



U.S. Citizenship  
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[REDACTED]

FILE:

Office: VERMONT SERVICE CENTER

Date: JUN 07 2006

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, Vermont 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 Guatemala who entered the United States without lawful admission or parole in October 1993. On December 27, 1993, the applicant filed a Request for Asylum in the United States (Form I-589). On October 14, 1998, the applicant was informed that the Form I-589 was being referred to an immigration judge and she was issued a Notice to Appear (NTA) for a hearing before an immigration judge. On December 21, 1998, the applicant failed to appear for the hearing and the immigration judge ordered her deported in absentia. On January 20, 1999, the applicant timely filed an appeal with the Board of Immigration Appeals (BIA). On June 30, 1999, the BIA dismissed the applicant's appeal because they did not have jurisdiction over the in absentia order. On May 18, 2000, a notice requiring the applicant to report for removal on June 19, 2000 was issued. On April 15, 2002, the applicant filed the Form I-212. 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). 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 her U.S. citizen spouse, U.S. citizen son and lawful permanent resident son.

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 August 2, 2005.

On appeal, counsel contends that the director erred in finding that the unfavorable factors in the applicant's case outweighed the favorable factors. *See Applicant's Brief*, dated August 22, 2005.

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.

The record of proceedings indicates that the applicant entered the United States without inspection and, when subsequently placed into removal proceedings, failed to appear at her immigration hearing. The applicant was ordered removed from the United States and failed to comply with the order. Subsequently a warrant for removal of the applicant was issued. The applicant failed to appear for removal or to depart the United States. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and, therefore, must receive permission to reapply for admission.

On appeal, counsel asserts that the applicant merits a favorable exercise of discretion because she has a U.S. citizen son and a lawful permanent resident son, she is eligible under her husband's approved Petition for Immigrant Worker (Form I-140) for an immigrant visa, she is a person of good moral character and that except for the deportation order she never violated any law. On appeal, counsel submits a brief, a copy of the applicant's spouse's lawful permanent resident card, copies of the applicant's children's birth certificates, a copy of the applicant's son's lawful permanent resident card, letters of recommendation from individuals regarding her good moral character, copies of tax returns, documentation regarding property ownership, and copies of police clearances.

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, prior to the issuance of the in absentia order, the applicant gave birth to a U.S. citizen son and she married her spouse who had an approved labor certification. Additionally, prior to issuance of the removal order, the applicant's spouse's employer filed the Form I-140. The Form I-140 was approved on February 3, 1999 and the applicant's spouse became a lawful permanent resident in 2000. The applicant's

other son became a lawful permanent resident in 2001 through the approved Form I-140. The applicant's spouse became a naturalized U.S. citizen in 2006.

The director's decision stated that the unfavorable factors in the applicant's case included her willful disregard of the laws of this country and her 11 years of unlawful presence and unauthorized employment in the United States. 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 filed a non-frivolous asylum application and she was entitled to exhaust all means available to her by law in an effort to legalize her status in the United States. Her various applications and appeals conferred on her a status that allowed her to remain in the United States while they were pending. The director found that the applicant had also worked without authorization. However, the record contains evidence that the applicant was granted work authorization pursuant to the pending Form I-589.

The AAO finds that the director failed to consider the applicant's family ties in the United States, her U.S. citizen spouse, U.S. citizen son and lawful permanent resident son, the absence of any criminal record since entering the United States, the potential of general hardship to her family, the fact that she has filed tax returns as required by law and the letters of recommendation regarding her character.

The AAO finds that the unfavorable factors in this case are the applicant's initial entry without inspection, failure to appear for a court hearing and her failure to depart the United States after an immigration judge issued a final removal order.

While the applicant's entry into the United States without inspection, her failure to attend a court hearing and her subsequent failure to depart the United States after being ordered removed 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.