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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

[Redacted]

H4

Date: FEB 15 2012

Office: NEW YORK

FILE: [Redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Maria F. Rhew

f.s.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application will be approved.

The applicant is a native and citizen of Ecuador who attempted to procure entry to the United States in June 1995 by presenting a fraudulent passport. The applicant was ordered excluded and deported from the United States on June 14, 1995. *See Order of the Immigration Judge*, dated June 14, 1995. The applicant departed the United States on August 23, 1995. *See Notice to Alien Ordered Excluded by Immigration Judge*, dated August 23, 1995. The applicant subsequently entered the United States without inspection in December 1995. The applicant is inadmissible 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)(C)(iii) in order to reside in the United States with his U.S. citizen spouse and child.

The district director found that the applicant was ineligible for a grant of the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) pursuant to section 241(a)(5) of the Act. Moreover, the district director considered the positive and negative factors and concluded that the applicant's disregard for immigration laws when he re-entered the United States without permission after being ordered removed by an Immigration Judge, coupled with other negative equities in his case, weighed against a favorable exercise of discretion. The applicant's Form I-212 was denied accordingly. *Decision of the District Director*, dated December 6, 2008.

In support of the appeal, counsel for the applicant submits the following: a brief, dated January 5, 2009; evidence of the applicant's spouse's and child's U.S. citizenship; a copy of the applicant's and his spouse's marriage certificate; medical documentation pertaining the applicant's child; psychiatric documentation regarding the applicant's spouse; an affidavit from the applicant's spouse; and a confirmation of employment letter for the applicant. The entire record was reviewed and considered in rendering this decision.

Section 241(a)(5) of the Act provides in pertinent part:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The regulation at 8 C.F.R. § 241.8 states that:

(a) [A]n alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such

circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

- (1) Whether the alien has been subject to a prior order of removal. . . .
- (2) The identity of the alien. . . .
- (3) Whether the alien unlawfully reentered the United States

(b) [I]f an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

A thorough review of the record reflects that the applicant in the present matter was not given a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required by 8 C.F.R 241.8(b).¹ Consequently, the applicant's prior removal order was not reinstated. The AAO will therefore adjudicate the merits of the Form I-212 application.

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 section 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

¹ The AAO notes that Immigration and Customs Enforcement (ICE) is the agency responsible for issuance of the Form I-871.

(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.

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:

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 the instant case, counsel documents that the applicant has not been convicted of any crimes. Counsel further notes that the applicant's child, born in 2004, suffers from bronchial asthma. Moreover, counsel asserts that the applicant's spouse is experiencing psychological problems due to the anxieties and fears that she has in regards to her husband's removal from the United States. Finally, counsel maintains that the applicant has been gainfully employed since 1999 in the United States, has paid taxes, and has extensive community ties to the United States as a result of having resided in the United States since 1995. *See Brief in Support of Appeal*, dated January 5, 2009.

In support, evidence has been provided establishing the applicant's U.S. citizen child's medical condition, specifically, bronchial asthma. *See Letter from* [REDACTED] dated December 30, 2008. In addition, a letter and medical documentation has been provided establishing that the applicant's spouse is suffering from depression and anxiety as a result of her husband's immigration situation. Said documentation further establishes that the applicant's spouse has been prescribed medications for her conditions and needs to continue psychotherapy. *Letter from* [REDACTED] M.D., [REDACTED], dated January 2, 2009. Moreover, a letter has been provided establishing the applicant's gainful employment, since November 1999, earning \$400 per week. Said letter also confirms that the applicant is very dependable and always on time. *See Letter from* [REDACTED], [REDACTED], LLC, dated December 30, 2008. Documentation has also been provided establishing that the applicant has no criminal record. *See Good Conduct Certificate from* [REDACTED] dated August 17, 2006.

Finally, an affidavit has been provided by the applicant's U.S. citizen spouse. In her declaration, the applicant's spouse explains that she works from 11:00 PM to 9:00 AM Monday through Saturday and depends on the applicant to take care of their daughter. Were he to relocate abroad, she contends that she would have to quit her job to care for her child, thereby causing her financial hardship. She further maintains that she and her child are very close to the applicant and were he to relocate abroad, they would both suffer emotional hardship. Finally, the applicant's spouse asserts that she and her daughter are unable to relocate to Ecuador as she would not be able to obtain gainful employment and her daughter would not be able to receive proper medical care. *Affidavit of* [REDACTED], dated January 2, 2009.

The favorable factors in this matter are the hardships the applicant's U.S. citizen spouse and child would face if the applicant were to relocate to Ecuador, regardless of whether they accompanied the applicant or remained in the United States, the approval of the Petition for Alien Relative (Form I-130) filed on behalf of the applicant in November 2005, the applicant's long-term gainful employment in the United States, the payment of taxes, the apparent lack of a criminal record, his community ties, and the passage of more than sixteen years since the applicant was ordered removed. The unfavorable factors in this matter are the applicant's attempt to procure entry to the United States by fraud or willful misrepresentation in 1995, his deportation from the United States in 1995, his subsequent re-entry to the United States without inspection in 1995 and periods of unauthorized presence and employment in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established 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. The application is approved.