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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: SOUTH PORTLAND, MAINE Date: OCT 0 2 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 Field Office Director, South Portland, Maine, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India, who entered the United States on May 9, 1993. On July 20, 1993, the applicant filed a Request for Asylum in the United States (Form I-589). On December 17, 1993, an immigration judge ordered the applicant excluded and deported from the United States. The applicant failed to depart the United States as ordered. On May 15, 2003, the applicant's employer filed a Petition for Alien Worker (Form I-140) on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On July 27, 2004, the applicant's Form I-140 was approved. On June 3, 2005, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On September 26, 2007, the Field Office Director denied the applicant's Forms I-212 and I-485. 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). 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 continue his employment in the United States.

The Field Office Director found that the unfavorable factors in the applicant's case outweighed the favorable factors, and he denied the applicant's Form I-212 accordingly.

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

(A) Certain alien previously removed.-

(i) Arriving Aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 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.

(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.

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, asserts that the Field Office Director "did not give sufficient weight to the Applicant's favorable factors including the Applicant's demonstrated 'reformation of character' despite prior immigration violations." *Attachment to Form I-290B*, filed October 23, 2007. Counsel claims that the applicant "was not ordered excluded and deported pursuant to Section 235(b)(1) or Section 240 proceedings, therefore Section 212(a)(9) does not apply here." *Id.* The AAO notes that the applicant was ordered excluded and deported under exclusion proceedings; however, under section 212(a)(9)(A)(ii)(I) of the Act, the applicant is inadmissible for being ordered deported under "section 240 *or any other provision of law*." [emphasis added]. Counsel states that the applicant failed to comply with the immigration judge's order because he "had real fear to return to his home country and the fear remains that he will be persecuted should he not be allowed to reenter the United States.... Applicant respectfully asserts that he has presented sufficient justification for not following the order of deportation." *Appeal Brief*, page 2, November 23, 2007. The AAO notes that the applicant had an opportunity to file an asylum claim and make his case to an immigration judge; however, the immigration judge denied the applicant's request for asylum and the applicant failed to appeal the immigration judge's ruling. Counsel asserts that the applicant "would make a meaningful contribution to his community, provide valuable assistance to the business of a United States citizen, and prevent a family consisting of a Legal Permanent Resident and three United States Citizens, including two minors, from unnecessarily experiencing extreme hardship." *Id.* at 3. The applicant states that he resides "with [his] United States Citizen uncle...[his uncle's] legal permanent resident wife, and two United States Citizen children since [his] entry into the United States. This is [his] family in the United States. [He] spend[s] all of [his] free time with them and assist[s] them in the care of their children." *Affidavit from the applicant*, dated May 24, 2005. The applicant's uncle states the applicant "is an essential part of [his] family. [He has] been ill health of the past nine years. [He has] had two heart surgeries, and [has] diabetes, and high blood pressure.... [The applicant] has been an important part of [their] daily lives in that he has assist[ed] [him] and [his] wife in the care of [their] young daughter.... He has also assist[ed] [them] financially in helping to pay [their] bills and [their] mortgage." *Affidavit from* [redacted] dated May 24, 2005. Regarding the hardship the applicant's family may face, 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. Counsel claims that the applicant's lengthy residence in the United States is a favorable factor. However, the AAO notes that the applicant's lengthy residence in the United States has been without authorization and that is an unfavorable factor. Counsel states that the applicant's employer would suffer hardship if the applicant is removed from the United States. The AAO notes that the applicant has been employed in the United States without authorization and that is an unfavorable factor.

The record of proceeding reveals that on December 17, 1993, an immigration judge ordered the applicant excluded and deported from the United States. The applicant failed to depart the United States as ordered. 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 and a lawful permanent resident of the United States, general hardship they may experience, his lack of a criminal record, and the approval of an employment-based immigrant petition. The AAO finds that the unfavorable factors in this case include the applicant's failure to comply with an order of deportation, and his approximately ten years of unauthorized employment and unauthorized presence in 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.