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U.S. Citizenship and Immigration Services

[redacted]

H4

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 23 2005

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: SELF-REPRESENTED

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, 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 a citizen of Mexico who entered the United States without a lawful admission or parole in June 1990, and on March 13, 2001, he applied for asylum. On April 19, 2001, an Asylum Officer interviewed the applicant for asylum status. His application was rejected and a Notice to Appear (NTA) for a removal hearing before an Immigration Judge was issued on April 24, 2001. The record reflects that on October 22, 2001, an Immigration Judge granted the applicant voluntary departure until November 21, 2001, in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on May 28, 2003, and he was granted voluntary departure until June 27, 2003. The applicant failed to surrender for removal or depart from the United States. The applicant appeared at a Citizenship and Immigration Services (CIS) office on February 23, 2004. He was placed in custody and was removed from the United States on February 24, 2004. The applicant 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) in order to travel to the United States and reside with his U.S. citizen spouse and child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Director's Decision* dated October 19, 2004.

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

> (A) Certain aliens previously removed.-
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> . . . .
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> (ii) Other aliens.- Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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 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, with limited exceptions, 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 the applicant states that he was never aware that he filed an asylum application. According to the applicant the individual who assisted him to file an immigration application informed him that he qualified for an amnesty program based on the length of time he had been in the United States. The applicant states that this individual was later arrested for various immigration violations. In addition the applicant states that he never failed to appear for deportation proceedings on February 8, 1996, as stated in the Director's decision. He further states that he was never in deportation proceedings in 1996 at which time he was a minor and attending school. Furthermore the applicant states that since his removal his family has been devastated psychologically and his spouse is very depressed. The applicant's spouse submits a letter in which she states that the applicant is a very hard working father and husband and her child would not be able to excel in school without the applicant's presence. In addition she states that if the applicant's waiver is not granted she and her child will suffer extreme emotional psychological and physical hardship. The applicant submits copies of his spouse's naturalization certificate, his marriage certificate, a copy of his child's birth certificate, letters of recommendation and other documentation regarding his character

This office agrees with the applicant and finds that the Director erred in stating that the applicant failed to appear for deportation on February 8, 1996. According to the record of proceedings the applicant was not in deportation or removal proceedings until April 24, 2001, the date the NTA was issued. In addition the Director erred in stating that the applicant's Form I-589 was frivolous and subsequently denied by the Immigration Judge on November 1, 2001. The record of proceedings reveals that on May 3, 2001, the Director, Los Angeles Asylum office, rejected the applicant's Application for Asylum and Withholding of Removal (Form I-589) because it was untimely filed and there were no changed or extraordinary circumstances that would result in the application being excepted from the filing deadline. In addition the record reveals that on October 21, 2001, the applicant withdrew his Form I-589, not that Immigration Judge denied it. Based on the record of proceeding the AAO is unable to confirm the Director's conclusion that the applicant filed a frivolous asylum application.

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 had abided 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.*

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 states that the unfavorable factors in the applicant's case are his failure to appear for deportation on February 8, 1996, the filing of a frivolous Form I-589, his removal from the United States and his lack of good moral character. The Director concluded that these factors outweighed the fact that the applicant is the spouse and father of U.S. citizens

As noted above the AAO finds that the applicant did not fail to appear for deportation on February 8, 1996, nor did he file a frivolous asylum application, and therefore does not consider these to be unfavorable factors. Any alien has the right to file an asylum application and although it was subsequently rejected he was entitled to exhaust all means available to him by law in an effort to legalize his status in the United States. His various applications and appeals conferred on him a status that allowed him to remain in the United States while they were pending.

In his decision the Director indicates only one favorable factor for the applicant, the fact that he is the spouse and father of U.S. citizens. The AAO finds that the Director failed to consider the other favorable factors including, the absence of any criminal record since entering the United States in 1990, the potential of general hardship to his family, the favorable letters of recommendation and documentation from the applicant's school attesting to his good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his failure to depart the country after he was granted voluntary departure and periods of unlawful presence and unauthorized employment.

While the applicant's entry into the United States without an admission or parole and his failure to depart the United States after being granted voluntary departure 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.