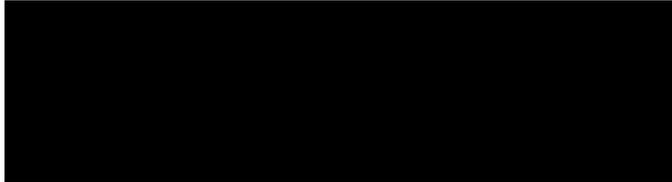


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U.S. Citizenship  
and Immigration  
Services



114

FILE:



Office: ATLANTA, GA

Date:

MAR 06 2007

IN RE:



APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:



PUBLIC COPY

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for permission to reapply for admission after removal was denied by the District Director, Atlanta, Georgia (Greer, South Carolina), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a citizen of Venezuela who was admitted into the United States on June 6, 1988 in F-1 student status.<sup>1</sup> *Applicant's Form I-94*, dated June 6, 1988. The applicant changed his status to J-1 status with authorization to remain in the United States until September 30, 1991.<sup>2</sup> *Applicant's Form IAP-66*, dated May 13, 1991. The applicant was placed in removal proceedings pursuant to an April 19, 2001 Notice to Appear, and he filed a cancellation of removal case which was denied by the immigration judge. *Oral Decision of Immigration Judge*, at 2, 9, dated August 26, 2002.

On August 26, 2002, the applicant was granted voluntary departure, until September 25, 2002, with an alternate order of removal. *Decision of Immigration Judge*, dated August 26, 2002. The applicant subsequently filed a timely appeal with the Board of Immigration Appeals (BIA). On October 29, 2003, the BIA upheld the decision of the immigration judge and granted the applicant until November 28, 2003 to voluntarily depart the United States. *BIA Decision*, dated October 29, 2003.

The applicant filed a motion to reconsider with the BIA on November 28, 2003 and it was denied on January 13, 2004, thereby subjecting the applicant to the alternate order of removal. *Second BIA Decision*, dated January 13, 2004. The applicant's request to extend his grant of voluntary departure was denied on February 5, 2004. *Form I-210, Notice of Action, Voluntary Departure*, dated February 5, 2004. The record reflects that the applicant departed the United States on February 11, 2004. *Applicant's Form I-212*, dated January 20, 2005.

On June 4, 2004, the applicant applied for admission into the United States and was ordered removed under section 235(b)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1225(b)(i). *Form I-296, Notice to Alien Ordered Removed/Departure Verification*, dated June 4, 2004. Therefore, the applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 travel to the United States.

The district director determined that after an in-depth review of the applicant's immigration history, the application must be denied and the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) was denied accordingly. *District Director's Decision* dated August 26, 2005. The district director's decision does not mention the section under which the applicant was found inadmissible, nor does the decision include a discretionary analysis of the applicant's case.

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<sup>1</sup> The applicant also entered the United States on February 22, 1982 in F-1 student status, failed to attend the designated school, and was granted voluntary departure on March 8, 1982. *Form I-213, Record of Deportable Alien*, dated March 8, 1982. It appears that the applicant complied with the grant of voluntary departure. *Applicant's Airline Ticket*, dated March 12, 1982. The record is not clear as to whether he returned again before his June 6, 1988 entry.

<sup>2</sup> The applicant was granted a waiver of the two-year home residency requirement on January 8, 2001. *Applicant's Form I-797, Notice of Action*, dated January 8, 2001.

On appeal, prior counsel states that the district director failed to state the grounds of denial, did not address any of the issues related to the reasons for the waiver, and used hyperbole and anti-immigrant sentiments to justify the denial. *Form I-290B*, dated September 26, 2005.<sup>3</sup>

Section 212(a)(9)(C) of the Act provides, in pertinent part, that:

- (A) Certain alien previously removed.-
  - (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(i) or at the end of proceedings . . . and who again seeks admission within 5 years of the date of such removal (or within 20 years 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 or any other provision of law, or

...

- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

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,

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<sup>3</sup> The AAO notes that prior counsel referenced both the applicant and his spouse on the Form I-290B. The applicant's spouse's Form I-212 had a separate decision and therefore required a separate Form I-290B. There is no evidence of a separate Form I-290B or of an additional filing fee. As such, this decision only relates to the denial of A 24 878 618 and has no effect on the decision made on the applicant's spouse's Form I-212.

[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.*

Pursuant to *Matter of Lee*, the recency of deportation (removal) will not be considered as the record does not reflect that the applicant is a person of poor moral character. The immigration judge found that the applicant was a person of good moral character in his cancellation of removal application. See *Oral Decision of Immigration Judge*, at 3. The record includes numerous letters detailing the applicant's good moral character.

The first favorable factor is the hardship the applicant's two U.S. citizen children, ages 19 and 16, would experience if their parents are not allowed to return to the United States. Prior counsel asserts that they would face extreme hardship. *Brief in Support of Appeal*, at 10, dated October 20, 2005. The BIA found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The record reflects that the applicant's two children are completely integrated into the American lifestyle and are not fluent in Spanish. *Brief in Support of Appeal*, at 11-14. Therefore, they would face extreme hardship upon return to Venezuela. The record reflects that the children are close to their parents. See *Forensic Evaluation*, at 8-11, dated May 16, 2002. Prior counsel's brief also reflects their closeness to their parents. *Brief in Support of Appeal*, at 11-13. Therefore, they would face hardship in the form of emotional stress due to separation from their parents.

Other favorable factors include the applicant's lack of a criminal record, payment of taxes and good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's lengthy period of unauthorized stay, failure to maintain student status in 1982, unauthorized employment, and his failure to depart the United States when ordered to do so.

The basis for the applicant's first removal was that he remained in the United States for a longer time than permitted. *Oral Decision of Immigration Judge*, at 1. The applicant was initially granted voluntary departure, but due to his motion to reopen and request for extension of voluntary departure being denied, the alternate order of removal was put in effect. The record reflects that the applicant was to report for removal on August 10, 2004. *Notice to Obligor to Deliver Alien*, dated June 28, 2004. The record indicates that the applicant self-deported the United States on February 11, 2004, within one week of his extension request being denied. *Applicant's Form I-212*.

The basis for the applicant's second removal was that he attempted to enter the United States on an H-1B visa without first receiving permission to reapply for admission after removal. *Form I-275, Withdrawal of Application for Admission/Consular Notification*, at 2. According to the inspecting officer, the applicant answered "no" to the question on his H-1B visa application asking whether he had ever been in deportation proceedings. *Form I-275, Withdrawal of Application for Admission/Consular Notification*, at 1-2, dated June 4, 2004. However, the officer also notes that the applicant answered "yes" to the question asking whether he had ever violated the terms of a visa, accrued unlawful presence or been deported. *Id.* Therefore, it does not appear that the applicant was willfully misrepresenting himself. In addition, the inspecting officer did not

make a finding of fraud or willful misrepresentation under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Although ignorance of the law is no excuse, the AAO notes prior counsel's admission that he did not advise the applicant to file the Form I-212 at the time he filed for his visa. *I-212 Cover Letter*, at 1, dated June 24, 2004.

Therefore, the bases for the applicant's removals are relatively less serious than other reasons for removal.

The AAO finds that the immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.