

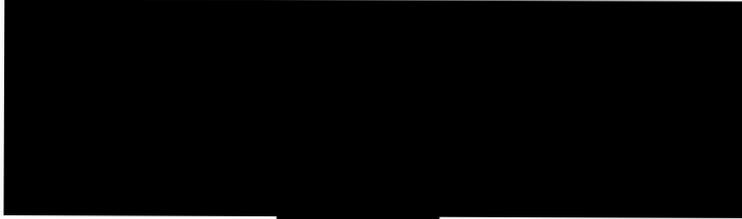


U.S. Citizenship
and Immigration
Services

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H14



FILE:



Office: VERMONT SERVICE CENTER
[consolidated therein]

Date: APR 30 2008

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) of the Immigration and Nationality
Act, 8 U.S.C. § 1182(a)(9)(A)

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 after removal was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The record reflects that the applicant is a native and citizen of Mexico, who married [REDACTED] a citizen of Mexico, on October 31, 1991, in Mexico. In November 1991, the applicant initially entered the United States without inspection. On July 10, 1992, the applicant's daughter, [REDACTED] was born in Maryland. On March 23, 1993, an Order to Show Cause and Notice of Hearing (OSC) was issued for the applicant. On August 25, 1993, an immigration judge granted the applicant voluntary departure until November 25, 1993. The applicant failed to depart the United States as ordered. On January 23, 1994, the applicant departed the United States; however, he reentered the United States without inspection in the same month. On April 27, 1994, the applicant's daughter, [REDACTED], was born in New York. On February 14, 1995, a Warrant of Deportation (Form I-205) was issued. On July 3, 2000, the applicant's daughter, [REDACTED] was born in New York. On March 22, 2002, the applicant's son, [REDACTED] was born in Maryland. On October 10, 2003, an Immigrant Petition for Alien Worker (Form I-140) was filed on behalf of the applicant by [REDACTED]. On June 4, 2004, the Form I-140 was approved. On May 5, 2005, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On February 10, 2006, the applicant was taken into custody by the Service. On February 21, 2006, the Acting Director found the applicant inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), for being deported from the United States and reentering without inspection. The Acting Director determined that the applicant is "statutorily inadmissible to the United States pursuant Section 212(a)(9)(C)(i)(II) of the Act [8 U.S.C. § 1182(a)(9)(C)(i)(II)], and no waiver of that statute is available to [him]. Therefore, no purpose would be served in approving this application." *Acting Director's Decision*, dated February 21, 2006. On March 17, 2006, a Form I-205 was issued, and on June 20, 2006, the applicant was removed from the United States. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for his removal from the United States. 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 reside with his Mexican citizen wife and four United States citizen children.

The AAO finds that the Acting Director improperly determined that the applicant was ineligible under section 212(a)(9)(C)(i)(II) of the Act, and she improperly denied the applicant's Form I-212. An Office of Programs Memorandum titled, Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Act, states that section 212(a)(9)(C)(i)(II) "applies to those 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 alien may have been placed in removal proceedings before or after April 1, 1997, but the unlawful reentry or attempted unlawful reentry must have occurred on or after April 1, 1997." *See Memorandum by Paul W. Virtue, Acting Executive Associate Commission, Office of Programs, dated March 31, 1997.* The AAO notes that the applicant's illegal reentry in January 1994 did not make him inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and therefore, he was not subject to the provisions of section 212(a)(9)(C) of the Act at the time of the Acting Director's decision. However, the AAO finds that the applicant is subject to the provisions of section 212(a)(9)(A) of the Act, because of his June 20, 2006 removal from the United States.

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 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.

Section 212(a)(9)(C). Aliens unlawfully present after previous immigration violations.-

(i) In general.- Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's embarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the alien's reapplying for admission.

On appeal, the applicant, through counsel, contends that the record "establish[es] that [the applicant] warrants a favorable exercise of discretion." *Appeal Brief*, filed March 27, 2006. Counsel claims that the applicant has paid federal taxes since 1994, real estate taxes since May 2005, and has been "trying to legalize his status, by

filing for alien labor certification.” *Id.* Counsel states the applicant “has been supporting his wife and four U.S. citizen children...[and the applicant] has been continuously employed full-time...since November 1998.” *Brief in Support of Form I-212*, dated April 28, 2005. The AAO notes that the applicant’s wife is also in the United States without any legal standing and her inability to remain in the United States is not a hardship; however, the applicant is the primary wage earner in the family. *See affidavit from the applicant*, dated November 18, 2005; *see also psychological evaluation by [REDACTED]*, *Psy.D.*, dated November 16, 2005 (“[The applicant] is the family’s only breadwinner.”). The applicant claims he returned to the United States after his voluntary departure, because his wife and daughter were still in the United States. *Affidavit from the applicant, supra.* [REDACTED] states “that the deportation of [the applicant] would create severe emotional consequences for his four children. It is apparent that the current legal proceedings involving their father have caused the three eldest children deep anxiety. As is particularly evident with [REDACTED], the loss of her father would cause her to suffer tremendously. Although she performs well academically and is well adjusted, the promise which she shows would be severely jeopardized should she lose her father. A hardship exception [in] this case would prevent the onset of a reactive depression on her part. Should [the applicant] be deported, it is strongly recommended that all children receive outpatient psychotherapy services in order to assist them with the shock of losing their father.” *Psychological evaluation by [REDACTED]*, *Psy.D., supra.* The AAO notes that 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.

The record of proceedings reveals that on August 25, 1993, an immigration judge granted the applicant voluntary departure. On January 23, 1994, the applicant departed the United States. In January 1994, the applicant reentered the United States without inspection. On February 14, 1995, a Form I-205 was issued for the applicant. On March 17, 2006, another Form I-205 was issued, and on June 20, 2006, the applicant was removed from the United States. Based on the applicant’s previous order of deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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 favorable factors in this matter are the applicant's United States children, hardship they may experience, no criminal record, a history of paying taxes, letters of recommendation, and the approval of a petition for alien worker.

The AAO finds that the unfavorable factors in this case include the applicant's entries without inspection, his failure to abide by an order of voluntary departure, and his periods of unauthorized presence and employment.

While the applicant's actions cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.