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



U.S. Citizenship
and Immigration
Services



H4

FILE:



Office: HARLINGEN, TEXAS

Date: **JAN 31 2005**

IN RE:

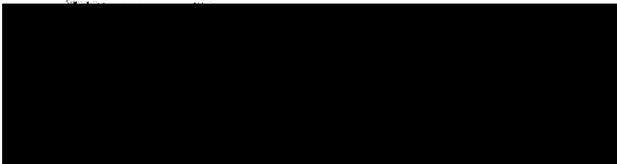
Applicant:



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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 District Director Harlingen, 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 Honduras who was present in the United States without a lawful admission or parole on September 14, 1997. The applicant was served with a Notice to Appear (NTA) for a removal hearing. On February 3, 1998, the applicant failed to appear for a removal hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1182 (a)(6)(A)(i). The applicant failed to surrender for removal, and a motion to reopen his immigration court hearing was denied on April 23, 2003, by an Immigration Judge. On May 2, 2003, the Interim District Director for Immigration and Customs Enforcement (ICE) issued a warrant of removal and the applicant was removed from the United States on May 15, 2003. He 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 is the beneficiary of an approved petition for alien relative filed by his U.S. citizen spouse. 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 travel to the United States and reside with his U.S. citizen spouse, child and stepchildren.

The District Director determined that the applicant has no extenuating circumstances that merit the granting of the application. In addition the District Director determined that he is not eligible to immigrate or adjust status to that of a lawful permanent resident of the United States prior to February 4, 2008, and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See District Director's Decision* dated July 8, 2004.

The District Director based his statement that the applicant cannot adjust his status to that of a lawful permanent resident on section 240(b)(7) of the Act, which states:

Limitation on discretionary relief for failure to appear. - Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 239(a), was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 240A, 240B, 245, 248, or 249 for a period of 10 years after the date of the entry of the final order of removal.

The sections of the Act under which the applicant is not eligible for relief pursuant to section 240(b)(7) of the Act are for cancellation of removal; adjustment of status; voluntary departure; adjustment of status of nonimmigrant to that of person admitted for permanent residence, change of nonimmigrant classification and admission for permanent residence in the case of certain aliens who entered the United States prior to July 1, 1924, or January 1, 1972. Section 240(b)(7) of the Act does not preclude an individual to immigrate to the United States if he applies for an immigrant visa at a United States embassy overseas and is found admissible, or if found inadmissible the applicant has obtained the necessary waivers.

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 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 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, letters of recommendation from friends and family regarding the applicant's character, copies of the applicant's child's birth certificate, his marriage certificate and medical documentation regarding his spouse's and stepchild's medical conditions. In his brief counsel states that the applicant's spouse and children would suffer extreme hardship if the waiver application were denied. In addition counsel states that the applicant is a person of good moral character, has no criminal record, has been gainfully employed since his arrival in the United States and has provided financial and emotional support to his spouse, child and stepchildren. Furthermore counsel states that the applicant's spouse suffers from depression and has increased her medication since the applicant's removal. The applicant's stepchild suffers from several medical conditions and according to the medical documentation submitted the child's condition may have worsened due to the applicant's absence.

Counsel states that the applicant's failure to attend his removal hearing was because he did not receive a hearing notice due to the absence of a mailing address and blames the Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services (USCIS)) for not obtaining an address from the applicant.

The AAO finds counsel's statement not persuasive since on September 14, 1997, the applicant was served an NTA in person and he was advised of his responsibility to inform the Service of his full mailing address. The NTA further advised the applicant that if he did not provide an address, a notice of his hearing was not required to be sent to him and that a hearing in absentia could be held.

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.*

The AAO finds that the favorable factors in this case include the applicant's family ties in the United States, his spouse, child and stepchildren, the approval of a petition for alien relative, the absence of any criminal record since entering the United States, the numerous favorable letters of recommendation from relatives and friends attesting to his good moral character and the hardship experienced by his family.

The unfavorable factors in this case include the applicant's failure to appear for a removal proceeding, his failure to depart the United States after a final removal order was issued by an Immigration Judge, his employment without authorization and his lengthy presence in the United States without a lawful admission or parole.

While the applicant's failure to attend a removal hearing, and his unauthorized employment and stay in the United States are serious matters that cannot be condoned, the AAO finds that in view of the humanitarian aspects in this matter, specifically regarding the applicant's stepchild's medical condition, 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.