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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: **SEP 12 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 India who entered the United States without a lawful admission or parole on or about August 21, 1991. On April 2, 1998, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On July 30, 1998, the applicant failed to appear for an asylum interview. His application was referred to the immigration court and a Notice to Appear (NTA) for a hearing before an immigration judge was issued on July 31, 1998. On March 8, 1999, an immigration judge found the applicant removable 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, and granted him voluntary departure until July 6, 1999, in lieu of removal. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on July 28, 1999, as untimely. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to July 28, 1999, changed the voluntary departure order to an order of removal. On March 26, 2003 a Warrant of Deportation (Form I-205) was issued and on April 8, 2003 the applicant was apprehended and placed into custody. The applicant filed a Motion to Reopen (MTR) and an application for a stay of removal. On April 14, 2003, his application for a stay of removal was granted pending a decision on the MTR. On May 22, 2003, the MTR was denied and the stay of removal was rescinded. Consequently, on December 12, 2003, the applicant was removed from the United States. The applicant is the derivative beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140) filed on behalf of his 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 travel to the United States and reside with his U.S. citizen 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 July 8, 2005.

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 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 in 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 reducing and/or stopping aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief, a letter from the applicant's children, copies their birth certificates, and copies of the applicant's tax returns. In his brief, counsel states that the Director abused his discretion in denying the application because he did not weigh the fact that the applicant's U.S. citizen children are suffering extreme hardship. In addition, counsel states that the extreme hardship the children are suffering should be given greater weight than the facts that the applicant entered the United States without inspection, failed to appear for a scheduled asylum hearing, was arrested for DWI, was granted voluntary departure, the immigration judge rescinded the stay of removal and he failed to depart, his bond was breached, was arrested by the Service and was ultimately removed. Counsel states that these factors are so common with aliens who are in the United States illegally, and only relate to the fact that such aliens want to stay in the United States. Counsel further states that the applicant was a hard-working tax-paying father who wanted to "support his family in the American way." Additionally, counsel states that the Director failed to consider the favorable factors and the extreme hardship of the applicant's U.S. citizen children and denied the case without giving any weight whatsoever to these factors. Finally, counsel requests that the appeal be sustained and the Form I-212 approved.

In their letter, the applicant's children state that they are suffering extreme hardship. They state that they miss their father and feel sorry for their mother who is struggling to support them. In addition, they state that because of their father's removal they worry about him and cannot concentrate in school. Additionally, they state that they are financially deprived and their mother does not have time to spend time with them because she is constantly working. Furthermore, they state that their father cannot find employment in India in order to support them and they do not want to relocate to India because they are American citizens. Finally, they state that the applicant is not a criminal, he is not a danger to society and they request that he be permitted to return to the United States.

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 U.S. citizen children, 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.*

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 children, the fact that he is a derivative beneficiary of an approved Form I-140, the prospect of general hardship to his children, and the absence of any 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 attend an asylum interview, his failure to depart the United States after he was granted voluntary departure and after his voluntary departure order became a final order of removal, his 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 that the applicant is eligible 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.