



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



HA

FILE: [Redacted] Office: Tegucigalpa

Date: MAR 12 2001

IN RE: Applicant: [Redacted]

APPLICATIONS:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii), filed in conjunction with Application for Waiver of Grounds of Inadmissibility under § 212 of the Immigration and Nationality Act, 8 U.S.C. 1182

IN BEHALF OF APPLICANT: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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.

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Officer in Charge, Tegucigalpa, Honduras, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected.

The applicant is a native and citizen of Costa Rica who was found to be inadmissible to the United States by a consular officer under §§ 212(a)(6)(C)(i) and 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)(C)(i) and 8 U.S.C. 1182(a)(9)(A)(i), for having attempted to procure admission into the United States by fraud or misrepresentation and for having been previously removed from the United States. The applicant is the beneficiary of an approved petition for alien relative alleging that she is the spouse of a United States citizen. That evidence is not present in the record. The applicant seeks a waiver of the bar under § 212(i) of the Act, 8 U.S.C. 1182(i), and permission to reapply for admission under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to rejoin her spouse in the United States.

According to the decision of the officer in charge, the applicant arrived at Miami International Airport and applied for admission as a nonimmigrant visitor. In a sworn statement dated July 8, 1997, the applicant stated that she had lived in the United States from 1987 to 1990. She departed for Costa Rica in 1990, returned in 1992 and remained until 1994. The applicant stated that she did not advise the Consular officer at the time of her nonimmigrant visa interview that her husband lived in the United States and that she had lived and worked illegally in the United States.

The officer in charge reviewed the § 212(i) application and denied it for failure of the applicant to establish that extreme hardship would be imposed upon qualifying relatives if she were not allowed to return to the United States.

On appeal the applicant states that her husband became a naturalized U.S. citizen on May 2, 1998 and they have two daughters ages approximately 6 and 10 years who need her presence. The applicant states that her husband is unable to care for them properly due to his work and they need the love and protection of their mother.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other

documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a) (6) (C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Section 212(a) (9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under § 235(b)(1) [1225] or at the end of proceedings under § 240 [1229a] 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...

(iii) EXCEPTION.-Clause (i)...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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is

determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Prior to 1981, an alien who was arrested and deported from the United States was perpetually barred. In 1981 Congress amended former § 212(a)(17) of the Act, 8 U.S.C. 1182(a)(17), eliminated the perpetual debarment and substituted a waiting period.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) added a bar of 5 years for aliens who are removed upon arrival, (2) increased the bar to admissibility and the waiting period from 5 to 10 years for aliens removed under any other provision of law, (3) added a bar to admissibility for aliens who are unlawfully present in the United States and (4) 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 reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have violated immigration laws. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

The record reflects that the applicant was ordered removed under § 235(b)(1) of the Act, and as a result, she requires permission to reapply for admission.

Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

The operations instruction also provides that after receipt by a Service office, if grounds of inadmissibility other than those for which the waiver is sought are discovered, the application and all relating documents should be returned to the consular officer for reconsideration. This would also apply if certain grounds of inadmissibility are not applicable.

The present record reflects that the Form I-601 was adjudicated first and denied for failure of the applicant to establish that extreme hardship would be imposed on qualifying relatives. The Form I-212 application was denied as part of the officer in charge's order without addressing the issues of that application.

Therefore, since the Form I-212 application has not been adjudicated first, the appeal of the officer in charge's decision denying the Form I-601 application will be withdrawn, and the record remanded so that the officer in charge may adjudicate the Form I-212 application first based on its own merits.

If the officer in charge approves the Form I-212 application or provides evidence that such application has been approved, he shall certify the record of proceeding to the Associate Commissioner for review and consideration of the appeal regarding the Form I-601 application. However, if he denies the Form I-212 application or provides evidence that such application has been denied, he shall certify that decision to the Associate Commissioner for review, reject the Form I-601 application, and refund the fee.

ORDER: The appeal is rejected. The decision of the officer in charge is withdrawn. The matter is remanded for further action consistent with the foregoing discussion.