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

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 15 2006

IN RE:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 of Iran and a citizen of the United Kingdom who, in 1982, entered the United States as a visitor. On September 16, 1985, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589). In 1986, the applicant was granted asylum in the United States. In 1991, the applicant became a citizen of the United Kingdom. In 1992, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved asylum application. In 1996, the applicant moved to the United Kingdom to open a business. On June 22, 1998, the applicant's Form I-485 was denied for lack of prosecution. While the Form I-485 was pending, the applicant traveled between the United Kingdom and the United States utilizing his U.K. passport. On September 9, 2003, the applicant applied for admission to the United States at the Los Angeles, California, Port of Entry. The applicant presented his U.K. passport for admission as a nonimmigrant under the Visa Waiver Program (VWP). The applicant was placed into secondary inspections when it was discovered that, on June 1, 1994, he had been admitted to the United States under the VWP for a period of 90 days and failed to depart the United States until April 8, 1996. The applicant was refused admission to the United States and was placed into proceedings before an immigration judge because he expressed a fear of returning to Iran. On September 24, 2003, the applicant withdrew his applications for asylum, withholding of removal and convention against torture before the immigration judge who returned the applicant to deferred inspections to apply for admission to the United States. On October 3, 2003, deferred inspections refused admission to the applicant because he had previously overstayed his 1994 admission under the VWP. On October 6, 2003, a warrant for removal of the applicant was issued. On October 20, 2003, the applicant was removed from the United States. The applicant has remained outside the United States since his removal. On November 11, 2004, the applicant married his U.S. citizen spouse, [REDACTED]. On December 13, 2004, [REDACTED] petition for Alien Relative (Form I-130) on behalf of the applicant. On January 21, 2005, [REDACTED] filed a Petition for Alien Fiancé (Form I-129K) on behalf of the applicant. On January 13, 2005, the applicant filed the Form I-212. The applicant was removed from the United States and is therefore inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). 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 reside in the United States with his U.S. citizen spouse and U.S. citizen parents.

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The director denied the Form I-212 accordingly. *See Director's Decision* dated July 19, 2005.

On appeal, the applicant contends that because of his wife and parents he should be allowed to return to the United States. *See Applicant's Brief*, dated August 12, 2005.

Section 212(a)(9)(A) 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.

. . . .

(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 removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(i) of the Act and, therefore, must receive permission to reapply for admission.

On appeal, the applicant asserts that he believed he was permitted to reside and work in the United States pursuant to his asylum status and that he was unaware of the denial of the Form I-485 based on his asylum approval because he never received notification at his address in the United States or the United Kingdom. The applicant asserts that each time he entered the United States utilizing his U.K. passport he intended to return to the United Kingdom, even though he believed his application for permanent residence was still pending. Finally, the applicant asserts that he has no criminal record and paid taxes while he resided in the United States.

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 record reflects that the applicant's mother and father, who are natives of Iran, became lawful permanent residents in 1994. The applicant's father became a naturalized U.S. citizen in 2001 and his mother became a naturalized U.S. citizen in 2002.

The director's decision stated that the unfavorable factors in the applicant's case included his willful disregard of the laws of this country. The AAO does not find that the applicant has shown a continued disregard for and abuse of the laws of the United States. The applicant was granted asylum and was entitled to file the Form I-485 in an effort to legalize his status in the United States. While the applicant should have obtained advance parole and not utilized a nonimmigrant status to enter the United States during the adjudication of the Form I-485, the Sworn Statement in the record indicates that the applicant did not intend to disregard the laws of the United States and believed that he was entitled to return to the United States in such a fashion.

The AAO finds that the director failed to consider the applicant's family ties in the United States, his U.S. citizen spouse, U.S. citizen parents, the absence of any criminal record since entering the United States, the circumstances surrounding the applicant's removal and the fact that the applicant has remained outside the United States since his removal.

The AAO finds that the unfavorable factors in this case are the applicant's inadvertent abuse of the immigration laws of the United States and his removal from the United States.

While the applicant's entries into the United States and overstay as a VWP nonimmigrant while he was seeking permanent residence in the United States 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.