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U.S. Citizenship
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Services

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FILE:



Office: SAN ANTONIO, TEXAS

Date: NOV 10 2005

IN RE:

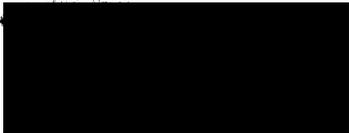
Applicant:



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 into the United States after Deportation or Removal (Form I-212) 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 England who adjusted his status to that of a lawful permanent resident on July 29, 1991. On April 15, 1997, in the 290th District Court of Bexar County, Texas, the applicant was convicted of the offense of Driving While Intoxicated (“DWI”) 3rd. The applicant was sentenced to three years imprisonment suspended and he was placed on community supervision for a period of five years. The applicant was placed in removal proceedings and on February 4, 1999, an Immigration Judge ordered him removed to England pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony at any time after admission. The applicant filed an appeal with the Board of Immigration Appeals (BIA) that was dismissed on October 12, 1999. On November 22, 1999, the applicant was removed to England. The applicant 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 travel to the United States and reside with his U.S. citizen spouse and child.

The District Director determined that the unfavorable factors in the applicant’s case outweighed the favorable factors, and denied the Form I-212 accordingly. *See District Director Decision* dated October 29, 2001.

On appeal, counsel states that the District Director abused his discretion in evaluating the application and misapplied the favorable factors in the applicant’s case and in some case totally ignored factors. Counsel further states that the Fifth Circuit Court of Appeals has held that the applicant’s conviction for DWI 3rd is no longer considered to be an aggravated felony. In addition, counsel requests an oral argument in order to address the issues that surround application.

The regulation at 8 C.F.R. § 103.3(b) provide that the affected party must explain in writing why oral argument is necessary. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

In *United States v. Chapa-Garza* 243 F.3d 921 (5th Cir. 2001) the Fifth Circuit Court of Appeals ruled that a conviction for driving while intoxicated is not a “crime of violence” under 18 U.S.C. § 16 and hence is not an “aggravated felony” under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Since this case arises in the Fifth Circuit, *Chapa-Garza, supra*, is controlling.

The AAO notes that the applicant was deported based on the aggravated felony charge. This office does not have jurisdiction over the Immigration Judge’s ruling and cannot change the ruling, despite the Fifth Circuit Court decision. The applicant was deportable under section 237(a)(2)(A)(iii) of the Act at the time he was removed from the United States on November 22, 1999. Therefore he is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act. 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.

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.

The District Director's decision states that the unfavorable factors in the applicant's case are his convictions of DWI, his arrests for criminal mischief, criminal trespassing, assault causing bodily injury, failure to identify a fugitive from justice and theft by check, and the fact that his probation for the DWI conviction was revoked due to violation of the conditions of probation. The District Director states that such a history shows a total disregard for the safety for the persons in this country, a complete contempt of the law of this nation, a total disregard for the rights of others, and a lack of good moral character. In addition the District Director states that the applicant does not have a labor certificate issued to him in order to show that he has skills or abilities that could aid the economy of the United States.

The District Director concluded that the applicant's record outweighed the fact that the applicant is married to a U.S. citizen and has a U.S. citizen child.

On appeal counsel states that the applicant's arrests for criminal mischief and assault were dismissed and the check for which he was charged for theft by check was paid in full. Counsel further states that the trespass charge was a lapse in judgment by the applicant but he does not address the arrest for failure to identify a fugitive from justice.

Counsel submits a copy of a document from the Office of the Criminal District Attorney, Check Section, that shows that a check has been paid by the applicant. This document does not show if the applicant was convicted for theft by check and then paid the check or if the matter was dismissed. In addition, counsel does not submit any documentary evidence that the applicant's arrests for criminal mischief and assault were dismissed nor did he submit any documentation regarding the applicant's arrests for trespassing and failure to identify a fugitive from justice.

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 AAO finds that the favorable factors in this case include the fact that the applicant had been residing legally in the United States for over eight years prior to the order of removal, his 14-year-old marriage to a U.S. citizen, the fact that he is the father of a U.S. citizen child and the prospect of general hardship to his family. In addition, the AAO does not find that the absence of a labor certificate on behalf of the applicant is an unfavorable factor. In contrast, the record of proceeding reveals that he applicant has useful skills that could aid the economy of the United States. The applicant is married to a U.S. citizen and does not need a labor certificate to be filed on his behalf in order to be eligible for an immigrant visa. Finally, there is nothing in the record of proceeding to indicate that the applicant has not been rehabilitated.

The AAO finds that the unfavorable factors in this case are the applicant's arrests and convictions of DWI, which although they cannot be condoned, do not render the applicant an aggravated felon.

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. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.