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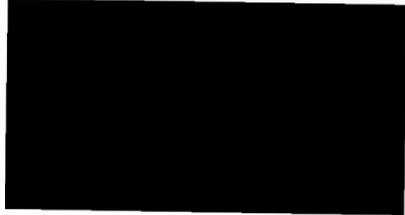
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3041
Washington, DC 20529



U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

JUL 07 2006

IN RE:



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

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, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Ireland who was admitted into the United States October 3, 1997 through the Visa Waiver Program. On January 19, 2002, the applicant was deported from the United States and extradited to the United Kingdom where he faced criminal charges for rape. The applicant 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 reside in the United States with his U.S. citizen spouse.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Director's Decision* dated April 29, 2005.

On appeal, counsel asserts that the director's decision placed undue emphasis on the perceived negative equities; misinterprets the applicable standards for granting a Form I-212; misstates the facts in the case; and fails to consider the positive equities in the case. *Counsel's Brief*, undated

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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The record indicates that on October 3, 1997 the applicant entered the United States under the Visa Waiver Program. On February 26, 1998 he was arrested for possession of crack cocaine in the amount of 0.2 grams. He was never convicted and the case was ordered *nolle prosequi* meaning the criminal charge was dismissed voluntarily. On January 23, 1999 the applicant married his current spouse. On December 17, 2001 he was arrested for extradition and on January 19, 2001 he was deported to the United Kingdom where he stood trial

for rape. On June 24, 2002 he was acquitted for the charge of rape. On April 6, 2004 the applicant submitted a Form I-212.

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 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 unfavorable factors in this case include the applicant overstaying his visitor visa, his unlawful presence in the United States for over three years and the applicant's initial failure to appear in a U.K. court for the charge of rape. While there is no proof that he was avoiding prosecution as noted by the director, he did, in fact, fail to return to the U.K. to face the charge. This cannot be taken lightly.

The applicant's arrest for possession of crack cocaine and the charge of rape cannot be considered negative factors in this case. The applicant was never convicted of possession of crack cocaine nor did he ever admit to being in possession of the controlled substance. All that exists in the applicant's case pertaining to possession of crack cocaine is an arrest record. Similarly, the applicant was never convicted of rape. He was acquitted of the charge on June 24, 2002. Thus, these two incidents cannot be considered negative factors in the applicant's case.

The favorable factors in this case include the applicant's marriage to a U.S. citizen on January 23, 1999, the financial hardships the applicant and his spouse are experiencing in Ireland and the letters submitted by family, friends and members of the community attesting to the applicant's good moral character and rehabilitation.

The applicant's actions in this matter cannot be condoned. His record contains two immigration violations and a serious incident regarding the failure to appear in court. The applicant has not established that the favorable factors in his case 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 not established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.