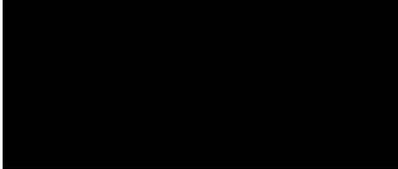




U.S. Citizenship
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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 20 2008
[consolidated therein]
[consolidated therein]

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.


Robert P. Wiemann, Chief
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 dismissed.

The applicant is a native and citizen of Mexico who initially entered the United States without inspection on October 18, 1970. On November 1, 1972, an Order to Show Cause (OSC) was issued against the applicant. On November 8, 1972, the applicant was deported from the United States. On an unknown date before April 5, 1973, the applicant reentered the United States without inspection. On April 5, 1973, the applicant was arrested in Los Angeles, California, for driving while under the influence, and was sentenced to fifteen (15) days in jail. On October 4, 1981, the applicant was arrested for planting and cultivating marijuana. On October 5, 1981, the applicant pled guilty to possession of marijuana in excess of 28.5 grams, in violation of California Health and Safety Code § 11357(c), and was sentenced to five (5) days in jail. On September 23, 1987, the applicant filed an Application for Status as a Temporary Resident (Form I-687). On January 17, 1989, the applicant's Form I-687 was denied. The applicant filed an appeal of the denial of his Form I-687, and on June 11, 1990, the Legalization Appeals Unit dismissed the applicant's appeal. On October 14, 1993, the applicant's wife, a lawful permanent resident of the United States at the time, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On November 19, 1993, the applicant's Form I-130 was approved. On July 27, 1996, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On an unknown date, the applicant departed the United States, and on February 2, 1997, he was paroled into the United States. On November 21, 2000, the District Director, Los Angeles, denied the applicant's Form I-485. On November 14, 2006, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On November 19, 2006, the applicant filed a motion to reopen the District Director's denial of his Form I-485. On June 21, 2007, the applicant's motion to reopen was denied. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C). 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 five United States citizen adult 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 from the United States; section 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating a law relating to a controlled substance; section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for willfully misrepresenting a material fact on his Form I-485; and section 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C), for reentering the United States after being deported. The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and she denied the applicant's Form I-212 accordingly. *Director's Decision*, dated June 21, 2007.

Section 212(a)(2) 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, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

is inadmissible.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) *and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana...*

Emphasis added.

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

(i) In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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

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

(1) The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien....

Section 212(a)(9) of the Act states: Aliens previously removed

(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 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.

....

(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.

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 a lawful admission or parole.

On appeal, the applicant, through counsel, asserts that the applicant is eligible for a waiver under 212(h) of the Act, in that he was convicted of being in possession of less than 30 grams of marijuana. *See letter from counsel*, dated August 16, 2007. The AAO notes that the applicant may be eligible for a waiver of his controlled substance conviction; however, the AAO finds that his conviction is an unfavorable factor. Counsel claims that the applicant is eligible for a waiver under 212(i) of the Act, because “[i]t was not his intention to misrepresent any facts...However, assuming arguendo that a misrepresentation was made, it was not willful on [the applicant’s] part.” *Id.* Counsel states that the applicant did not willfully misrepresent that he had never been deported from the United States in his adjustment of status application and interview. *Id.* The AAO notes that the applicant may be eligible for a waiver of his section 212(a)(6)(C) ground of inadmissibility. However, the AAO notes that during the applicant’s adjustment interview, he was asked if he had been deported from the United States and he stated “No.” Additionally, the applicant signed his Form I-485 certifying that all the information supplied was correct and true. Counsel claims that since the applicant’s Form I-212 was filed under the jurisdiction of the 9th circuit court of appeals, the Director is enjoined by the “preliminary injunction protecting those individuals such as [the applicant].” *Id.* citing *Duran Gonzalez v. DHS*, 2:06-CV-1411 (W.D. Wash.). The AAO notes that counsel is correct that based on the *Duran Gonzalez* class action, the Service is enjoined from denying a Form I-212 based on section 212(a)(9)(C) of the Act; however, the applicant in the present case was also found inadmissible under sections 212(a)(9)(A), 212(a)(2)(A), and 212(a)(6)(C) of the Act. Additionally, the AAO finds that since the applicant filed his Form I-485 before the date of enactment of the unlawful presence provisions under IIRIRA, the applicant has not accrued unlawful presence.

Counsel states that the applicant “has resided in the United States since 1971.” *Letter from counsel*, supra. The AAO notes that many of these years in the United States were without authorization and that is an unfavorable factor. Counsel claims that the applicant’s family “will suffer extreme hardship if he is removed from the United States, because he is the one individual who provides financially for the family. He owns a home, a business, pays taxes, educates his children, and provides for six law abiding citizens.” *Id.* The AAO notes that the applicant has been employed in the United States without authorization and that is an unfavorable factor. The applicant’s wife states they “have two children in college which [they] provide and support financially and two other children at the high school level. [They] work very hard to keep [their] children in school, especially those in college.” *Letter from [REDACTED]*, dated June 30, 2005. The AAO notes that all of the applicant’s children are adults and there is no evidence in the record that his children cannot provide for themselves. Additionally, 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 family, but it will be just one of the determining factors.

The record of proceeding reveals that on November 8, 1972, the applicant was deported from the United States. On an unknown date, the applicant reentered the United States without inspection. Based on the applicant's previous deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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, a history of paying taxes, and the approval of a petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection, his illegal reentry into the United States subsequent to his November 8, 1972 deportation, his criminal record, his inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(6)(C)(i) of the Act, and his lengthy periods of unauthorized presence and employment. The AAO notes that the applicant may be eligible to waive his grounds of inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(6)(C)(i) of the Act; however, there is no evidence in the record that he has filed an Application for Waiver of Grounds of Excludability (Form I-601); and, therefore, the applicant remains inadmissible to the United States.

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.

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.