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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 15 2008

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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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 application for permission to reapply for admission after removal was denied by the Director, Vermont 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 China who initially entered the United States without inspection on June 24, 1989. On August 9, 1993, the applicant departed the United States. On September 13, 1993, the applicant returned to the United States. On September 27, 1993, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On August 10, 1994, the applicant's Form I-485 was approved and the applicant became a lawful permanent resident. On December 9, 1998, the applicant was arrested for alien smuggling. On April 22, 1999, the applicant pled guilty to conspiracy to smuggling aliens. On February 16, 2001, the applicant filed an Application for Naturalization (Form N-400). On May 17, 2000, a United States District Court judge convicted the applicant of Conspiracy to Alien Smuggling, and sentenced the applicant to five (5) years probation. On November 30, 2004, a Notice to Appear (NTA) was issued against the applicant. The applicant filed an Application for Asylum and Withholding of Removal (Form I-589), and on February 24, 2005, an immigration judge denied the applicant's Form I-589 and ordered the applicant removed from the United States. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On May 26, 2005, the applicant withdrew his appeal to the BIA. On January 10, 2007, the applicant's wife, [redacted], became a United States citizen. On or about April 6, 2007, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He now 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 reside with his naturalized United States citizen wife and naturalized United States citizen children.

The Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for being ordered removed under section 240 or any other provision of law; section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E), for alien smuggling; and section 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii), for being convicted of a crime involving moral turpitude. Additionally, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and he denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Director's Decision*, dated March 19, 2007.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

> (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 –
> >
> > > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime...

Section 212(h) of the Act provides, in pertinent part, that:

> (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—
>
> (i)...the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
>
> (ii)the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii)the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien...
>
> (2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 212(a)(6)(E) of the Act provides, in pertinent part, that:

> (i) In General.—Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.
>
> (ii) Special Rule in the case of family reunification.—Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was

physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized.—For provision authorizing waiver of clause (i), see subsection (d)(11).

Section 212(d)(11) of the Act provides, in pertinent part, that:

> The [Secretary] may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

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 [now, Secretary, Department of Homeland Security] 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 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, the applicant, through counsel, asserts that "[f]actual errors were made by the Center Director regarding the circumstances of Applicant's guilty plea and conviction for smuggling in his daughter." *Form I-290B*, filed April 12, 2007. The AAO notes that on April 22, 1999, the applicant pled guilty to "knowingly combin[ing], conspir[ing], and agree[ing] with [others]...to commit...to bring[ing] and attempt[ing] to bring hundreds of aliens from China and other countries to the United States." *Transcript of Proceedings*, United States Court Reporter – NDNY, page 20-22, dated April 22, 1999. On May 17, 2000, the applicant was convicted of conspiracy to smuggle aliens and was sentenced to five years probation. *See Transcript of Proceedings*, United States Court Reporter – NDNY, page 7, dated May 17, 2000. The AAO notes that during the criminal proceedings, the applicant's attorney addressed the fact that the applicant was attempting to bring his daughter to the United States; however, the United States District Court judge stated that the applicant "can't do a wrong thing, even for a child. It hurts [the applicant], it hurts everyone in [his] family." *Id.* at 6. Additionally, in the court transcripts, the applicant pled guilty to transporting or receiving fewer than five aliens. He did not plead guilty to transporting one alien, who would then be his daughter. The applicant states that he is "sorry that [he] broke the law; [he] did it to bring [his] daughter to [them]." *Applicant's affidavit*, dated April 30, 2007. The AAO notes that alien smuggling has not been determined to a crime involving moral turpitude, but it has been addressed by the Ninth Circuit Court of Appeals when making a determination regarding an alien's lack of good moral character. *See Moran v. Ashcroft*, 395 F.3d 1089, 1093 (9th Cir. 2005); *see also Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 749 (9th Cir. 2007); *see also Marmolejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007). Therefore, the applicant is not inadmissible under section 212(a)(2)(A) of the Act, in that he has not been convicted of a crime involving moral turpitude.

The AAO notes that if, as the Director notes in his decision, the applicant is found to be inadmissible under section 212(a)(6)(E)(i), and cannot prove that he was *only* smuggling his daughter into the United States, then he would be ineligible for a waiver under section 212(d)(11) of the Act. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. However, if the applicant was only smuggling his daughter into the United States, then he could be eligible for a waiver under section 212(d)(11) of the Act. As noted above, the applicant pled guilty to transporting or receiving fewer than five aliens, not

only transporting or receiving *one* alien. The AAO finds that court transcripts are unclear on whether or not the applicant was *only* smuggling his daughter into the United States. Therefore, the applicant is subject to the provisions of section 212(a)(6)(E)(i) of the Act and no waiver is available to the applicant because he knowingly encouraged, induced, assisted, abetted, or aided other aliens, besides his daughter, to enter the United States.

Counsel argues that the Director "misapplied the special rule found in INA Section 212(a)(6)(E)(ii)." *Form I-290B, supra.* Counsel states "[c]lause (ii) (regarding the special rule in the case of family reunification) is completely irrelevant to [the applicant's] case." *Brief in Support of Appeal*, page 4, filed July 13, 2007. The AAO notes that even if the Director misapplied the rule, which the AAO does not concede, the applicant is still inadmissible to the United States based on his previous order of removal. Counsel contends that the Director made "[f]actual and legal errors" and "abused his discretion." *Id.* The applicant states he "work[s] hard; [he] pay[s his] taxes; [he has] never been in trouble for anything anywhere, except the federal charge related to [his] daughter." *Applicant's affidavit, supra.* Additionally, he states he has "a wonderful family – a wife, three daughters, one son and six grandchildren whom [he] want[s] to be with here in the U.S. for the remainder of [his] life; [He has] no family ties to China." *Id.* The applicant's son states the applicant is a "caring father to [him], he is a very generous person, always tries his best to help his coworkers and friends. He works very hard, which a good example for [him] to follow, [he is] very proud of him." *Letter from* [redacted], dated December 4, 2004. The AAO notes that 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 wife and children, but it will be just one of the determining factors. The applicant's son states the applicant works for him as chef. *See Affidavit from* [redacted], dated December 6, 2004. The AAO notes that the applicant has been working without authorization and this is an unfavorable factor. Additionally, the AAO finds that the applicant's unauthorized presence in the United States is an unfavorable factor.

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.*

The favorable factors in this matter are the applicant's family ties to United States citizens, his wife and children, general hardship they may experience, letters of recommendation from friends, and the approval of a petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's conviction for alien smuggling, his initial entry without inspection, his failure to abide by an order of deportation, and periods of unauthorized presence and employment.

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. Therefore, in addition to the previous finding that the applicant was statutorily inadmissible under section 212(a)(6)(E)(i) and no purpose would be served in granting permission to reapply for admission, the AAO also finds that the application should be denied as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible 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.