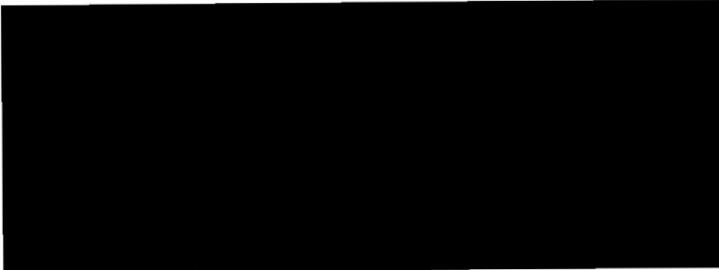




U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 20 2006

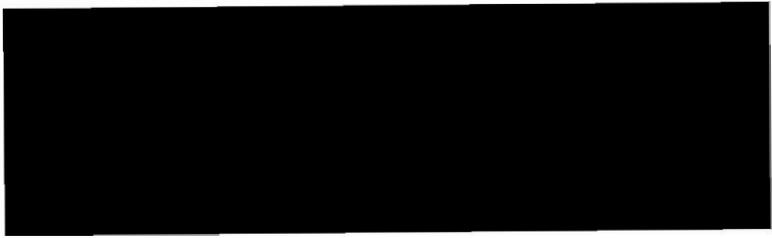
IN RE:

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:



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 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 sustained and the application approved.

The applicant is a native and citizen of Mexico who entered the United States on or about July 1, 1983, without a lawful admission or parole. On April 26, 1997, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and a Notice to Appear (NTA) for a removal hearing before an immigration judge was issued. The applicant was placed in custody and on May 1, 1997, he was released on a \$1,500 bond. On January 23, 1998, the applicant failed to appear for a removal hearing and he was subsequently ordered removed in absentia by an immigration judge pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i) for having been present in the United States without being admitted or paroled. The applicant failed to surrender for removal or depart from the United States, and on February 9, 1998, a Warrant of Deportation (Form I-205) was issued. A Motion to Reopen (MTR) the removal proceedings was denied by an immigration judge on March 24, 1998. On July 20, 2004, the applicant appeared at a CIS office in connection with an Application to Register Permanent Residence or Adjust Status (Form I-485). The applicant was apprehended and placed in custody and, consequently, on July 21, 2004, he was removed from the United States. The applicant is the beneficiary of an approved Immigrant Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under 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 to reside with his U.S. citizen spouse and children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. See *Director's Decision* dated April 4, 2005.

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, 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 contiguous territory, the

Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

On appeal, counsel submits a brief in which he states that the Director failed to cite a single example of false testimony given by the applicant, as mentioned in his decision. In addition, counsel states that the Director abused his discretion by failing to evaluate the application in good faith. Counsel further states that in the NOID the Director erroneously stated that the applicant failed to show that he is residing abroad, that on October 18, 1994, he filed an application for political asylum claiming to be a citizen of Guatemala and that on November 25, 1994 he appeared for an asylum interview. Counsel states that in response to the NOID the applicant submitted evidence that he has been residing and employed in Mexico since his removal. In addition, the applicant submitted a sworn statement in which he stated that he was born in Mexico and has never applied for political asylum. Additionally, counsel states that the applicant's spouse and three U.S. citizen children have suffered extreme emotional and financial hardship since his removal. The applicant's spouse and children relocated to Mexico but his children do not read or write Spanish and were unable to enroll in school in Arizona, United States, because they do not reside there. The applicant's family has to depend on relatives for financial support because he is unable to support them with the salary he earns in Mexico. Furthermore, counsel states that solely because the applicant lived in the United States since he was four years old and remained in the United States as an adult does not establish lack of good moral character as defined by section 101(f) of the Act. Finally, counsel requests that the Form I-212 be granted based on the substantial equities of the case.

The AAO finds counsel's assertions persuasive. The applicant presented documentary evidence to show that he resides in Mexico. The record of proceedings does not reflect that the applicant re-entered the United States after his removal. In addition, a thorough search of the electronic database of CIS does not reveal that the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). Furthermore, the record of proceedings does not support the Director's statement that the applicant gave a false statement when he was arrested and interviewed. The only reference to false information provided by the applicant is in the Director's decision. The record of proceedings does not contain a record of sworn statement at the time of the applicant's arrest.

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 Director's decision states that the unfavorable factor in the applicant's case is his continued disregard for and abuse of the laws of this country.

The AAO finds that the Director failed to consider the applicant's favorable factors which include the applicant's ties to U.S. citizens, his spouse and children, the existence of an approved Form I-130, the absence of any criminal record, the potential of general hardship to his family and the fact that he did not reenter or attempt to reenter after his removal. The AAO notes that in 1983 the applicant was five years of age and, therefore, cannot be held accountable for entering the United States without a lawful admission or parole.

The AAO finds that the unfavorable factors in this case include the applicant's failure to appear for a removal hearing, his failure to depart the United States after his MTR was denied, and his period of employment without authorization.

While the applicant's failure to appear at a removal hearing and his failure to depart after his MTR was denied are serious matter that cannot be condoned, the AAO finds that given all the circumstances in 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.