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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUL 13 2005
EAC-00-247-50525

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: 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 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. An appeal was dismissed by the Administrative Appeals Office (AAO) on December 11, 2001. The AAO order was affirmed on April 2, 2002, subsequent to a motion to reopen and reconsider. On June 12, 2003, subsequent to a second motion to reopen and reconsider the AAO remanded the matter to the Director for further action. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions will be withdrawn and the application approved.

The applicant is a native and a citizen of Guatemala who was present in the United States without a lawful admission or parole on June 1, 1991. On August 26, 1991, the applicant applied for asylum. On April 19, 1999, an Immigration Officer interviewed the applicant for asylum status. His application was denied and a Notice to Appear was issued on May 3, 1999. On August 6, 1999, the applicant failed to appear for a removal hearing and he was subsequently ordered removed in absentia by an Immigration Judge pursuant to section 241(a)(6)(A)(i) of the Immigration and Nationality Act (the Act). 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 is a derivative beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his spouse's father. 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 spouse 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 Decision* dated January 30, 2001.

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.

The AAO remanded the matter to the Director in order to obtain evidence that shows that the approval of Forms I-212 filed by the applicant's wife and daughter were based on identical facts. The Director forwarded all Service files to the AAO. A review of the files reveals that the applicant's and one of his daughter's Forms I-212 were denied while his spouse's and his other daughter's Forms I-212 were approved on February 8, 2001. It is further noted that all four files contain the same information and all four individuals were ordered removed in absentia on August 9, 1999.

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 removal; the recency of the removal; 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 existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and others; and the need for the applicant's services in the United States.

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.*

In his decision the Director states that the unfavorable factors in the applicant's case are his entry without a lawful admission or parole, the denial of his asylum application, his failure to attend his removal proceedings, his failure to depart after a final removal order was issued, his lengthy presence in the United States without a lawful admission or parole and the absence of an immigrant visa having been approved on his behalf. The Director concluded that these factors outweighed the fact that the applicant is the father of a U.S. citizen.

The AAO finds that the applicant's application for asylum and subsequent denial of his asylum application are not unfavorable factors as noted in the Director's decision. Any alien has the right to file a non-frivolous asylum application. The AAO further finds that the applicant was not living in the U.S. illegally for nine years as noted by the Director in his decision. His application for asylum submitted on August 26, 1991, conferred on him a status that allowed him to remain in the U.S. while the applicant was pending.

Based on the motion to reopen and the review of all the files related to the applicant and his family, the AAO finds the following to be favorable factors. The applicant is a derivative beneficiary of an approved Form I-130, his spouse's and child's Forms I-212 have been approved, the absence of any criminal record since entering the United States, the numerous favorable recommendations from relatives and friends and the prospect of general hardship to his family.

While the applicant's unlawful entry and his failure to depart the United States after a final removal order was issued are very serious matters that 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 adverse factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the motion to reconsider will be granted, previous decisions withdrawn and the application approved.

ORDER: The motion is granted and the application approved.