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

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H4

FILE:



Office: VERMONT SERVICE CENTER

Date:

JUL 08 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after deportation or removal was denied by the Director, Vermont Service Center and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a motion to reconsider.¹ The motion will be granted and the order dismissing the appeal will be affirmed.

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 May 22, 1997. On May 29, 1997, a Notice to Appear (NTA) was issued for a removal hearing before an Immigration Judge. On July 20, 1998, the applicant failed to appear for a removal hearing and he was subsequently ordered removed in absentia by an Immigration Judge. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was returned to the Immigration Court on December 20, 1998, because of lack of jurisdiction. On November 15, 2001, an Immigration Judge reaffirmed the prior order of removal. 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). 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 U.S. citizen father.

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 Deportation or Removal (Form I-212) accordingly. See *Director's Decision* dated September 20, 2002. The decision was affirmed by the AAO on appeal. See *AAO Decision*, dated May 23, 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 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 continuous territory, the

¹ The AAO notes that a Form EOIR-29 Notice of Appeal to the Board of Immigration Appeals (BIA) was submitted indicating an appeal of the AAO decision of May 23, 2003. It is unclear whether counsel meant to file the appeal with the BIA or used an incorrect form to file a motion with the AAO. However, as a cover letter addressed to the AAO was attached to the EOIR-29, the AAO will accept this as a motion. Further, it is noted that AAO decisions cannot be appealed to the BIA.

Attorney General has consented to the aliens' 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 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 motion, counsel states that the applicant never received the NTA because the notice was forwarded to the wrong address. In addition counsel states that even after the applicant was granted Temporary Protected Status (TPS) he was ordered to appear for deportation. Counsel further states that the government erroneously claimed that the applicant failed to appear on February 8, 2003, for an interview with the Immigration and Naturalization Service (INS). Counsel states that he and the applicant appeared at an INS office on February 8, 2003 for an interview regarding the applicant's TPS eligibility and that interview was rescheduled for a later date. Finally counsel states that the equities that exist are in the applicant's favor.

The AAO notes that if the applicant did not receive correspondence regarding his removal proceedings this was not an error by INS. The NTA was forwarded to the address provided to the Service by the applicant on the day of his apprehension. Neither the Director nor the AAO mentioned in their decisions that the applicant failed to appear for an interview on February 8, 2003 so it is unclear what this statement by counsel refers to. The proceeding in the present case is limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act, to be waived and therefore the AAO will not discuss the issue of whether the applicant was properly ordered removed as this is not within the AAO's jurisdiction.

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 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.*

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 favorable factors in this matter are the applicant's family ties to U.S. citizens and lawful permanent residents, his father and siblings, the approval of a petition for alien relative, and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection, his failure to appear for a removal hearing, his failure to depart the country after a final removal order was issued, 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 issues in this matter were thoroughly discussed by the Director and the AAO in their prior decisions. The applicant in this case failed to establish 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 motion to reconsider will be granted and the prior AAO's decision dismissing the appeal will be affirmed.

ORDER: The order of May 23, 2003, dismissing the appeal is affirmed.