

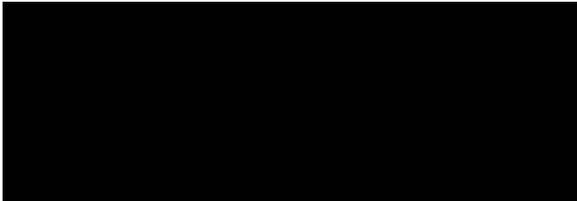
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**U.S. Citizenship
and Immigration
Services**

114

PUBLIC COPY



FILE:



Office: SAN ANTONIO, TEXAS

Date:

APR 10 2006

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Interim 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 citizen of Mexico who was admitted to the United States as a Lawful Permanent Resident (LPR) on September 27, 1991. On March 13, 1996, in the 54th District Court of McLennan, Texas, the applicant was convicted of the offense of driving while intoxicated (“DWI”). The applicant was sentenced to ten years imprisonment. The imposition of the sentence was suspended and the applicant was placed on probation for a ten-year period. Prior to this conviction the applicant had two additional convictions for DWI, on August 23, 1995, and December 17, 1992. On September 29, 1998, a Notice to Appear (NTA) for a removal hearing before an immigration judge was issued. On January 13, 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. The applicant filed an appeal with the Board of Immigration Appeals (BIA) which was dismissed on October 27, 1999. A motion for stay of deportation filed with the Fifth Circuit Court of Appeals was denied on November 24, 1999. Consequently, the applicant was removed to Mexico. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. He is inadmissible under section 212(a)(9)(A)(ii) of the Act, 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 and reside with his U.S. citizen spouse and children.

The Interim District Director found the applicant inadmissible to the United States because he falls within the purview of section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B) for having been convicted of two or more offenses for which the aggregate sentence to confinement was 5 years or more. In addition, the Interim District Director determined that the evidence on record fails to establish that a favorable exercise of discretion is warranted and denied the Form I-212 accordingly. *See Interim District Director’s Decision* dated May 21, 2003.

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 an 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 24, 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.

On appeal, the applicant states that he believes that his application should be granted because he has a U.S. citizen spouse, four U.S. citizen children and seven grandchildren. In addition, the applicant states that he was mistreated by the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) because he was deported before the Fifth Circuit Court of Appeal made a decision on his petition for review. Furthermore, the applicant states that he has completely turned around since his last mistake and he needs to enter the United States in order to be reunited with his family.

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.

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 approximately 15 years prior to when the order of removal was issued and has no criminal record except for his convictions for DWI. Other favorable facts are the applicant's 23-year

marriage to a U.S. citizen, his family ties in the United States, his U.S. citizen spouse and children, and the fact that he did not reenter or attempt to reenter after his removal.

The AAO finds that the unfavorable factors in this case are the applicant's 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.