U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 01 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 dismissed.

The applicant is a native and citizen of Peru who was admitted into the United States as a nonimmigrant visitor for pleasure on August 10, 1986, with an authorized period of stay until February 2, 1987. On February 26, 1997, an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued. On May 20, 1999, an Immigration Judge found the applicant deportable, pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having remained in the United States longer than permitted and section 241(a)(2)(A)(ii) of the Act, for having been convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, and granted him voluntary departure until August 20, 1999, in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which on September 25, 2002, affirmed, without opinion, the immigration judge's decision. The applicant was permitted to depart from the United States voluntarily within 30 days of the date of the BIA's order. The applicant filed a petition for review of the order by the BIA and a motion for a stay of removal with the United States Court of Appeals for the Ninth Circuit. On October 15, 2002, the applicant was granted temporary stay pending the court's decision on his petition for review. On December 11, 2002, the Ninth Circuit Court of Appeals denied the applicant's motion for stay of deportation, and on January 12, 2005, his petition for review was denied. The record of proceeding reflects that the applicant departed the United States on May 7, 2005, and, as such, self deported. The record further reflects that the applicant was convicted of the offense of theft on April 28, 1994, and on May 27, 1994, he was convicted of the offenses of theft and theft with a prior conviction. The applicant is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140). 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 father and siblings.

The Director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude and that he is not eligible for any exceptions or waivers under the Act based on the severity of the crimes. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Director's Decision* dated January 23, 2006.

The AAO finds that the Director erred stating in his decision that the applicant is inadmissible without exceptions or waivers under the Act. If the Form I-212 is granted, the applicant will be eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(h) of the Act, based on his relationship to a U.S. citizen, his father.

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-

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

On appeal, counsel submits a brief, a letter from the applicant's father, a copy of the applicant's father's naturalization certificate, a letter from a doctor regarding the applicant's father's medical condition and a psychological evaluation regarding the applicant. In his brief, counsel states that the applicant filed a Form I-212, has documented his physical presence in Argentina and has properly followed the steps for readmission and, therefore, the denial should be reconsidered and the From I-212 be granted. In addition, counsel states that although the applicant is inadmissible due to his criminal convictions he may qualify for a waiver under section 212 (h) of the Act. Counsel states that the applicant's convictions occurred in 1994 and his lack of criminal record since then is substantial evidence of his rehabilitation. Counsel further states that along with the filing of the Form I-212, documentation was submitted regarding the hardship the applicant's father would suffer should the applicant not be allowed to reenter the United States. Additionally, counsel states that the applicant's father suffered a stroke that left him impaired and that the applicant was a constant companion and helped his father overcome his medical handicaps. Furthermore, counsel states that the applicant was arrested immediately after his mother's death because of his difficulty in dealing with her loss. Counsel states that the positive factors in the applicant's case are his rehabilitation and his family ties to U.S. citizens, and the negative factors are his crimes for which he seeks a waiver of inadmissibility. Finally, counsel states that the applicant voluntarily left the United States in May of 2005, he is needed in the United States in order to help his father, he had been living in the United States for over 19 years and the favorable factors outweigh the adverse factors and, as such, the Form I-212 must be reconsidered and approved.

In his affidavit, the applicant's father states that the applicant is a changed person since his last conviction in 1994. The applicant's father attempts to explain that the applicant's criminal activities were influenced by his

grief over his mother's death. In addition, the applicant's father states that due to his age, he needs the applicant to assist him and although he has other children, they are busy with their families. Furthermore, the applicant's father states that the applicant has employment opportunities in the United States, and in Argentina, where he presently resides, he does not have family or close friends. Finally, the applicant's father states the since the applicant was born in Peru his status in Argentina is uncertain.

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 potential grounds of inadmissibility under any other section of the Act nor the filing of a Form I-601. This proceeding is 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. This is the only issue that will be discussed.

Although the record reflects that the applicant's father has a medical condition, no evidence was provided to show that he cannot take care of himself and his daily needs or that it was necessary for the applicant to be present to care for him. Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's father, but it will be just one of the determining factors.

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 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.*

The AAO finds that the favorable factors in this case are the applicant's family ties to U.S. citizens, his father and siblings, an approved Form I-140, and the prospect of general hardship to his father.

The AAO finds that the unfavorable factors in this case include the applicant's criminal convictions, his overstay after his initial lawful admission, his failure to depart the United States after he was granted voluntary departure and after his voluntary departure order became a final order of deportation, his periods of unauthorized employment and his extended periods in the United States without authorization. The Commissioner stated in *Matter of Lee, supra,* that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.