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FILE:  Office: VERMONT SERVICE CENTER Date:

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 removal was denied by the Director, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who entered the United States on or about May 21, 1985, without inspection. On January 23, 1989, the applicant was granted voluntary departure in lieu of deportation until July 23, 1989. On August 21, 1989, the applicant was removed from the United States at government expense since he failed to surrender for removal or depart from the United States on or prior to July 23, 1989. The applicant's failure to depart on or prior to July 23, 1989, changed the voluntary departure order to an order of deportation. The record reflects that the applicant reentered the United States in March 1990, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1326. The applicant is 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 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 Removal (Form I-212) accordingly. See *Director's Decision* dated February 5, 2003.

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 aliens' reapplying for admission.

A review of the 1996 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 appeal, counsel submits a statement from the applicant in which he states that he first entered the United States without inspection on or about January 20, 1989, that in July 1989 he was detained by the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) in Baltimore, Maryland, he was granted voluntary departure and was returned to Mexico. Counsel states that on or about August 29, 2002, his office contacted the District office in Baltimore Maryland and confirmed that the applicant was in fact given voluntary departure and departed the United States the next day. In addition, in his statement the applicant states that he reentered the United States without inspection in March 1990, and he used an "invented" social security number in order to gain employment to support himself and his family in Mexico. Finally the applicant states that he has a U.S. citizen child, he is a person of good moral character, he is the beneficiary of an approved Form I-140 and based on the above he requests reconsideration of the Service's denial of his Form I-212.

The applicant's statements are not persuasive. The applicant states that he first entered the United States on or about January 20, 1989. Form I-213, Record of Deportable Alien, reveals that the applicant first entered the United States on or about May 21, 1985. In a sworn statement taken at the Baltimore District office on January 17, 1989, the applicant freely admitted working in a construction company from about May 1987 to October 1987, that he applied for amnesty on or about May 4, 1988, and that he had used a social security card which he bought from an unknown individual. In addition, the record of proceedings reveals on January 23, 1989, the applicant was granted voluntary departure and employment authorization until July 23, 1989. Counsel states that his office contacted the Baltimore District office which confirmed that the applicant was granted voluntary departure and departed the United States the next day, but does not mention the date of the applicant's departure, nor does he provide any documentary evidence of the applicant's departure. Documents in the record of proceedings reveal that the applicant was detained on August 18, 1989, and was removed to Mexico on August 21, 1989, after his voluntary departure order had expired.

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 the applicant's family 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.*

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.*

The favorable factors in this matter are the applicant's family tie to his U.S. citizen child, the approval of a Form I-140 and the favorable recommendations regarding his character.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States in May 1985, his failure to depart the United States after he was granted voluntary departure, his illegal re-entry subsequent to his August 21, 1989 deportation, his employment without authorization 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 applicant has not established 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 appeal will be dismissed.

ORDER: The appeal is dismissed.