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U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

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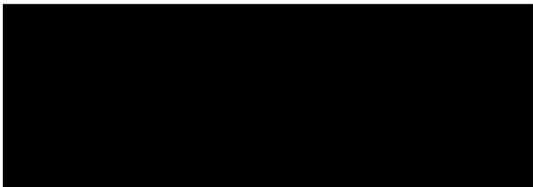
IN RE:

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 Acting 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 Honduras who entered the United States without a lawful admission or parole on or about February 27, 1995. On February 28, 1995, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and he was served with an Order to Show Cause (OSC) for a hearing before an immigration judge. On March 9, 1995, an immigration judge found the applicant deportable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for entering the United States without inspection. Consequently, on March 14, 1995, the applicant was deported to Honduras. The record reflects that the applicant reentered the United States on or about July 23, 1995, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140). 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 now 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.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Acting Director's Decision* dated January 12, 2006.

On appeal, counsel submits a brief in which he states that the Acting Director did not take into account all favorable factors, and failed to consider reasons which were beyond the applicant's control which resulted in accruing unfavorable factors. In addition, counsel states that the Acting Director erroneously concluded that the applicant failed to comply with certain requirements when the applicant had complied with those requirements. Counsel alleges that some of the unfavorable factors mentioned in the decision, such as the applicant's illegal reentry after his removal, remaining longer than authorized in the United States, being employed without authorization and his lengthy presence in the United States without a lawful admission or parole are addressed by section 245(i) of the Act, for which the applicant qualifies, and should not be viewed as unfavorable factors. Counsel further states that the applicant's conviction for Driving While Intoxicated (DWI) and the suspension of his license do not preclude him from adjustment of status. Additionally, counsel states that the applicant responded to a request for additional evidence, and was never released on a \$7,500 bond as stated in the decision. Further, counsel asserts that the Acting Director erred in stating that the applicant has a minor U.S. citizen daughter born on [REDACTED]. According to counsel, the applicant has a son born in Honduras on the above-mentioned date but did not list him on his income tax returns because he resides in Honduras. Counsel further states that the applicant kept the Service informed of his current address through various applications he filed with the Service. Counsel asserts that the applicant's denial of Temporary Protective Status (TPS) should not be considered an unfavorable factor because it shows the applicant's attempt to legalize his status. Counsel further alleges that the Service did not take into consideration that the applicant and his spouse own property in the United States, he is a person of good moral character, and is of benefit to the community. Counsel also states that the applicant is apologetic for having reentered the U.S., but that those actions were governed by hardship. Finally, counsel states that if the applicant is forced to return to his country he and his family will suffer extreme hardship, he would not be able to support his family, and his children's future education would be in jeopardy. Counsel finally asserts

that the applicant has demonstrated that a favorable exercise of discretion should be used in this matter and the Form I-212 should be approved.

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.

The AAO concurs with several of counsel's assertions. It is unclear from the record of proceeding if the applicant was released after posting a \$7,500 bond. The record contains a Notification to Alien of Conditions of Release or Detention (Form I-286) in which the applicant requested a re-determination by an immigration judge of the custody decision issued by a Border Patrol Agent. No final re-determination by an immigration judge is reflected in the record of proceeding. In addition, the AAO agrees with counsel regarding the applicant's child born on April 20, 1993. The record reflects that the applicant has included this child in several applications as a son born and residing in Honduras, and not as a U.S. citizen daughter. In addition, the applicant has kept the Service informed of his current address through filing various applications.

Counsel notes that the applicant applied for TPS, but failed to note that on the Applications For Temporary Protected Status (Form I-821), the applicant did not answer all the questions truthfully. On the Forms I-821

the applicant stated that he was never in immigration proceedings when, in fact, he had been. In addition, counsel does not specify what hardship the applicant was facing when he illegally reentered the United States after his deportation. The record of proceeding reflects that at the time of the applicant's illegal reentry he was single with no family members residing in the United States.

The AAO notes that applicants for adjustment of status under section 245(i) of the Act, as with all applicants for adjustment of status, must be admissible to the United States. *Section 245(i)(2)(A) of the Act*. There are exceptions for applicants under section 245(i) of the Act, but admissibility under section 212(a)(9)(A) of the Act is not one. In order for an applicant's inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived, all favorable and unfavorable factors must be weighed.

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

If the applicant's children were to relocate to Honduras to reside with the applicant, it would be expected that some economic, linguistic, and cultural difficulties would arise. There is no independent corroboration to show that the applicant's children would not be able to adjust to life in Honduras if they were to relocate with the applicant. The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. *See Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

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 U.S. citizen children, an approved Form I-140, and the prospect of general hardship to his children.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his illegal reentry subsequent to his deportation, his periods of 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 AAO further finds that the applicant's failure to reveal on the Forms I-821 that he was placed in deportation proceedings, and that he was deported from the United States, shows a disregard for the immigration laws of the United States. In addition, the AAO finds that the applicant's conviction of DWI and his multiple convictions for driving over the speed limit show a disregard for the laws of this country.

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.