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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

[redacted]

File: [redacted] Office: SAN ANTONIO, TEXAS Date: MAR 12 2001

IN RE: Applicant: [redacted]

Application: 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)

IN BEHALF OF APPLICANT:

[redacted] 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Antonio, Texas, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of France who was deported from the United States on November 14, 1988. She subsequently reentered the United States without inspection in April 1990. In November 1992, the applicant married a United States citizen. She seeks permission to reapply for admission into the United States under § 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 her spouse and step-children.

The district director determined that the applicant had failed to establish that the favorable factors outweigh the unfavorable ones and denied the application accordingly.

On appeal, counsel asserts that the district director failed to give consideration to all pertinent facts and failed to give proper consideration to the favorable evidence presented by the applicant demonstrating her strong ties to the United States through her husband and community involvement. Counsel asserts a finding that the applicant has a disregard for the laws of the United States and for the rights of others and lacks good moral character is baseless. Counsel concludes by stating that the applicant has demonstrated that she merits a favorable decision as the favorable factors presented far outweigh the adverse factors alleged by the district director.

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:

(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS 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 an 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-

 [redacted]

> (I) has been ordered removed under § 240 of the Act or any other provision of law, or
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> (II) departed the United States while an order of removal was outstanding,
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> 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) EXCEPTION.-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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former §§ 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former § 236 of the Act, 8 U.S.C. 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

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. The Service argues that most precedent case law relating to permission to reapply for admission was effectively negated by the new statute in 1981 and, as a consequence, granting of these applications now requires an applicant to meet a higher standard of eligibility since the bar is no longer insurmountable.

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) increased the bar to admissibility and the waiting period from 5 to 10 years, (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 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 who have committed a crime involving moral turpitude or have been present in the United States without a lawful admission or parole. 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 Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service 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 alien's 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 to 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).

In Matter of Tin, the Regional Commissioner held that unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following Tin, an equity gained while in an unlawful status can be given only minimal weight.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as "after-acquired family ties" in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight.

The record reflects that when the applicant initially applied at New York, New York for admission into the United States on April 9, 1984, she was found ineligible for admission and referred for a hearing before an immigration judge. The immigration judge allowed the applicant to withdraw her application for admission and depart the United States voluntarily.

Two months later, on June 11, 1984, the applicant obtained admission at Houston, Texas as a nonimmigrant visitor for pleasure and was authorized to remain until June 30, 1985. The applicant remained longer than authorized and was placed in deportation proceedings. On January 31, 1986, the immigration judge allowed the applicant to depart the United States voluntarily in lieu of deportation.

Less than two weeks later, on February 10, 1986, the applicant attempted to obtain admission at Dallas, Texas but withdrew her application for admission the next day.

On June 15, 1987, the applicant again obtained admission into the United States at Houston, Texas as a nonimmigrant visitor for

pleasure. She again remained longer than authorized and her unlawful status was discovered when she was encountered by Service officers in jail on September 29, 1988.

On November 14, 1988, the applicant was deported from the United States after being denied the privilege of departing voluntarily. The applicant subsequently obtained entry without inspection in April 1990 and has resided in the United States thereafter without lawful status.

In addition to her immigration history, the record reveals the following information concerning the applicant's arrests, charges against the applicant and/or convictions:

1. On April 18, 1986 in the County Court at Law #2 in and for Bell County, Texas, the applicant was convicted of two charges of the offense of Issuance of a Bad Check. She was fined $200.00, costs of $62.50 and restitution for each charge.

2. On the same date and in the same court as above, an additional eleven charges against the applicant were dismissed because she pleaded guilty in companion case(s).

3. On September 11, 1986 in Bell County, Texas, a charge of Driving Without a License against the applicant was dismissed for insufficient evidence to obtain a conviction.

4. On September 21, 1988 in Bell County, Texas, the applicant was convicted of the offense of Failure to Maintain Financial Responsibility. She was sentenced to ten days imprisonment and fined $100.00 plus court costs.

5. On July 24, 1991, a protective order was issued against the applicant by [redacted] and his daughter [redacted] The basis for the protective order was the disruption the applicant caused to the business of the [redacted] assaults on their persons and threats, including death threats, against them.

The applicant's equities in this matter include the applicant's family ties as the spouse of a United States citizen and step-mother to her spouse's children since 1992. The favorable factors include her family responsibilities, community ties and the emotional hardship she and her family would face if she were required to depart the United States.

The Commissioner stated in Matter of Lee, supra, that he could only relate a positive factor of residence in the United States where that residence is pursuant to a legal admission or adjustment of

status as a permanent resident. To reward a person for remaining in the United States in violation of law, would seriously threaten the structure of all laws pertaining to immigration.

The unfavorable factors in this matter include the applicant's lengthy unlawful residence in the United States; her having overstayed her authorized period of admission on two occasions; her deportation and subsequent reentry without inspection, and without prior permission to reapply, subsequent to her removal; and her criminal convictions.

The applicant's actions in this matter cannot be condoned. Her equity (marriage) gained while being unlawfully present in the United States (after having obtained entry without inspection and without prior permission) can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish that she warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.