENTED

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 application for permission to reapply for admission after removal was denied by the Director, California 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 El Salvador who was present in the United States without a lawful admission or parole on or about December 9, 1986. The applicant applied for asylum in April 1987 with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)). The record reflects that on March 8, 1988, an Immigration Judge granted the applicant voluntary departure until November 1, 1988. 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). The applicant applied for and received Temporary Protective Status (TPS), and was issued employment authorization cards. On August 30, 1999, the applicant applied for relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA). His application was denied because of his outstanding order of deportation. 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) in order to remain in the United States and reside with his Lawful Permanent Resident (LPR) spouse, children and his U.S. citizen children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Director's Decision* dated October 29, 2004.

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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (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, with limited exceptions, 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 the applicant states that he did not recognize the magnitude of the document he was signing when he signed his voluntary departure order. In addition he states that he did not leave the United States because he feared for his life and the life of his wife and children due to the war in his country. Furthermore the applicant states that he has no criminal record since entering the United States, submits letters of recommendations from friends, regarding his character and copies of his children's' birth certificates and LPR cards.

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 for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

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 condone the alien's acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

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 his decision the Director states that the unfavorable factors in the applicant's case are his illegal entry on or about December 9, 1986, his failure to depart the United States after he was granted voluntary departure, and his disregard for, and abuse of, the laws of this country. The Director concluded that these factors outweighed the fact that the applicant is married to a LPR and has two LPR and two U.S. citizen children.

The AAO finds that the Director failed to consider the other favorable factors, including the absence of any criminal record since entering the United States, the prospect of general hardship to his family, the fact that he filed tax returns as required by law and the favorable letters of recommendation attesting to his good moral character. Additionally the applicant applied for and received TPS and was issued employment authorization

cards. Furthermore the AAO does not find that the applicant has been living in the United States illegally for such a long period time. The applicant filed a non-frivolous asylum application, TPS applications and a NACARA application. His various applications conferred on him a status that allowed him to remain in the United States while they were pending.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection and his failure to depart the country after he was granted voluntary departure.

While the applicant's entry without inspection in the United States and his subsequent failure to depart the United States after being granted voluntary departure 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.