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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

PUBLIC COPY

[redacted]

APR 22 2003

FILE [redacted] Office: Baltimore Date:

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:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Baltimore, Maryland, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a motion to reopen. The motion will be granted. The order dismissing the appeal will be withdrawn, and the application will be approved.

The applicant is a native and citizen of El Salvador who was present in the United States without a lawful admission or parole on January 25, 1988. The applicant's Request for Asylum was denied on November 7, 1988, and he was served with an Order to Show Cause on March 10, 1989. On June 28, 1989, an immigration judge ordered the applicant deported *in absentia*. The applicant departed on his own in 1992 effecting his deportation. Therefore, he is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii).

In January 1995 the applicant was again present in the United States without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). He was granted Temporary Protected Status (TPS) in 1992 and applied for asylum in accordance with the ABC Settlement Agreement in 1996. The applicant is the beneficiary of an employment-based visa petition approved in August 1998 with a priority date of September 1997. He filed his Application to Register Permanent Residence or Adjust Status and his Form I-212 application in December 1998. 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).

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly. The AAO affirmed that decision on appeal.

On motion, counsel provides evidence that the applicant is the beneficiary of an approved labor certification allowing him to be "grandfathered" in under section 245(i) of the Act, 8 U.S.C. § 1255(i).

Section 245(i) of the Act, created by the Legal Immigration Family Equity Act (LIFE Act) on December 21, 2000, allows certain persons who have an immigrant visa immediately available, but entered without inspection or otherwise violated their status and thus are ineligible to apply for adjustment of status in the United States, to apply for adjustment of status if they pay a $1,000 penalty. The LIFE Act temporarily extended the ability to preserve eligibility for this provision of law until April 30, 2001. Use of section 245(i) of the Act was previously limited to beneficiary's of visa petition or labor certification applications filed on or before January 14, 1998. The LIFE Act provided a very short window of opportunity, which ended on April 30, 2001, to preserve their eligibility to file for adjustment of status under section 245(i). It is not necessary to apply for section 245(i) adjustment of status on or before April 30, 2001.

The LIFE Act gave an important benefit to certain eligible individuals who entered illegally or violated their status and who would be restricted from filing for adjustment of status in the United States and would have to obtain their visas abroad. Having to depart the United States to obtain their visas would trigger the 3-year or 10-year bar to admission to the United States related to unlawful presence.

Section 212(a)(9)(A) of the Act provides, in part, that:

> (i) 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.
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> (ii) Any alien not described in clause (i) who-
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> > (I) has been ordered removed under section 240 of the Act or any other provision of law, or
> >
> > (II) departed the United States while an order of removal was outstanding, and who 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 alien convicted of an aggravated felony) is inadmissible.
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> (iii) Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary, Department of Homeland Security, has consented to the alien's reapplying for admission.

The Bureau has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he has equities within the United States or there are other favorable factors which offset the fact of removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Bureau include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and others; and the need for the applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg.

Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. *Matter of Acosta*, 14 I&N Dec. 361 (D.D. 1973).

The favorable factors in this matter are the absence of a criminal record, the need for the applicant's services, his departure from the United States by his own volition (although late), the approved preference visa petition, his compliance with INS regulations through application for TPS and asylum, his receipt of employment authorization since 1995, and the prospect of general hardship to his family.

The unfavorable factors in this matter include the applicant's unlawful entry, his failure to appear for the removal hearing, his failure to depart when required, and his lengthy unlawful presence in the United States.

Although the applicant's actions in this matter should not be condoned, considerable weight must be given to his good behavior, the hardship to his employer, and the fact that he falls within that narrow window of time based on the LIFE Act which allows only a certain group of individuals who are eligible to apply for adjustment of status without having to leave the United States. The applicant has now established by supporting evidence that the favorable factors outweigh the unfavorable ones, therefore, the order dismissing the appeal will be withdrawn, and the application will be approved.

ORDER: The motion is granted. The order of January 7, 2002, dismissing the appeal is withdrawn, and the application is approved.