

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE: A9 [REDACTED] Office: SAN ANTONIO, TEXAS Date: DEC 05 2005
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)(iii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

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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. Wiernann, Director
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, San Antonio, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and a citizen of El Salvador who entered the United States without inspection on or about January 18, 1984. The applicant applied for and was granted temporary residence status on June 16, 1988. On September 27, 1991, the applicant was granted Lawful Permanent Resident (LPR) status. On August 11, 1999, in the 299th Judicial District Court of Travis County, Texas, the applicant was convicted of the offense of driving while intoxicated ("DWI") a 3rd degree felony. The applicant was sentenced to 10 years imprisonment, probated for five years. The imposition of the sentence was suspended and the applicant was placed on community supervision for five years. The record reflects that the applicant has three other convictions for DWI. One on August 30, 1999, for a DWI that occurred on December 12, 1994, and two convictions on January 30, 1997, for DWIs that occurred on January 1, 1996, and on January 25, 1997. The applicant was placed in removal proceedings, and on December 28, 1999 an Immigration Judge ordered the applicant removed to El Salvador pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony at any time after admission. Consequently, the applicant was removed from the United States on February 4, 2000. The record reflects that the applicant reentered the United States on or about February 20, 2000, without permission to reapply for admission, in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). The applicant was indicted for violation of 8 U.S.C. § 1326. On May 8, 2002, the United States District Court for the Western District of Texas, Austin Division, dismissed the applicant's indictment for violating 8 U.S.C. § 1326. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 remain in the United States and reside with his U.S. citizen spouse and children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. See *District Director's Decision* dated December 5, 2002.

Section 212(a)(9)(A) of the Act states in pertinent part:

(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 has consented to the aliens' reapplying for admission.

On appeal, counsel states that the District Director abused his discretion because he failed to properly weigh the favorable factors in the applicant's case. Counsel refers to the decision in *United States v. Chapa-Garza* 243 F.3d 921 (5th Cir. 2001) in which the Fifth Circuit Court of Appeals ruled that a conviction for driving while intoxicated is not a crime of violence and thus not an aggravated felony for immigration purposes. In addition, counsel asserts that the District Director failed to take into account the fundamental unfairness of not only removing a permanent resident for a crime which was never a crime of violence and hence, never a removable offense but also of denying permission to reapply to an applicant who should have never been removed in the first place. Furthermore, counsel states that the District Director focused solely on the applicant's convictions, the applicant's initial illegal entry in 1984 and the existence of an unexecuted warrant of deportation dated December 12, 1986. Counsel states that these violations did not render the applicant inadmissible for temporary and permanent residence status. Additionally counsel states that the District Director placed undue weight on the applicant's subsequent reentry after his removal but failed to mention that a federal district court had ruled that the applicant's prior removal was unlawful and thus dismissed an indictment for illegal reentry. Counsel states that the District Director did not give proper weight to the applicant's extended family ties in the United States, failed to consider the applicant's length of lawful residence in the United States, failed to consider the economic, emotional, educational, and health related hardship the applicant and his family would face if he were forced to return to El Salvador, and the fact that the applicant is not inadmissible under any other provision of law. Finally counsel states that the District Director failed to consider the applicant's good moral character as evidence by the numerous letters submitted by friends, family members and employers, as well as the applicant's sworn statement regarding his rehabilitation and remorse for his actions. It is noted that on appeal counsel refers to *Matter of Torres-Varela*, 23 I&N Dec. 3449 (BIA 2001) in an effort to show that the applicant's convictions do not constitute crimes involving moral turpitude.

The AAO agrees with counsel in part. In *United States v. Chapa-Garza* 243 F.3d 921 (5th Cir. 2001) the Fifth Circuit Court of Appeals ruled that a conviction for driving while intoxicated is not a "crime of violence" under 18 U.S.C. § 16 and hence is not an "aggravated felony" under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Since this case arises in the Fifth Circuit, *Chapa-Garza*, is controlling. In his decision the District Director did not find the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude and therefore the AAO will not discuss the findings in *Chapa-Garza*.

The AAO notes that the applicant was deported based on an aggravated felony charge. The AAO does not have jurisdiction over the Immigration Judge's ruling and cannot change the ruling, despite the Fifth Circuit Court decision. The applicant was deportable under section 237(a)(2)(A)(iii) of the Act at the time he was removed from the United States on February 4, 2000. Therefore, he is inadmissible pursuant to section 212(a)(9)(A)(ii) 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 be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

In his decision, the District Director states that the unfavorable factors in the applicant's case are his convictions of DWI, his entry without inspection in 1984 and his illegal reentry after his removal. The District Director states that such a history shows a total disregard for the immigration laws, and for the safety of the persons in this country, and a total disregard for the rights of others. In addition, the District Director states that the applicant does not have a labor certificate issued to him in order to show that he has skills or abilities that could aid the economy of the United States.

The District Director concluded that the applicant's record outweighed the fact that the applicant is married to an LPR (the applicant's spouse is now a naturalized U.S. citizen) and has two U.S. citizen children.

The AAO does not find that the absence of a labor certificate on behalf of the applicant is an unfavorable factor. The applicant has been lawfully employed for years and thus has shown that he has needed skills. A labor certificate is not necessary. In addition, the fact that the applicant entered the United States without inspection in 1984 should be given only minimal weight since after his illegal entry he was granted LPR status through a program specifically designed for illegal aliens. Further, the applicant's reentry after removal should be given minimal weight since his indictment for violation of 8 U.S.C. § 1326 was dismissed at the District Court.

The AAO finds that the favorable factors in this case include the fact that the applicant had been residing legally in the United States for approximately 11 years prior to the order of removal, and has no criminal record except for his convictions for DWI. Other favorable facts are the applicant's 17-year-old marriage to a U.S. citizen, his extensive family ties in the United States, his spouse, children and siblings, the numerous

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letters of recommendation from relatives and friends regarding his character, and the prospect of general hardship to his family.

The AAO finds that the unfavorable factors in this case are the applicant's convictions of DWI, which, although they cannot be condoned, do not render the applicant an aggravated felon.

The AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and 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 and the application approved.