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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: SEP 07 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:

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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California 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 was convicted of the offense of possession for sale of a narcotic controlled substance, to wit: methamphetamine. On July 7, 1999, the applicant was served with a Notice to Appear (NTA) for a removal hearing before an Immigration Judge. On July 15, 1999, an Immigration Judge ordered the applicant removed from the United States 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 and 237(a)(2)(B)(i) of the Act 8 U.S.C. § 1227(a)(2)(B)(i), for having committed an act in violation of a law or regulation relating to a controlled substance. Subsequently, on July 23, 1999, the applicant was removed to Mexico. The applicant is inadmissible to the United States because he falls within the purview of sections 212(a)(2)(A)(i)(II), and 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) and 8 U.S.C. § 1182(a)(9)(A)(ii). 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 travel to the United States as a nonimmigrant visitor.

The Director determined that the applicant is not eligible for any exception or waiver under the Act and that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the applicant's Form I-212 accordingly. *See Director's Decision* dated September 27, 2004.

The AAO finds that the Director erred in his decision stating that the applicant is not eligible for any exception or waiver under the Act. The applicant in the present case filed a Form I-212 in order to be eligible to apply for a non-immigrant visa, not an immigrant visa. If the applicant's Form I-212 were to be granted he would be eligible to file a waiver of his inadmissibility pursuant to section 212(d)(3) of the Act.

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 record of proceedings reveals that on November 5, 1998, in the Superior Court of California, County of Riverside, the applicant was convicted of the offense of possession for sale of a narcotic controlled substance, to wit: methamphetamine. The applicant was sentenced to 16 months of imprisonment.

Based on the above conviction the applicant is clearly inadmissible under section 212(a)(2)(A)(i)(II) of the Act, for having been convicted of a violation of any law or regulation relating to a controlled substance.

Section 101(a)(43) of the Act defines the term "aggravated felony":

(B) illicit trafficking in controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)

In the instant case the applicant's inadmissibility is an aggravated felony for immigration purposes.

On appeal, the applicant states that he wishes to visit the United States in order to visit his parents and his U.S. citizen child. In addition he states that he needs to reenter the United States in order to be able ship and sell cattle in Texas. The applicant states that he never committed a crime and when he was arrested, he was young and scared and his attorney advised him to accept the 16-month imprisonment. Further, the appeal, filed on November 19, 2004, stated that the applicant would be submitting a brief and/or evidence to the AAO within 60 days. To date, more than eight months later, no documentation has been received by the AAO.

The AAO does not have jurisdiction over the circumstances surrounding the applicant's conviction and sentencing. The fact remains that the applicant was convicted of a crime and was removed from the United States. He is therefore inadmissible under 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.

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 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 favorable factors in this matter are the applicant's family ties to lawful permanent residents and a U.S. citizen, his parents and his child.

The AAO finds that the unfavorable factors in this case include the applicant's criminal history and his removal from the United States as an aggravated felon.

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 he 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.