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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

SEP 16 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 Director, California Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the AAO order dismissing the appeal will be withdrawn, the appeal will be sustained and the application approved.

The applicant is a native and citizen of Mexico who entered the United States without a lawful admission or parole on or about November 11, 1989. The applicant applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)) on April 12, 1993. On May 24, 1993, an Immigration Officer interviewed the applicant for asylum status. His application was denied and an Order to Show Cause for a hearing before an Immigration Judge was issued on February 9, 1994. The record reflects that on June 7, 1994, an Immigration Judge granted the applicant voluntary departure until March 7, 1995, 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 March 7, 1995, changed the voluntary departure order to an order of removal. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on June 1, 1995. On October 19, 1995, the applicant was apprehended and removed to Mexico pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection. The record reflects that the applicant reentered the United States on an unknown date after his deportation without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of 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 children.

The Director determined that an advance approval of the applicant's Form I-212 was inappropriate because once the applicant departed the United States he would be inadmissible pursuant to 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. The Director denied the Form I-212 accordingly. *See Director's Decision* dated May 7, 2003. On appeal the AAO found that the Director erred in his decision finding the applicant inadmissible under section 212(a)(9)(B) of the Act. The AAO determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and dismissed the appeal accordingly. *See AAO Decision*, dated December 12, 2003.

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.

On motion, counsel submits a brief in which he states that the applicant's removal from the United States would cause severe hardship to his spouse, his three U.S. citizen children, his parents and his siblings. Counsel submits copies of the children's birth certificates, a copy of the applicant's marriage certificate, letters and records from the applicant's children's teachers and school, verification of the applicant's employment, a copy of the applicant's property deed, a copy of the applicant's health benefits, copies of the applicant's siblings legal residency in the United States, tax returns, proof of no criminal record and letters of recommendation regarding the applicant's good moral character. In his brief counsel states that the applicant's three U.S. citizen children were born in the United States and have lived in this country all their lives. In addition counsel states that the children do not know how to read or write in Spanish and a change of environment will have a devastating effect on their academic progress. Furthermore counsel states that one of the applicant's children is undergoing orthodontic treatment that must be continued. In his brief counsel emphasizes the hardship to the applicant and his family as set out in *Matter of O-J-O*, Interim Decision 3280 (BIA 1996), in *Matter of Anderson*, Interim Decision 596, 597 (BIA 1978) and other decisions by the Ninth Circuit Court of Appeals.

Matter of O-J-O and *Matter of Anderson* as well as other case law referred to by counsel dealt with suspension of deportation where extreme hardship is taken into consideration. Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant seeking permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied.

While there is no level of hardship mentioned in the Act, the AAO finds that if the applicant were removed to Mexico his U.S. citizen children would suffer hardship since they have lived their entire lives in the United States and are completely integrated into their American lifestyles. The AAO notes that the applicant's spouse and parents do not have legal status in the United States and therefore this office will not consider hardship to them in adjudicating the motion to reopen.

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 AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen children and his lawful permanent resident and U.S. citizen siblings, the approval of a Form I-140, the fact that he has filed tax returns, as required by law, the potential of hardship to his children, the numerous favorable letters of recommendation, his steady employment, his activities in the community and the absence of any criminal record.

The unfavorable factors in this matter include the applicant's initial entry without inspection, his failure to depart the United States after he was granted voluntary departure, his reentry subsequent to his deportation and his illegal stay for part of his presence in the United States.

While the applicant's immigration violations 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. Accordingly, the motion will be granted, the appeal will be sustained and the application approved.

ORDER: The motion to reconsider is granted, the appeal is sustained and the application approved.