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U.S. Citizenship  
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Services

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FILE:



Office: SAN ANTONIO, TEXAS

Date:

**MAR 08 2005**

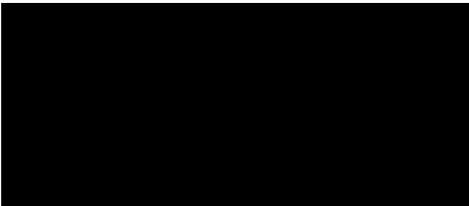
IN RE:

Applicant:



APPLICATION: Application for Permission to Reapply for Admission after Removal into the United States after Deportation under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(ii)

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 Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the District Director, San Antonio, 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 January 6, 1999. The applicant was served a Notice to Appear for a hearing before an Immigration Judge and she was released on a \$7,500 bond. On February 23, 2000, an Immigration Judge granted the applicant voluntary departure in lieu of deportation until June 22, 2000. The applicant failed to surrender for removal or depart from the United States and a Warrant of Removal was issued on September 29, 2000. The applicant's failure to depart on or prior to June 22, 2000, changed the voluntary departure order to an order of removal. The applicant married a U.S. citizen on May 20, 2000. She is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). She now 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 her U.S. citizen spouse and Lawful Permanent Resident (LPR) children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the application accordingly. *See District Director's Decision* dated February 8, 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 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 Attorney General has consented to the alien's reapplying for admission.

On appeal, counsel states that the applicant received ineffective assistance of counsel when she sought representation prior to the expiration of her voluntary departure date. The applicant was advised to file for Temporary Protected Status (TPS) when she should have been seeking an extension of her voluntary departure date. Counsel states that the applicant has filed a complaint with the State Bar of Texas and he intends to seek reopening of the applicant's removal case before the Immigration Court. Counsel further states that the applicant has no criminal record other than her illegal entry and failure to depart pursuant to her grant of voluntary departure.

The AAO does not have jurisdiction over the circumstances surrounding the applicant's voluntary departure or her application to reopen her removal case before an Immigration Court due to ineffective assistance of counsel. The fact remains that the applicant did not depart on or before June 22, 2000, the date her voluntary departure expired and she is therefore inadmissible under section 212(a)(9)(A)(ii) of the Act. The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal under section 212(a)(9)(A)(iii) of the Act. That is the only issue that will be discussed.

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 District Director's decision states that the unfavorable factor in the applicant's case is that she has been residing in the United States without a lawful immigration status for approximately four years.

The District Director concluded that this outweighed the applicant's family ties in the United States.

The AAO does not find that the applicant has been living in the United States illegally for the period of time stated by the District Director. The applicant was issued a Notice to Appear on January 7, 1999, and was not granted a hearing until February 23, 2000. She filed a Form I-212 on September 29, 2001, based on her marriage to a U.S. citizen. The applicant was entitled to exhaust all means available to her by law in an effort to legalize her status in the United States. The applicant was out of status from June 22, 2000, the date her voluntary departure expired until September 29, 2001 the date she filed Form I-212. The Notice to Appear and her Form I-212 application conferred on her a status that allowed her to remain in the United States while they were pending.

The AAO finds that the District Director failed to consider the other favorable factors including the fact that the applicant has two Legal Permanent Resident children, has an approved Petition for Alien Relative (Form I-130) and has no criminal history since entering the United States.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection and her failure to depart the country after she was granted voluntary departure.

While the applicant's entry without inspection in the United States and her 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.