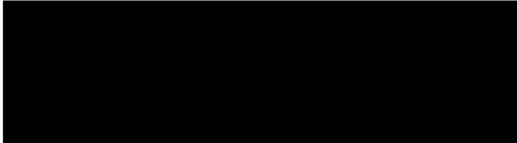




U.S. Citizenship  
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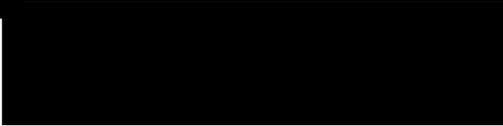
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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **NOV 17 2006**

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 dismissed.

The applicant is a native and citizen of Guatemala who entered the United States without a lawful admission or parole on October 8, 1998. On October 10, 1998, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on the same date a Notice to Appear (NTA) for a removal hearing before an immigration judge was served on him. On or about January 20, 1999, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the office of the immigration judge. On June 2, 1999, an immigration judge denied the applicant's request for asylum and withholding of removal and ordered the applicant removed 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 filed an appeal with the Board of Immigration Appeals (BIA) which was dismissed on April 4, 2002. On April 29, 2002, the applicant filed a petition for review of the order by the BIA, and a motion for a stay of removal with the United States Court of Appeals for the Ninth Circuit. The applicant was granted temporary stay pending the court's decision on his petition for review. On December 29, 2003, the Ninth Circuit Court of Appeals dismissed the appeal for failure to file an opening brief. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his Lawful Permanent Resident (LPR) mother. The applicant is inadmissible pursuant to 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 remain in the United States and reside with his LPR mother.

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 October 21, 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 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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has; (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief in which she states that the Director did not consider the applicant's positive factors, which outweigh the one negative factor of being ordered deported. Counsel refers to *Matter of Carbajal*, Interim Decision 2765 (Comm.1978) which held that a record of immigration violations, standing alone, did not conclusively support a finding of lack of good moral character. In addition, counsel refers to *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) that states that the recency of deportation can only be considered when there is a finding of a poor moral character. Counsel states that the applicant is the beneficiary of an approved Form I-130 filed by his elderly mother whom he supports. Counsel further states that the applicant's mother would suffer hardship if the applicant were removed because she relies on the applicant for financial and emotional support.

In the present case, the Director did not find that the applicant lacked good moral character. The Director denied the Form I-212 after determining that the unfavorable factors outweighed the favorable. Neither did the Director address the time factor of the applicant's removal order.

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 for 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. The AAO will consider the hardship to the applicant's mother, but it will be just one of the determining factors.

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.*

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his LPR mother, an approved Form I-130, the prospect of general hardship to his mother and the absence of a criminal record.

The applicant's removal order is not the only unfavorable factor in this case, as alleged by counsel. The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his failure to depart the United States after a final removal order was issued and after his appeals to the BIA and the Ninth Circuit Court of Appeals were dismissed, his unauthorized employment, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

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 eligibility 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.