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FILE: [REDACTED] Office: SAN FRANCISCO, CALIFORNIA Date: MAR 12 2007

IN RE: Applicant: [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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 District Director, San Francisco, California. The District Director's decision was affirmed by the Administrative Appeals Office (AAO) and is now before the AAO on a Motion to Reopen and Reconsider (MTR). The MTR will be granted and the AAO's previous decision will be affirmed and the application denied.

The applicant is a native and a citizen of Mexico who was admitted into the United States on March 1, 1970, in possession of an Alien Registration Card (Form I-151) that did not belong to him. On February 28, 1974, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on the same date an Order to Show Cause (OSC), for a hearing before an immigration judge was served on him. The record reflects that on March 8, 1974, the applicant was deported from the United States pursuant to section 241(a)(1) of the Act, 8 U.S.C. § 1227(a)(1), for being excludable at time of entry. The applicant reentered the United States in May 1974 without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of the Act (a felony). On August 27, 1976, after his previous spouse withdrew her Petition for Alien Relative (Form I-130) the applicant was served with a second OSC. On September 9, 1976, an immigration judge found the applicant deportable pursuant to section 241(a)(1)(B) of the Act, for having entered the United States without inspection and granted him voluntary departure until October 9, 1976, in lieu of deportation. The record reflects that the applicant departed the United States on October 9, 1976. The record further reflects that the applicant reentered the United States on or about December 3, 1976, without a lawful admission or parole. On January 12, 1977, the applicant was apprehended and was served with a third OSC. The applicant was again deported and in February 1977 reentered the United States without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of the Act. On September 21, 1983, he was served with a fourth OSC. The applicant was deported from the United States on April 17, 1985. The applicant reentered the United States in 1988, and on December 7, 1993, he was served with an fifth OSC. On April 12, 1994, an immigration judge found the applicant deportable and granted him voluntary departure until October 12, 1994, in lieu of deportation. The record reflects that the applicant departed the United States on July 10, 1994. The record further reflects that the applicant illegally reentered the United States on November 15, 1994. On July 20, 1994, the Acting District Director, San Francisco, California, denied a Form I-212. On March 31, 1995, the AAO withdrew the Acting District Director's decision and remanded the case for further action. On May 14, 1997, the District Director denied the Form I-212 and certified his decision to the AAO. On February 27, 2003, the AAO affirmed the District Director's decision. The applicant filed a MTR on March 31, 2003. The applicant is the beneficiary of an approved Form I-130 filed by his Lawful Permanent Resident (LPR) 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 to reside with his LPR spouse and his adult U.S. citizen children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See District Director's Decision* dated May 14, 1997. The decision was affirmed by the AAO on certification. *See AAO Decision*, dated February 27, 2003.

On motion, counsel submits a letter for a medical appointment for the applicant's spouse, numerous letters of recommendation from the applicant's family members, friends, and business associates, attesting to his good moral character, photographs of the applicant with family and friends, and income tax returns for the years 2000, 2001 and 2002. Counsel states that extreme hardship factors to the applicant's family were overlooked

and equities in the applicant's favor were minimized despite the fact that his entire family resides in the United States. In addition, counsel states that the applicant operates a well-established business and that leaders of his community have recognized him for his long service to the community and his good moral character. Additionally, counsel states that the AAO dismissed any and all hardship factors to the applicant's four U.S. citizen children. Counsel states that the applicant's children were born in the United States, his spouse has been an LPR since 1989 and "these equities have not diminished, and hardship to his very close, united family does not pose any lesser after the seven years that the decision was pending". Counsel states that the existence of previous deportations should not be used to deny an otherwise admissible applicant especially in light of the overall purpose of the immigration laws to promote family unity. Counsel further states that the applicant is not subject to section 212(a)(9)(C) of the Act, as stated in the AAO decision, because this section of the Act refers to applicants who reentered or attempted to reenter subsequent to April 1, 1997. Furthermore, counsel states that section 212(a)(6)(A)(i) of the Act does not apply to the applicant because he is eligible for relief under section 245(i) of the Act. Counsel states that the adverse factors in the applicant's case are outweighed by his close family ties in the United States that began as far back as 1977 with the birth of the applicant's first child. Counsel states that in addition to his four U.S. citizen children, the applicant's other equities such as an LPR spouse, steady employment, favorably recognized and well established community business, home ownership and no public assistance, weigh strongly in a favorable exercise of discretion. Counsel further states that the applicant's previous attorney was not aware of the need to file a Form I-212 after he departed the United States pursuant to a voluntary departure order. Additionally, counsel states that the applicant was not deported for any crimes but only for his entries without inspection, and although his time in the United States is not legal residence, it is worth of consideration. Finally, counsel states that the applicant has shown that he merits a favorable exercise of discretion.

The AAO agrees with counsel regarding the applicant's inadmissibility under section 212(a)(9)(C) of the Act. A March 31, 1997, memorandum clarified that section 212(a)(9)(C)(i)(I) of the Act applies to aliens entering or attempting to enter the United States without being admitted on or after April 1 1998, following an aggregate period of unlawful presence of one year or more. In addition, section 212(a)(9)(C)(i)(II) of the Act applies to aliens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997. The applicant, in the present case, has not attempted to enter or reenter the United States after April 1, 1997 and, therefore, he is not subject to section 212(a)(9)(C) of the Act.

Although the applicant is not subject to section 212(a)(9)(C) of the Act, he is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

The proceeding in the present case is for a Form I-212 and, therefore, the AAO will not discuss the applicant's possible eligibility for adjustment of status under section 245(i) of the Act. However, 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.

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 Shooshtary v. INS*, 39 F. 3d 1049 (9th Cir. 1994). 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 spouse and children, but it will be just one of the determining factors.

The record of proceeding reflects that the applicant has the following convictions:

September 29, 1981, in the Superior Court of California, County of Solano, Branch of Fairfield, the applicant was convicted of the offense of lewd and lascivious act on a child in violation of California Penal Code Section 288(a). The applicant was sentenced to 180 days imprisonment and two years probation.

September 20, 1983, in the Municipal Court of California, County of Contra Costa, Bay Judicial District the applicant was convicted of the offense of possession of firearm. The applicant was sentenced to 70 days imprisonment.

The record does not reflect that the applicant has made a good faith effort to comply with immigration laws. The applicant entered the United States by fraud and willfully misrepresenting a material fact, worked without authorization and reentered illegally on several occasions subsequent to deportations. In addition, the applicant was convicted of a crime involving moral turpitude and although it may have been expunged, he remains convicted for immigration purposes and, therefore, inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his LPR spouse, children and grandchildren, an approved Form I-130, the prospect of general hardship to his family and the numerous letters of recommendation.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry into the United States by fraud, his illegal reentries subsequent to his deportations and his voluntary departures, his conviction of a crime involving moral turpitude, his periods of unauthorized employment, and his lengthy presence in the United States without a lawful admission or parole. The applicant has shown a complete disregard for the immigration laws of the United States. The Commissioner stated in *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) 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 issues in this matter were thoroughly discussed by the District Director and the AAO in their prior decisions. The applicant in this case failed to establish by new 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 motion to reconsider will be granted and the prior AAO decision will be affirmed.

ORDER: The motion to reconsider is granted and the prior AAO decision is affirmed, and the application denied.