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U.S. Citizenship  
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[REDACTED]

FILE: [REDACTED] Office: PHOENIX Date: JUN 09 2006

IN RE: [REDACTED]

H4

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.

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Phoenix, Arizona, 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 dismissed.

The applicant is a native and citizen of Mexico who originally entered the United States without inspection in 1971. On July 14, 1973, the applicant's U.S. citizen daughter was born. The applicant was apprehended by immigration officers on three occasions and returned voluntarily to Mexico, each time reentering the United States without inspection. On November 15, 1977, the applicant entered the United States without inspection. The applicant was apprehended by immigration officers and placed into proceedings on November 23, 1980. On November 26, 1980, the immigration judge granted the applicant voluntary departure until December 26, 1980. The applicant was returned to Mexico on November 26, 1980. On the same day the applicant reentered the United States without inspection. The applicant was apprehended by immigration officers and was placed into proceedings on April 16, 1981. The proceedings were terminated under the "Silva v. Levi" injunction. Once the injunction was lifted the applicant requested voluntary departure through prior counsel, [REDACTED]

[REDACTED] When the applicant's request for voluntary departure was denied on May 20, 1982, the applicant's prior counsel requested a hearing before the immigration judge and the applicant was again placed into proceedings on November 1, 1983. On February 14, 1985, the immigration judge ordered the applicant removed in absentia because he failed to appear for his hearing. On August 21, 1985 a warrant of removal was issued and served on the applicant informing him that he should appear on September 3, 1985 for removal to Mexico. The applicant failed to present himself for removal or to depart the United States. On October 15, 1985, fugitive operations apprehended the applicant at his work. On the same day, the applicant was removed from the United States at San Luis, Arizona. On October 16, 1985, the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission. The applicant has remained in the United States since that entry. On January 28, 2001, the applicant's U.S. citizen daughter filed a Petition for Alien Relative (Form I-130) on his behalf. On June 8, 2001, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485), based on the Form I-130. On February 22, 2005, the applicant filed the Form I-212. The Form I-130 was approved on June 24, 2005. The applicant was found inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) for seeking admission after being removed from the United States. 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 daughter.

The district director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The district director denied the Form I-212 accordingly. *See District Director's Decision* dated May 23, 2005.

On appeal, counsel contends that the district director erred in finding the applicant inadmissible and that the favorable factors outweighed the unfavorable factors. *See Applicant's Brief*, dated August 24, 2005.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested.

The AAO finds that the applicant is clearly inadmissible under sections 212(a)(9)(A) and 212(a)(9)(C)(i) of the Act and, therefore, must receive permission to reapply for admission.

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 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.

(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.

....

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

- (1) the alien's having been battered or subjected to extreme cruelty; and

- (2) the alien's--
  - (A) removal;
  - (B) departure from the United States;
  - (C) reentry or reentries into the United States; or
  - (D) attempted reentry into the United States.

Counsel contends that the applicant cannot be found inadmissible to the United States because of a prior removal order because (1) the district director has not provided the applicant with proof of his removal; (2) the applicant was unaware of a removal order against him and he was not informed that he was required to apply for permission to reapply for admission to the United States before reentering the United States; and (3) since proceedings against the applicant were terminated in 1998 it is unlikely that the applicant has been previously removed from the United States. Counsel's arguments are unpersuasive.

Counsel asserts that because proceedings against the applicant were terminated by an immigration judge in 1998, there is evidence that the applicant was not previously removed from the United States. The AAO finds that termination of proceedings does not necessarily require the favorable exercise of a judge's discretion which is the basis for counsel's contention that the applicant was not previously removed from the United States. Termination of proceedings may be based on a technical ground. Moreover, at the time proceedings were terminated the immigration judge may not have been aware of the prior removal because those records were associated with a different A-number than the A-number under which proceedings were terminated. When the applicant's fingerprints were taken in connection with the Form I-485 it was discovered that the applicant had been previously removed under an alternative A-number.

The record contains an executed Warrant of Deportation (Form I-205), A Notice of Deportation to Alien (Form I-294), Notice of Surrender for Deportation (Form I-166), A Record of Deportable Alien (Form I-213), A Record of Sworn Statement in Affidavit Form (Form I-215B) and Immigration Judges Orders. The Form I-213 and Form I-215B indicate that the applicant originally entered the United States without inspection in 1971 and, prior to the order of voluntary departure in 1980, had been apprehended and voluntarily returned to Mexico by immigration officers on three occasions. The above-referenced documents reflect that the applicant continued to reside at the same address during the entire time he was in proceedings between 1980 and 1985, he was represented by counsel who received all the notices, and there are certified mail return receipts indicating that the applicant signed for all the notices. The Form I-205 reflects that the applicant was informed he was being deported to Mexico and it is executed by the applicant. The Form I-294 informed the applicant, in English and Spanish, that if he wished to return to the United States he would need to obtain permission to return after deportation and he would be guilty of a felony if he returned within five years without permission.

Counsel asserts that he is unable to mount a rebuttal of the allegations against the applicant in regard to his prior deportation because the district director failed to provide supporting evidence with his decision. The AAO notes that the district director is not required to provide such documentation and counsel should file a Freedom of Information Act (FOIA) application if he wishes to obtain such evidence. Counsel then contends

that FOIA applications take an inordinate amount of time to process. However, there is no evidence in the record to suggest that counsel has ever filed a FOIA application. It is noted that the applicant has three separate A numbers: [REDACTED] the current file; [REDACTED] which contains his legalization application; and [REDACTED] his initial deportation file, which has been consolidated into [REDACTED]

The record of proceedings indicates that the applicant entered the United States without inspection, failed to appear at an immigration hearing, was ordered removed and failed to comply with the order of removal. The applicant was detained and removed from the United States in 1985 and subsequently entered the United States without lawful admission or parole and without permission to reapply for admission.

Counsel contends that the applicant does not have an "extensive history" of immigration violations and has not shown a "callous attitude" towards the laws of the United States because he was deported over twenty years ago and has not committed any violations during the intervening 20 years. Counsel's arguments are unpersuasive. While the applicant does not have any criminal arrests or convictions in the United States, the record clearly reflects that the applicant has shown a callous attitude towards and has an extensive history of immigration violations. The applicant entered the United States without inspection in 1971, after which he resided and worked in the United States without authorization. The applicant re-entered the United States without inspection on three occasions after immigration officers had permitted him to return to Mexico voluntarily. The applicant re-entered the United States without inspection after the immigration judge granted him an order of voluntary departure. The applicant re-entered the United States without lawful admission or parole and without permission to reapply for admission after he was removed from the United States and was informed that he required permission to return to the United States. The applicant has extended unlawful presence and unauthorized employment in the United States. Counsel's argument that the applicant has not committed any violations in the last twenty years is unpersuasive because during that period of time he has unlawfully resided and worked 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 favorable factors in this matter are the applicant's U.S. citizen daughter, the absence of any criminal record since entering the United States, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's multiple illegal entries into the United States, extended unauthorized residence and employment in the United States, failure to appear at an immigration hearing, failure to comply with an order of removal and the applicant's return to the United States without lawful admission or parole and without permission to reapply for admission after he was informed such permission was required.

The applicant in the instant case has multiple immigration violations. The applicant's actions in this matter cannot be condoned. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

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.