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

PUBLIC COPY

[redacted]

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FILE: [redacted] [relates] Office: PHOENIX, ARIZONA Date: **FEB 21 2008**

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 District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record establishes that the applicant is a native and citizen of Mexico who entered the United States without inspection in 1991. On September 10, 1991, the applicant was arrested for assault/domestic violence in Lake Havasu City, Arizona. On April 10, 1992, the applicant was arrested for aggravated assault and criminal damage. On June 30, 1992, the applicant was convicted of criminal damage and was sentenced to thirty (30) days in jail and eighteen (18) months probation. The applicant's brother, a naturalized United States citizen, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on July 22, 1992. On September 2, 1993, an Order to Show Cause (OSC) was issued against the applicant. On December 17, 1993, an immigration judge ordered the applicant deported *in absentia*. The applicant failed to depart the United States as ordered. On February 2, 1994, a Warrant of Deportation (Form I-205) was issued. On December 23, 1995, the applicant married [redacted] a native and citizen of Mexico, in California. On May 6, 1996, the applicant was deported to Mexico. On May 9, 1996, the applicant reentered the United States without inspection. On October 17, 1997, the applicant's daughter, [redacted], was born in Arizona. On March 15, 2000, the applicant's daughter, [redacted], was born in Arizona. On or about April 10, 2002, the applicant filed a motion to reopen the immigration judge's decision. On April 29, 2002, an immigration judge denied the applicant's motion to reopen. On May 30, 2002, the applicant filed an appeal with the Board of Immigration Appeals (BIA). On May 21, 2003, the applicant's son, [redacted] was born in Arizona. On July 7, 2003, the BIA affirmed the immigration judge's decision. On August 6, 2003, the applicant filed a Petition for Review of the BIA's decision with the Ninth Circuit Court of Appeals (Ninth Circuit). On July 21, 2004, the Ninth Circuit denied the applicant's petition for review. On March 1, 2005, the applicant's daughter, [redacted], was born in Arizona. On March 16, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On July 20, 2006, the applicant's Form I-485 was administratively closed. On or about August 1, 2006, the applicant filed a motion to reopen the administrative closure of the applicant's Form I-485. On October 2, 2006, the applicant's previous order of deportation was reinstated. On October 3, 2006, the applicant filed another Petition for Review and a Stay of Removal with the Ninth Circuit. On October 11, 2006, the Ninth Circuit granted the applicant a temporary stay of removal. Based on the applicant's previous order of removal, the applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I). Additionally, the applicant is inadmissible under section 212(a)(2)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for being convicted of a crime involving moral turpitude, and section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without admission or parole. 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 spouse and United States citizen children.

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered removed under section 240 or any other provision of law, and section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for his conviction of a crime involving moral turpitude. The District Director found that the unfavorable factors in the applicant's case outweighed the favorable factors, and he denied the applicant's Application for Permission to Reapply for

Admission into the United States after Deportation or Removal (Form I-212) accordingly. *District Director's Decision*, dated November 3, 2006.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

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...

is inadmissible.

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

Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—

(i)...the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii)the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii)the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien...

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 212(a)(6). Illegal entrants and immigration violators.-

(A) Aliens present without admission or parole.-

(i) In general.- An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General [now, Secretary, Department of Homeland Security], 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 lawful admission or parole.

On appeal, the applicant, through counsel, contends that the District Director "abused his discretion in denying [the applicant's] [Form I-212] because the District Director did not adequately consider the positive

factors in this case." *Appeal Brief*, page 3, filed November 29, 2006. Counsel states that the applicant "has resided in the United States for more than 15 years since his initial entry in 1991, and even though he was convicted as a young man of assault and damage to property, he has not been arrested or convicted of any crime for more than 14 years." *Id.* at 4. The AAO notes that the applicant initially entered the United States without inspection and failed to abide by the United States immigration laws by reentering the United States after being deported, and all of his years of unauthorized presence in the United States is an unfavorable factor. Counsel claims that "[t]hrough his actions, through his hard work[,] and through his quality as a husband and father, [the applicant] has demonstrated beyond any reasonable doubt that he has rehabilitated.... [The applicant] has accumulated a great deal of equitable factors during his time in the United States; his 4 U.S. citizen children, specifically, as well as his years of dedicated work as a cook." *Id.*

The AAO notes that all the years that the applicant has been employed, it has been without authorization and this is another unfavorable factor. The applicant's daughter, [redacted], states if the applicant is removed from the United States, "[she] will not know what to do without him." *Statement from* [redacted] undated. Counsel states that the "hardship factors on U.S. citizen family members should also be taken into account." *Appeal Brief, supra* at 5. The AAO notes that the applicant's wife is employed as a certified nursing assistant and it has not been established that the applicant is the primary wage earner for the family. 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 spouse and children, but it will be just one of the determining factors. Furthermore, the AAO notes that neither the applicant, nor his wife, nor his brother submitted a statement regarding the hardship they would suffer if the applicant were removed to Mexico.

The record of proceeding reveals that in 1991, the applicant entered the United States without inspection. On December 17, 1993, an immigration judge ordered the applicant deported. The applicant failed to depart the United States as ordered. On February 2, 1994, a Warrant of Deportation was issued. On May 6, 1996, the applicant was deported to Mexico. On May 9, 1996, the applicant reentered the United States without inspection. On October 2, 2006, the applicant's previous order of deportation was reinstated. Based on the applicant's previous order of 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 brother and children, general hardship they may experience, letters of recommendations, 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 failure to abide by an order of deportation, his illegal reentry into the United States subsequent to his May 6, 1996 deportation, his criminal record, and periods of unauthorized presence and employment.

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.