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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUL 18 2005

IN RE:

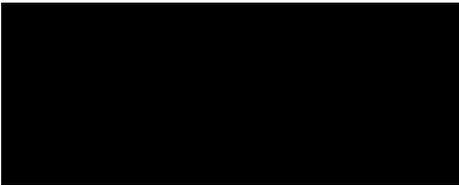
Applicant:



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:



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 citizen of Peru who was present in the United States without a lawful admission or parole on September 18, 1991. The applicant applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)) on March 11, 1993. On December 13, 1994, an Immigration Officer interviewed the applicant for asylum status. His application was denied and an Order to Show Cause for a hearing before an Immigration Judge was issued on June 6, 1995. On June 26, 1996, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant filed a Motion to Reopen his deportation hearing which was denied on October 23, 1996. An appeal to the Board of Immigration Appeals (BIA) was dismissed on August 5, 1997. The applicant failed to surrender for removal or depart from the United States and is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his spouse. The applicant 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 remain in the United States and reside with his U.S. citizen spouse and children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated October 12, 2004.

The AAO notes that although the applicant used a Peruvian address on the Form I-212, the record does not contain any documentary evidence to show that the applicant departed the United States after the BIA dismissed his appeal.

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 . . . [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.]

(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, 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, counsel submits a brief, affidavits from the applicant and his spouse, medical letters regarding the applicant's child and letters of recommendation regarding the applicant's character. In his brief counsel states that the favorable factors outweigh the unfavorable factors in this case and the Form I-212 should be granted. Counsel states that the only reason the applicant did not appear at his deportation hearing was because he did not receive the notice due to relocation. In addition counsel states that the applicant's spouse was granted asylum status in the United States and she would be in danger if she were to return to Peru. Furthermore counsel states that one of the applicant's children has a long history of medical problems and the other is not bilingual and will have a difficult time adjusting in Peru. Finally counsel states that the applicant has filed tax returns, never committed fraud against the government and is a person of good moral character. Counsel asserts that the above favorable factors outweigh the one unfavorable factor, the fact that he did not appear at his deportation proceeding. In their affidavits both the applicant and his spouse state that he never received the notice of his deportation hearing due to change of address which according to them they had orally informed the Service. In addition they state that the applicant is needed in the United States to provide emotional and financial support to the family.

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 favorable factors in this case include the applicant's family ties in the United States, his U.S. citizen spouse and children, the approval of a petition for alien relative, the absence of any criminal record since entering the United States, the numerous favorable letters of recommendation from relatives and friends attesting to his good moral character, the prospect of hardship to his family and the fact that he filed tax returns as required by law.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection and his failure to appear for deportation proceeding and his presence in the United States without a lawful admission or parole.

While the applicant's failure to attend a deportation hearing, and his unauthorized stay in the United States are serious matters that cannot be condoned, the AAO finds that 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.