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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 01 2004

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the 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 applicant is a native and a citizen of Guatemala who was present in the United States without a lawful admission or parole on December 14, 1992. The applicant applied for asylum on March 30, 1993, with the Immigration and Naturalization Service (now, Citizenship and Immigration Services, (CIS)). His application was referred to an Immigration Judge on October 13, 1995. The applicant was placed in removal proceedings and on September 11, 1996, he was granted voluntary departure until October 10, 1996. He filed an appeal with the Board of Immigration Appeals, which was dismissed on January 20, 1998. The applicant failed to surrender for removal or depart from the United States and is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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).

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the application accordingly. *See Director Decision* dated May 16, 2003.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five 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.

(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 has consented to the alien's 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 of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

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.*

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 be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The director's decision stated that the unfavorable factors in the applicant's case included his illegal entry into the United States on or about December 14, 1992, his failure to depart the country after a final removal order was issued, his illegal stay and employment in the United States, his application for asylum and the denial of his asylum application. The director concluded that these factors outweighed the fact that the applicant has no criminal history and the numerous favorable recommendations attesting to his good moral character.

The applicant had a right to file a non-frivolous asylum application and therefore the AAO finds that including his application for asylum and the subsequent denial of his asylum application is not an unfavorable factor as noted in the director's decision. Additionally the AAO does not find any documentation to support the director's statement that the applicant was deported from the United States on January 8, 1997. A final removal order was issued on January 20, 1998.

On appeal the counsel states that the applicant has two U.S. citizen children, ages 9 and 4 and a half, who depend on him for their support. Counsel further states that the applicant is a church goes, excellent husband and father, has no criminal record since entering the United States, has filed tax returns as required by law and is the beneficiary of an approved Immigrant Worker Petition.

The AAO finds that the favorable factors in this case include the fact that the applicant is the father of two U.S. citizen children who would face economic hardship if they went to Guatemala, or if, in the alternative, they remained in the U.S. without the applicant. In addition, the favorable factors include the fact that the applicant has no criminal record since entering the United States, has filed tax returns as required and has numerous favorable recommendations attesting to his good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States in 1992, his failure to depart the country after a final removal order was issued and periods of unlawful presence and unauthorized employment.

While the applicant's illegal entry into the U.S., in December 1992, and his subsequent failure to depart the United States after a final removal order was issued and his illegal stay and employment in the United States are serious matters that cannot be condoned, the AAO finds that given all of 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.

ORDER: The appeal of the denial of the Form I-212 is sustained and the application approved.