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U.S. Citizenship
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[REDACTED]

FILE:

Office: NEW YORK CITY, NEW YORK

Date: **SEP 10 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, New York City, New York, 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 in November 1999. On April 29, 2003, the applicant was arrested for rape in the second degree and endangering the welfare of a child. On October 22, 2003, the applicant was convicted of sexual misconduct and was sentenced to six (6) years probation. On June 10, 2005, a Notice to Appear (NTA) was issued against the applicant. On November 22, 2005, an immigration judge granted the applicant voluntary departure. On November 30, 2005, the applicant was removed from the United States. On January 21, 2006, the applicant entered the United States without inspection. On March 1, 2006, the applicant was expeditiously removed from the United States. On May 30, 2006, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On September 19, 2006, the applicant's Form I-130 was approved. The applicant is inadmissible to the United States under section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). 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 United States citizen wife and child.

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for being ordered removed under section 235(b)(1) of the Act, that the unfavorable factors in the applicant's case outweighed the favorable factors, and she denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *District Director's Decision*, dated August 6, 2007.

Section 212(a)(9) of the Act states:

(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 District Director erred in denying the applicant's Form I-212. *See Form I-290B*, filed August 31, 2007. Counsel claims that the applicant's wife is "already suffering financial hardship since [the applicant] has left the US. She and her child live with her mother...The [applicant's] spouse's mother is in poor health, and she therefore only works one day a week...Since the [applicant] has been deported, the applicant's spouse has therefore been forced to pay a much larger percentage of her salary to her mother to cover the rent amount." *Appeal Brief*, page 2, filed August 31, 2007. The AAO notes that the applicant has not established that he is unable to contribute to his wife's financial wellbeing from a location outside of the United States. Additionally, the AAO notes that when the applicant resided in the United States, he was employed and present in the United States without authorization and those are unfavorable factors. Counsel claims that the applicant's wife "has been diagnosed by doctors as having a 'high risk' of becoming diabetic." *Id.* at 2-3. The applicant's wife states "[her] appetite has suffered, and [she has] even lost weight. [She does] not sleep well at nights, and [she has] been on the verge of many nervous breakdowns." *Affidavit from [REDACTED]*, dated November 24, 2006. The AAO notes that there was no medical documentation submitted establishing that the applicant's wife is suffering from any medical conditions. Additionally, there was no documentation submitted establishing that the applicant's wife cannot receive medical care for any medical conditions in Mexico. Furthermore, 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 wife, but it will be just one of the determining factors.

The record of proceedings reveals that on November 22, 2005, an immigration judge granted the applicant voluntary departure. On November 30, 2005, the applicant was removed from the United States. On January 21, 2006, the applicant entered the United States without inspection, and on March 1, 2006, the applicant was

expeditiously removed from the United States. Based on the applicant's order of removal from the United States, the applicant is clearly inadmissible under section 212(a)(9)(A)(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 his United States citizen wife and child, general hardship they may experience, and the approval of a visa petition filed by the applicant's wife on his behalf.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry into the United States without inspection, his entry without inspection subsequent to his November 30, 2005, removal, his criminal conviction for sexual misconduct, 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.