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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 Francisco

Date:

MAY 10 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), filed in conjunction with Application for Waiver of Grounds of Inadmissibility under § 212(i) of the Act, 8 U.S.C. 1182(i)

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.

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

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The Form I-212 (Application for Permission to Reapply for Admission) and Form I-601 (Application for Waiver of Grounds of Inadmissibility) applications were denied by the District Director, San Francisco, California, and the matter is now before the Associate Commissioner for Examinations on appeal. The Form I-212 appeal will be dismissed. The Form I-601 appeal will be rejected.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States on October 23, 1991, by an immigration judge under former §§ 212(a)(19) and (20) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(19) and (20), now codified as §§ 212(a)(6)(C)(i) and 212(a)(7)(A) of the Act, 8 U.S.C. 1182(a)(6)(C)(i) and 1182(a)(7)(A), for having attempted to procure admission into the United States by fraud or misrepresentation and for having been an immigrant not in possession of a valid unexpired immigrant visa or lieu document.

The immigration judge noted that the applicant last arrived in the United States on September 20, 1990, and she presented a fraudulent United States passport in an assumed name seeking admission into the United States as a citizen of the United States. The immigration judge then ordered the applicant excluded and deported and denied her request for asylum under former § 212(a)(6)(A) of the Act, 8 U.S.C. 1182(a)(6)(A), now codified as § 212(a)(9)(A) of the Act, 8 U.S.C. 1182(a)(9)(A). The applicant failed to depart and her appeal to the Board of Immigration Appeals was summarily dismissed on February 20, 1992, because her counsel failed to submit a written brief.

The applicant married a U.S. citizen on May 26, 1996, and she is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver under §§ 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(i) and 1182(a)(9)(B)(v), to remain with her spouse and children in the United States.

The district director denied both applications upon concluding that the unfavorable factors outweighed the favorable ones.

On appeal, counsel states that the applicant was never physically removed from the United States, and a Form I-212 application is not necessary, but it was filed as an act of precaution. Counsel states that the favorable factors clearly outweigh the unfavorable ones.

8 C.F.R. 212.2(i)(2) provides for the retroactive approval of a Form I-212 application (for aliens who have not departed) if filed in conjunction with an Application to Register Permanent Resident or Adjustment Status under § 245 of the Act with the approval to be retroactive to the date on which the alien embarked or reembarked at a place outside the United States. The applicant was ordered excluded and deported and she requires permission to reapply for admission.

On appeal, counsel states that the fact that the fraudulent passport was not presented to an immigration officer was not even considered in the decision.

Issues of inadmissibility have already been determined by the immigration judge in this matter, and the Associate Commissioner is bound by that finding. This proceeding must be limited to the issue of whether or not the applicant meets the statutory and discretionary requirements necessary for the inadmissibility ground to be waived.

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.

Former § 212(a)(6)(A) of the Act, in effect until April 1, 1997, provided for the exclusion of any alien from admission into the United States who has been excluded from admission and deported and who again seeks admission within one year of the date of such deportation is excludable. Since the applicant failed to depart prior to April 1, 1996, she is now inadmissible under § 212(a)(9)(A)(ii) of the Act.

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

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

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

(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 contiguous 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. 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 and eliminated the perpetual debarment and substituted a waiting period.

In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgements or decisions under certain sections of the Act, created a new expedited removal proceeding, and established major new grounds of inadmissibility. Nothing could be clearer than Congress' desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration law. 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).

Although guidelines for considering permission to reapply for admission applications are set forth in Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973), and in Matter of Lee, 17 I&N Dec. 275 (Comm. 1978), these holdings were rendered long before Congress amended the Act from 1981 through the present 1996 IIRIRA amendments and beyond. Even though these decisions have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in the legislation and in their decisions that less weight should be given to individuals who violate immigration law. The later statutes and judicial decisions have effectively negated most precedent case law rendered prior to 1981. Such case law is still considered but less weight is given to favorable

factors gained after the violation of immigration laws following statutory changes and judicial decisions.

Even the Regional Commissioner in Tin, held that an alien's unlawful presence in the United States 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.

After reviewing the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, and after noting that Congress has increased the bar to admissibility from 5 to 10 years, has also added a bar to admissibility for aliens who are unlawfully present in the United States, and 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.

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).

The immigration judge rendered her oral decision on October 23, 1991, and gave the applicant's attorney until November 4, 1991, to file an appeal. The applicant, who was residing in New Jersey at that time, told the judge that she understood the decision. An appeal was filed on November 1, 1991. That appeal was dismissed by the Board on February 20, 1992, as previously mentioned. The applicant indicates that she remained at her New Jersey address until October 1992 before moving to San Francisco. A notice to appear for departure was sent to her former attorney and to the applicant at their addresses of record on May 16, 1994. The applicant had already been residing in California for 1 1/2 years and her former attorney had moved from [REDACTED] to a new address at [REDACTED] in New York City. Although, the applicant did not know that she had to appear for departure on June 20, 1994, notice was properly served and there is no evidence in the record that the applicant ever attempted to notify the Service of her address change.

The favorable factors in this matter are the applicant's family ties, the need for the applicant's presence to care for two minor children and her parents, the absence of a criminal record, the approved petition for alien relative, and the prospect of general hardship to her family.

The unfavorable factors in this matter include the applicant's attempt to procure admission into the United States by fraud, her being ordered removed, her failure to keep the Service aware of her current address, her failure to surrender for removal and her lengthy unlawful presence in the United States.

The applicant's actions in this matter cannot be condoned. Her equity (marriage) gained while being unlawfully present in the United States (and entered into while in removal proceedings) 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 she warrants the favorable exercise of the Attorney General's discretion. Accordingly, the Form I-212 appeal will be dismissed and the Form I-601 appeal will be rejected.

ORDER: The Form I-212 appeal is dismissed and the Form I-601 appeal is rejected.