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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

[redacted]

H4

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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 Director, Nebraska 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 citizen of the Philippines who was admitted into the United States as a crewman on October 28, 2001, with an authorized period of stay until November 26, 2001. The applicant overstayed his authorized period of stay and on December 27, 2001, he was found removable under section 237(a)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(1)(B) for having remained in the United States longer than permitted and on December 28, 2001 he was removed to the Philippines. The applicant married a U.S. citizen on November 17, 2001, and he is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen 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 travel to the United States and reside with his U.S. citizen spouse.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated June 25, 2003.

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 has consented to the aliens' reapplying for admission.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping

aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief, affidavits from the applicant, his spouse and family and friends. In the brief counsel does not dispute the fact that the applicant overstayed his authorized period of stay. Counsel states that the Director erred in stating that the applicant committed two separate immigration violations pursuant to sections 252(b) and 237(a)(1)(B) of the Act. Counsel states that these two separate sections of the Act are not two separate violations of the immigration laws and they cannot constitute two unfavorable factors when considering the Form I-212. In addition counsel states that the Service Center failed to consider all relevant factors and erroneously lists only one favorable factor or equity in favor of the applicant. Counsel states that the Director failed to account for the applicant's good moral character, his family responsibilities, hardship to himself, his spouse and her family, and the fact that the applicant is not a repeat violator of the immigration laws but relied in good faith on the erroneous advice of an individual whom he thought to be an attorney. In his affidavit the applicant states that his mistake was to trust a person whom he thought to be an attorney, that he had been in a relationship with his spouse for more than four years before their marriage and that he never violated his previous admissions into the United States with this crewman visa. The applicant's spouse submits an affidavit in which she states that she and her family would suffer hardship if the applicant is not permitted to reside in the United States because she would be forced to relocate to the Philippines with the applicant, would lose her job, and would not be able to support her elderly mother and her disabled sister. In addition she states that she has fallen into depression that is affecting her professional and social life.

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.*

The Director's decision states that the unfavorable factors in the applicant's case are his immigration violations under section 252(b) and 237(a)(1)(B) of the Act. The Director concluded these factors outweighed the fact that the applicant has an approved From I-130.

The AAO agrees with the attorney's assertion that the two sections of Act are not two different immigration violations. Section 252(b) of the Act states that an immigration officer may, in his discretion, revoke the

conditional permit to land which was granted to a crewman and section 237(a)(1)(B) of the Act states that any alien who is present in the United States in violation of this Act or any other law of the United States is deportable. It is clear that both section of the law refers to one immigration violation.

The AAO finds that the Director failed to consider the other favorable factors that include the fact that the applicant has no criminal record in the United States, has family ties to a U.S. citizen, his spouse, his willingness to follow immigration law and regulations, the prospect of hardship to his family and the favorable recommendations regarding his character from family and friends. In addition records of CIS show that the applicant has entered the United States numerous times since 1999 and never violated his immigration status.

The AAO finds that the unfavorable factor in this case is the applicant's failure to depart the country after his authorized period of stay expired.

While the applicant's stay in the United States longer than permitted 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. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.