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U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 18 2007

IN RE: [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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 Canada who, on April 1, 1980, was admitted to the United States as a lawful permanent resident. On January 27, 2003, the applicant pled guilty to and was convicted of driving under the influence of a controlled substance in violation of Chapter 813 of the Oregon Revised Statutes (ORS). The applicant was sentenced to ten days in jail and 3 years of probation. The applicant was also ordered to attend a DUI evaluation and treatment program. On January 27, 2003, the applicant pled guilty to and was convicted of possession of a controlled substance, alprazolam, in violation of Chapter 475 of the ORS. The applicant's sentence was suspended in favor of 2 years of probation. On March 10, 2003, the applicant pled guilty to possession of a controlled substance, marijuana, driving under the influence and reckless endangerment of another in violation of Chapters 813, 475 and 163 of the ORS. The applicant failed to appear for sentencing in these matters until December 17, 2004, at which time he was sentenced to a total of 54 months of probation and was ordered to attend a drug evaluation and treatment program. On October 29, 2003, the applicant pled *nolo contendre* to possession of marijuana for sale in violation of section 11539 of the California Health and Safety Code. The applicant's sentence was suspended in favor of 3 years of probation and 37 days in jail for which he received credit. The applicant was also sentenced to drug evaluation and treatment. On December 17, 2004, the applicant pled guilty to and was convicted of failure to appear in connection with his failure to appear for sentencing for his March 10, 2003, guilty plea, in violation of Chapter 162 of the ORS. The applicant was sentenced to 24 months of probation and 168 hours in jail. On December 20, 2004, immigration officers apprehended the applicant during his incarceration. On December 27, 2004, the applicant was placed into proceedings. On January 28, 2005, the immigration judge ordered the applicant removed from the United States pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), for being convicted of an aggravated felony after admission to the United States. On January 31, 2005, the applicant was removed from the United States and returned to Canada. On April 10, 2006, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 visit his two U.S. citizen daughters.

The director determined that the applicant was inadmissible pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and 1182(a)(2)(C), for being convicted of a crime related to a controlled substance and being a trafficker of a controlled substance. The director determined that there was no waiver available for these grounds of inadmissibility and denied the Form I-212 accordingly. *See Director's Decision* dated February 7, 2007.

On appeal, counsel contends that there is a waiver available to the applicant for his inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act because he is seeking admission as a nonimmigrant and is eligible for a temporary waiver for nonimmigrant visa applicants pursuant to section 212(d)(3) of the Act, 8 U.S.C. § 1182(d)(3). Counsel also contends that the applicant qualifies for permission to reapply for admission. *See Counsel's Brief,* dated April 5, 2007. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 101(43) of the Act states in pertinent part:

(43) The term "aggravated felony" means-

. . . .

(B) illicit trafficking in a controlled substance . . .

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

(1) Criminal and related grounds. —

(A) Conviction of certain crimes. –

(i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(a)(2)(C) provides:

CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so

. . . .

is inadmissible

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

(A) Certain aliens 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 who 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.[emphasis added]

(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.

The record of proceedings indicates that the applicant was ordered removed from the United States as a permanent resident who was convicted of an aggravated felony after admission and was physically removed from the United States in 2005. The applicant was convicted of the aggravated felony of possession of marijuana for sale, illicit trafficking of a controlled substance. The AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that the applicant is a Canadian citizen. The applicant has a 23-year old daughter and a 22-year old daughter who are both U.S. citizens by birth. The applicant owns his own business and house in Canada. The applicant has paid taxes in Canada and has not been arrested for or convicted of any crimes since 2005.

On appeal, counsel contends that the director erred in denying the applicant's application for permission to reapply for admission because the applicant is inadmissible pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act and the director determined that there was no waiver available for these grounds of inadmissibility. Counsel contends that, because the applicant is seeking admission as a nonimmigrant, he is eligible for a temporary waiver for nonimmigrant visa applicants pursuant to section 212(d)(3) of the Act. Counsel asserts that the applicant has applied for such a waiver by filing an Application for Advance Permission to Enter as a Nonimmigrant (Form I-192), which is currently pending. The AAO finds that the director erred in denying the applicant's Form I-212 based on the determination that there was no waiver available to him to waive his grounds of inadmissibility pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act. While the director would be correct is this finding if the applicant was seeking

admission as an immigrant, the applicant is not applying for admission as an immigrant, but as a nonimmigrant in order to visit his daughters in the United States. As such, the applicant may be eligible for a waiver of his grounds of inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act by virtue of section 212(d)(3) of the Act. The AAO finds that the director erred in failing to make a decision on the Form I-212 by determining whether the applicant warranted a favorable exercise of discretion.

On appeal, counsel asserts that, although the applicant's conviction is for a serious offense, it occurred more than five years ago and he has since rehabilitated himself and has not committed further offenses. Counsel asserts that the applicant is a devoted father and a hard-worker who owns his own business and pays taxes in Canada. Counsel asserts that the applicant is extremely close to his two daughters, is a very involved parent and has been a part of their lives since they were born. Counsel asserts that, if the applicant's permission to reapply was denied it would cause serious hardship to his two daughters because they are accustomed to his presence in their lives. Counsel asserts that both of the applicant's daughters will graduate from college in the near future and want their father to be present at such a joyous occasion. Counsel asserts that, prior to his removal the applicant was very conscientious in reporting to his probation officer and was considered for early termination of probation due to his exemplary conduct. Counsel asserts that the applicant's unfortunate financial difficulties, arising out of his unemployment after sustaining two injuries, and his personal tragedies, his mother was diagnosed with terminal brain cancer, led to his involvement with drugs and his convictions. Counsel asserts that the applicant was in the process of changing his life after a very difficult year prior to his removal and he realizes the seriousness of his convictions and is extremely remorseful for his actions.

The applicant, in his affidavit, states that he would like to enter the United States to visit his two U.S. citizen daughters who currently attend college. He states that in July 2002 his life drastically changed when he suffered an accident, leaving him with pain from the injury and facing unemployment. He states he had to sell his house and also learned that his mother was terminally ill. He states that he could not walk for 1½ years as a result of the injury and had to have several operations. He states that, even though he had some money saved, the medical and other bills began to cause him significant stress, as well as his inability to train horses, his passion and his job, which left him depressed. He states that a co-worker of his suggested he try marijuana for the pain after he suffered stomach pain as a result of the large quantities of pain killers he was taking for the pain associated with his injury. He states that he pled guilty to possession of marijuana for sale, even though he had never sold drugs, on the advice of his criminal attorney. He states that after his conviction in California he realized that he had become out of control and wanted to change his ways. He states that his probation officer was a great inspiration to him and helped him to become who he was prior to his arrests. He states that, prior to his removal he provided his daughters with a place to live and helped them with their bills while they were attending college. He states that he now owns his own business and works part-time at the Salvation Army. He states that he owns his own home in Canada, has gotten control of his life and has not been in any trouble since his removal. He states that his father lives with him in Canada. He states that his daughters have no interest in moving to Canada and, due to their busy schedules with college and work they are not in a position to visit him often. He states that if he is permitted to enter the United States it would enable them to maintain a close relationship. He states that his relationship with his daughters is of utmost importance to him and he wants to be present in their lives as the father that they love, especially since he is now himself again.

The applicant's daughters, in their affidavits, state that the applicant has been a wonderful father to them. They state that he has always helped them out monetarily and emotionally. They state that the applicant has learned his lesson and that he is not a criminal, but a dedicated, hardworking man who has done everything to

provide a good life to his daughters. They state that they cannot imagine his continuous physical absence from their lives. They state that without his presence at their graduations there will be no celebration.

The applicant's ex-spouse, in her affidavit, states that the applicant talks to his daughters by phone every day and she wants them to be able to sustain that closeness. She states that the applicant has always helped her to support their children and participated in their lives as much as any father could. She states that the applicant's recovery began after he was released from the Los Angeles county jail and he has strived to comply with the law and terms of his probation. She states that the applicant has otherwise been law-abiding, is hard-working, owns a home and business in Canada, and is a loving and supportive father to his daughters who need his presence in their lives, at least periodically.

The AAO notes that the only evidence, besides the affidavits, that the applicant is in recovery and continues to remain in recovery is a certificate indicating that he completed an outpatient program at a drug and alcohol treatment center in 2004.

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 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.*

The AAO finds that the director failed to consider the applicant's absence of any criminal record since 2004, the applicant's steady employment and payment of taxes in Canada, the applicant's two U.S. citizen daughters, the potential general hardship to the applicant's daughters, the temporary nature of his intended stay in the United States, the circumstances leading up to the applicant's convictions and his rehabilitation.

The AAO finds that the unfavorable factors in this case include the applicant's convictions for possession of controlled substances, driving under the influence, reckless endangerment, possession of marijuana for sale, failure to appear and his inadmissibility pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, for having been convicted of a controlled substance violation and for being an illicit trafficker of a controlled substance.

While the applicant's convictions for possession of controlled substances, driving under the influence, reckless endangerment, possession of marijuana for sale, failure to appear and his inadmissibility pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act 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.