

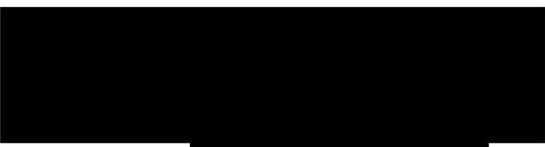
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U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 19 2006

IN RE: [Redacted]

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 Director, California Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 Colombia who, on June 15, 1986, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, taking up unauthorized residence and employment in the United States. On July 1, 1989, the applicant married his spouse, a native and citizen of Nicaragua. On November 10, 1989, the applicant's U.S. citizen son was born. On May 13, 1998, the applicant's U.S. citizen daughter was born. On May 19, 1999, the applicant filed an Application for Asylum and Withholding of Removal (Form I-589). On June 30, 1999, the asylum office referred the applicant's asylum application to an immigration judge. On November 30, 2001, the applicant's spouse became a lawful permanent resident. On July 1, 2002, the applicant withdrew his applications for asylum and withholding of removal and the immigration judge denied the applicant's application for cancellation of removal, granting him voluntary departure until August 30, 2002. The applicant failed to depart the United States and filed an appeal with the Board of Immigration Appeals (BIA) on July 10, 2002. On October 3, 2002, the applicant's lawful permanent resident spouse filed a Petition for Alien Relative (Form I-130) on his behalf. On November 18, 2003, the BIA affirmed the immigration judge's order, granting the applicant voluntary departure for a period of thirty days. The applicant failed to depart the United States and filed an appeal with the Ninth Circuit Court of Appeals (Ninth Circuit) on November 28, 2003. On April 28, 2004, the Ninth Circuit dismissed in part and denied in part the applicant's appeal. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On August 2, 2004, the Form I-130 was approved. On February 1, 2005, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 remain in the United States and reside with his U.S. citizen children and lawful permanent resident spouse.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the Form I-212 accordingly. *See Director's Decision* dated July 26, 2005.

On appeal, counsel contends that the applicant, his spouse and children would suffer extreme hardship if he were removed from the United States and that the Director erred in finding that the unfavorable factors outweighed the favorable factors. *See Applicant's Brief*, dated September 16, 2005. On appeal, counsel only submitted the above-referenced brief. The entire record was reviewed in rendering a decision in this case.

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.

The record of proceedings indicates that the applicant remained in the United States past his authorized stay and, when granted voluntary departure, failed to voluntarily depart the United States. The voluntary departure became a final order of removal with which the applicant failed to comply. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and, therefore, must receive permission to reapply for admission.

Counsel, in his brief, contends that the applicant's wife and children will suffer extreme hardship because without the applicant's income their standard of living would be substantially reduced and they would be separated from the applicant. Counsel contends that the applicant would also suffer extreme hardship because he would be forced to leave a country which he considers his home, the country to which he is returning is not stable and he would be unable to meet his driving force in life, to support his family, because he would be unable to earn sufficient income in Colombia. There is no evidence in the record to suggest that the applicant's spouse is not capable of earning sufficient income to support the family. There is no evidence in the record to suggest that the applicant's spouse suffers from an illness that would prevent her from working or decrease her ability to earn a sufficient income to support her family. There is no evidence in the record to suggest that the applicant's spouse, children or the applicant suffer from a physical or mental illness that would cause them to suffer hardship beyond that commonly suffered by aliens and families upon deportation. While it is unfortunate that the applicant's family may have to lower their standard of living, the applicant's spouse would essentially become a single parent and professional childcare may involve an added expense and not equate to the care of a parent, the applicant's children would essentially be raised in a single-parent environment and the applicant would need to adjust to a lower standard of living, these are not hardships that are beyond those commonly suffered by aliens and families upon deportation.

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 favorable factors in this matter are the applicant's U.S. citizen son and daughter, the applicant's lawful permanent resident spouse, the absence of any criminal record since entering the United States, the payment of taxes in the United States, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's extended unauthorized residence and employment in the United States prior to filing an asylum claim, failure to depart the United States under an order of voluntary departure and non-compliance with an order of removal.

While the applicant's unauthorized residence and employment in the United States, his failure to comply with an order of voluntary departure and his subsequent failure to depart the United States after being ordered removed 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 appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.