



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 18 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 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 Mexico who entered the United States without a lawful admission or parole on or January 15, 1988, and on March 5, 1997, he applied for asylum. The applicant failed to appear for an interview for asylum status and on November 12, 1997, a Notice to Appear (NTA) for a removal hearing before an Immigration Judge was issued. The record reflects that on October 18, 1999, an Immigration Judge granted the applicant voluntary departure until February 15, 2000, in lieu of removal. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to February 15, 2000, changed the voluntary departure order to an order of removal. The applicant is 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 is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140). 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 child.

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 August 2, 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, counsel submits a statement from the applicant. In his statement the applicant states that he was brought to the United States when he was 13 years old and has spent all his adult life here. In addition he states is married and has a U.S. citizen daughter, he is the main source of income for his family and he would not be able to find equitable employment in Mexico in order to support his family. Furthermore he states that he did not attend his asylum interview because he never received an appointment letter and he withdrew his asylum application due to insufficient physical evidence and funds to support his claim.

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 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 Director's decision states that the unfavorable factors in the applicant's case include his failure to attend his asylum interview, the withdrawal of his asylum application, the issuance of a NTA, the rescheduling of his hearing before an Immigration Judge and his failure to depart the United States after he was granted voluntary departure.

The Director concluded that these factors outweighed the fact that the applicant has a U.S. citizen child, has been awarded a good conduct certificate from the New York City Police Department and the fact that he was supported his family financially

As noted above the applicant claims that he never received an appointment letter for his asylum interview and he withdrew his asylum application due to lack of sufficient evidence and money. The applicant had the right to file a non-frivolous asylum application. The AAO finds that the fact that the applicant did not appear for an asylum interview is an unfavorable factor, however, the fact that he appeared for a removal hearing is a favorable factor on the applicant's behalf. It is unclear from the record of proceeding if the applicant caused the rescheduling of the removal hearing and therefore it cannot be considered an unfavorable factor.

The AAO finds that the Director failed to consider as favorable factors the existence of an approved Form I-140, the favorable recommendations attesting to his good moral character, the need for the applicant's presence to assist his child and the prospect of general hardship to the family.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection his failure to depart the country after he was granted voluntary departure and his lengthy presence in the United States without a lawful admission or parole. It is noted that he was a minor for part of that time, between the ages of 14 and 18, and his application for asylum status and his removal proceedings along with the voluntary departure order conferred on him a status that allowed him to remain in the United States while they were pending.

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.