U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 27 2006

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, 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 Director, California 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 on April 10, 1993, as a non-immigrant visitor for pleasure. On June 26, 1997, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant along with his parents. On July 21, 1997, the District Director granted the applicant voluntary departure until August 25, 1997, which was extended twice until October 25, 1997. The applicant failed to depart the United States on or prior to October 25, 1997, and a Notice to Appear (NTA) for a removal hearing before an immigration judge was issued on January 5, 1998. On March 24, 2000, an immigration judge ordered the applicant removed from the United States pursuant to 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. An appeal filed by the applicant's father with the Board of Immigration Appeals (BIA) was dismissed on December 12, 2001 and a Warrant of Removal/Deportation (Form I-205) was issued. A Motion to Reconsider (MTR) filed with the BIA was denied on August 30, 2002. On September 24, 2002, the applicant appeared at a CIS office regarding an extension of his employment authorization card. Based on the Form I-205 the applicant was arrested and placed in custody. The applicant's father filed a petition for review of a decision of the BIA and a request for stay of removal with the Ninth Circuit Court of Appeals. Subsequently he filed a motion to dismiss the petition for review, which was granted on October 16, 2002. Consequently, on October 22, 2002, the applicant was removed from the United States. The applicant 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 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), in order to travel to the United States and reside with his U.S. citizen spouse and child.

The Director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated September 21, 2005.

Section 212(a)(9)(A) of the Act states in pertinent part:

> (A) Certain aliens 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 alien 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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (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; (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 deterring 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 in which he states that the decision improperly included factors governing waivers of inadmissibility for unlawful presence found in section 212(a)(9)(B) of the Act which require a showing of extreme hardship to the United States citizen spouse. Counsel states that the Director's reliance on and citation of the extreme hardship waiver provisions in this case was completely "misplaced." In addition, counsel states that the applicant made no attempt to meet the extreme hardship standard of proof since this is not a requirement in a Form I-212 case. Additionally, counsel states that the Director's finding that the applicant failed to establish any favorable factors to offset his disregard for the immigration laws of the United States, was an abuse of discretion. Counsel refers to case law which states that failure to consider all factors presented is an abuse of discretion and that while repeated immigration violations are an important factor, they may be outweighed by close family ties in the United States. Counsel states that the applicant did not disregard immigration laws because at the time he was granted voluntary departure he was a minor and, thus, subject to his parents' decisions. Counsel further states that the Director did not give proper weight to the other favorable factors. The applicant has remained in the Philippines since his removal. During his stay in the United States he complied with his father's direction and advice while being educated. He has no criminal record in the Philippines or the United States and he never intentionally failed to appear for any proceedings with the immigration judge. When he was placed in removal proceedings with his parents he remained under the auspices of his father's request for relief.

According to counsel, the applicant's unawareness of the dismissal of the BIA appeal and the outstanding removal order is confirmed by the manner in which he was apprehended by CIS. The applicant presented himself to the local immigration office at which time he was take into custody. Counsel states that the applicant's ability to provide financial assistance to his family has been extremely difficult because he cannot obtain employment in the Philippines. Counsel states that the applicant's father's prior attorney did not properly advise them of the immigration consequences for failing to obey the immigration judge's order. The

applicant has set forth in the exhibits submitted with the original application that he and his U.S. citizen spouse and child have suffered hardship since his removal. Counsel states that the applicant's spouse and child attempted to relocate to the Philippines with the applicant but because of unbearable living conditions, they returned to the United States. Furthermore, counsel states that since the applicant resided in the jurisdiction of the Ninth Circuit Court of Appeals, only precedent decisions from this Court are binding. The Director's reliance on decisions made outside the Ninth Circuit is in error as a matter of law. Finally, counsel asserts that the Director's misapplication of the law shows that there was no rational basis for the denial and that his decision was arbitrary and capricious and contrary to binding precedent decisions. Counsel requests that the Director's decision be overturned and the Form I-212 be granted.

The AAO notes that although in his decision the Director states that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i) of the Act, he adjudicated the Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act. The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for a period of one year or more or his eligibility for a waiver based on his marriage to a U.S. citizen. These proceedings are limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived. That is the only issue that will be discussed.

The AAO notes that even though the applicant in the present case resided within the jurisdiction of the Ninth Circuit Court of Appeals, the published decisions of the other Circuits are considered persuasive evidence regarding issues not directly decided by the Ninth Circuit. Therefore, the AAO finds that the Director properly used case law from other Circuits.

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

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 his decision, the Director determined that the applicant did not establish any favorable factors to offset his disregard for the laws of the United States and denied the application accordingly.

The AAO does not find that the applicant has shown a continued disregard for the laws of the United States. As noted above, the applicant was admitted into the United States in possession of a non-immigrant visa. The applicant was minor when the District Director granted him voluntary departure and when the BIA dismissed his father's appeal and MTR.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse and child, an approved Form I-130, the prospect of general hardship to his family, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case are the applicant's overstay of his authorized period of stay, his failure to depart the United States after the BIA dismissed his appeal and MTR, and periods of unauthorized presence.

The applicant cannot be held accountable for overstaying his initial authorized period of stay in 1993, or for his failure to depart the country after he was granted voluntary departure because at the time he was a minor.

While the applicant's actions 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.