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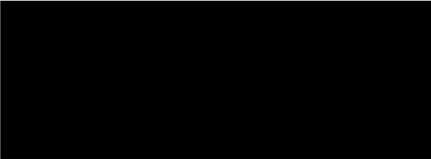
U.S. Department of Homeland Security  
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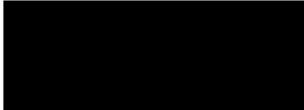
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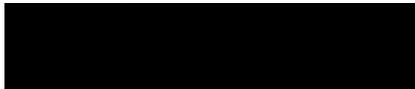


Office: VERMONT SERVICE CENTER

Date: **OCT 23 2006**

IN RE:

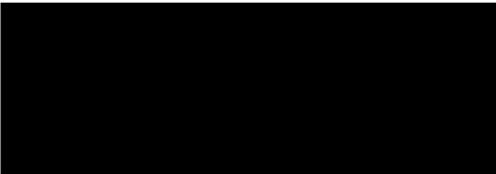
Applicant:



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, Vermont 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 Bangladesh who was present in the United States without a lawful admission or parole on March 8, 1992. On September 28, 1994, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On December 4, 1995, the applicant was interviewed for asylum status. His application was referred to the immigration court and on December 18, 1995, an Order to Show Cause (OSC) for the hearing before an immigration judge was served on him. On September 3, 1996, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported *in absentia* by an immigration judge pursuant to section 241(a)(1)(A) of the Immigration and Nationality Act (the Act), as an alien excludable at time of entry, pursuant to 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I), for being an immigrant not in possession of a valid immigrant visa or other valid entry document. The applicant filed a Motion to Reopen (MTR) that was denied by an immigration judge on December 13, 1996. An appeal of the immigration judge's decision filed with the Board of Immigration Appeals (BIA) was dismissed on August 7, 1997. On May 20, 1998, a Warrant of Removal/Deportation (Form I-205) was issued. On October 6, 1999, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear at the New York district office in order to be removed from the United States. The applicant failed to surrender for removal or depart from the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. 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 U.S. citizen spouse and child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. See *Director's Decision* dated April 14, 2003. The applicant filed a Motion to Reopen. On March 25, 2005, the Director affirmed the prior decision denying the Form I-212.

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, and (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 aliens 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 and a "forensic psychosocial evaluation" regarding the applicant's family. In his brief, counsel states that the Director's findings that the applicant is inadmissible pursuant to section 212(a)(6)(C) of the Act for fraudulently or willfully misrepresenting a material fact to procure admission into the United States and section 212(a)(6)(B) of the Act for failure to attend his deportation proceedings are erroneous. Counsel states that there was no finding that the applicant was inadmissible pursuant to section 212(a)(6)(C) of the Act. In addition, counsel asserts that the applicable five-year bar has already lapsed from the date of the deportation order. Additionally, counsel asserts that section 212(a)(6)(B) of the Act does not apply to the applicant and refers to a memorandum dated June 17, 1997, from CIS, Office of Programs, entitled, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Act*, which states: ". . . any alien placed in deportation or exclusion proceedings before April 1, 1997, will not be considered inadmissible under section 212(a)(6)(B) of the Act for failure to attend the removal hearing. . ."

The AAO agrees with counsel regarding the fact that section 212(a)(6)(B) of the Act does not apply in this case. The memorandum cited by counsel clearly states that an alien placed in deportation proceedings before April 1, 1997, is not subject to section 212(a)(6)(B) of the Act. Although the applicant is not subject to section 212(a)(6)(B) of the Act, he is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

The AAO notes that during the applicant's asylum interview he admitted under oath to entering the United States with a fraudulent passport. He was not officially charged with inadmissibility pursuant to section 212(a)(6)(C) of the Act, but this admission still renders him inadmissible for misrepresentation of a material fact, which does not require a conviction or official charge.

The regulations at 8 C.F.R. 212.2(a) specifically state that an applicant must remain outside of the United States from the date of deportation or removal, not from the date a deportation or removal order was issued. The applicant has not departed the United States since he was ordered removed, he is, therefore, still required to file a Form I-212.

In his brief, counsel states that the Director failed to consider the fact that the applicant has two U.S. citizen children and one permanent resident daughter, instead of just one U.S. citizen child mentioned in the decision. In addition, counsel states that the applicant's family is being subject to potential unusual and extreme

hardship that threatens the family's unity, and their emotional, physical and financial well being. Counsel further states that both the applicant and his spouse have been diagnosed with symptoms consistent with "Major Depressive Disorder; Rule Out Adjustment Disorder with Depress Mood." Furthermore, counsel asserts that the applicant's U.S. citizen child is likewise bound to seriously suffer as a consequence of any denial of the Form I-212. Counsel states that the applicant's child grew up in the United States and if relocated to Bangladesh would be denied health benefits, educational opportunities, and the cultural or societal influences he would have as a citizen of the United States. Counsel further states that the applicant has two other daughters who are emotionally attached to him as their father and separation would inevitably cause psychological trauma and anxiety to them. The psychological evaluation states that the applicant's child "would face a foreign culture, language and beliefs, strict restriction on his actions, dress, friends and interests, possible poverty, government corruption, police ineptitude, healthcare and social service delivery scarcity, academic deficits and language barriers." In addition, the psychological evaluation states that his relocation will likely introduce symptoms of depression and anxiety and the applicant's emerging mental health issues and his spouse's depression and anxiety will undoubtedly worsen. Finally, the evaluation states that the uprooting of the family would be a severe hardship since the emotional, financial and instrumental support available in New York would be lost in Bangladesh.

Prior to submission of the MTR, the applicant submitted a birth certificate for only one child and never mentioned other children or step-children. Therefore, counsel's assertion that the Director failed to consider the fact that the applicant has more than one child is without merit.

*Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation.

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 family, but it will be just one of the determining factors.

The psychological report was based on one interview with the applicant, his spouse and his U.S. citizen child and the statements contained in the report are speculative as to future effects the separation or relocation of the family may cause. No evidence was provided to show that the applicant's spouse would be unable to care for herself and her children if she decides to remain in the United States. It is noted that there are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

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 favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse, child, and two step-children, an approved Form I-130, the prospect of general hardship to his family and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his failure to appear for deportation proceedings, his failure to depart the United States after a final deportation order was issued and after the BIA dismissed his appeal, his periods of employment without authorization 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.