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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: PHOENIX, ARIZONA Date: MAR 29 2004

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:

[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 application for permission to reapply for admission after removal was denied by the District Director, Phoenix, Arizona, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a motion to reopen. The motion will be granted, and the May 14, 2003, AAO order dismissing the appeal will be withdrawn.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole as early as October 1975. On February 17, 1977 the applicant was apprehended and was granted voluntary departure until February 26, 1977. The record reflects that she was granted voluntary departure again in June 1979 following an unlawful entry. An Order to Show Cause was served on the applicant on October 25, 1982 and on April 13, 1983 an Immigration Judge granted the applicant until July 13, 1983 to depart the United States voluntarily in lieu of deportation. The applicant failed to depart and a Warrant of Deportation was issued on February 2, 1984. The applicant was removed to Mexico on March 12, 1984. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1182(a)(9)(A)(ii). She 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 her family.

The district director determined that the unfavorable factors outweigh the favorable ones and denied the application according. See *District Director's Decision* dated August 13, 2002. On May 14, 2003 the AAO affirmed that decision on appeal.

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.*

On motion, counsel submitted documentation to show that the applicant is a member of the class action lawsuit *Proyecto San Pablo v. INS* No. Civ. 89-456-TYC-WDB and asserts that the applicant is entitled to a motion to reopen her application for legalization. Additionally counsel states that the applicant's six U.S. citizen children will suffer hardship if the applicant's application was denied.

The record of proceedings clearly reflects that the applicant applied for legalization at the Phoenix legalization office on August 7, 1987. On January 31, 1988 the applicant was granted temporary resident status, which was terminated on September 5, 1989 pursuant to section 245A(g)(2)(B)(i) of the Act. On July 17, 1992 the applicant was granted class membership under the *Proyecto San Pablo v. INS* lawsuit.

The applicant has been granted employment authorization since 1997 and was in temporary resident status from January 31, 1988 to September 5, 1989. As a class member of *Proyecto San Pablo v. INS* the applicant was in a quasi-legal status and her presence in the United States cannot be held against her.

The unfavorable factors in the present case are the applicant's unlawful entry, her failure to depart voluntarily her reentry without permission and her employment without authorization .

The favorable factors in the present case are the hardship to the applicant's children; her family ties in the United States the absence of a criminal record and the approved preference visa petition. The applicant's

immigration violations occurred approximately 20 years ago and she has resided in the United States with no criminal record.

The AAO finds that the immigration violations committed by the applicant are serious in nature and 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 motion will be granted, the previous decisions will be withdrawn and the application approved.

ORDER: The motion to reconsider is granted, the previous decisions withdrawn, and the application approved.