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Immigration and Naturalization Service



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



File: [Redacted] Office: FRANKFURT, GERMANY

Date: FEB 05 2003

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



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 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert. P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The applications were denied by the Officer in Charge, Frankfurt, Germany, and are now before the Associate Commissioner for Examinations on appeal. The decision of the Officer in Charge to deny the Form I-601 (Application for Waiver of Ground of Inadmissibility) will be withdrawn. The appeal of the Form I-212 (Application for Permission to Reapply for Admission) will be dismissed.

The applicant is a native of Switzerland and citizen of Switzerland and France who was found by a consular officer to be inadmissible to the United States under section 212(a)(9)(A) and of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A) for having been ordered removed from the United States; and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(I), for having sought to procure admission into the United States by fraud or willful misrepresentation. The applicant is married to a citizen of the United States and is the beneficiary of an approved petition for alien relative. She seeks permission to reapply for admission to the United States after removal and a waiver of inadmissibility in order to travel to the United States to reside with her spouse.

In a single decision addressing both the Form I-212 and Form I-601 applications, the officer in charge denied the application for a waiver of inadmissibility based on a determination that the applicant had failed to establish extreme hardship to a qualifying relative. The officer in charge also denied the application for permission to reapply for admission into the United States as a matter of law.

On appeal, counsel contends that the applicant did not commit fraud and/or willful misrepresentation and that she was arbitrarily, capriciously, and wrongfully removed from the United States. Counsel asserts that the applicant's spouse has suffered extreme hardship as a result of separation from the applicant since 1998. Counsel also notes that the applicant and her spouse are the parents of a daughter born in Switzerland on September 28, 1999, however, no evidence of the child's birth is contained in the record of proceeding.

The record reflects that the applicant sought to procure admission into the United States as a nonimmigrant visitor under the Visa Waiver Pilot Program (VWPP) on October 15, 1998. She presented a Swiss passport and initially claimed to be pregnant and coming to the United States for one month to visit her boyfriend (now spouse). Upon further questioning, she admitted in a sworn statement that she intended to get married, become a citizen, get a job, and live in the United States permanently. Her application for admission was refused and she was permitted to return to Switzerland voluntarily.



On November 23, 1998, the applicant again sought to procure admission into the United States under the VWPP. On this second attempt, she presented a French passport. The applicant indicated on the VWPP application form that she had never been denied entry into the United States and stated that she had never had any problems with U.S. Immigration and was coming to the United States to stay with a family she had never met and study English. Upon further questioning, the applicant provided a sworn statement that she was coming to the United States to see her boyfriend and had obtained a new French passport to hide the fact that she had previously been refused admission. The applicant was found to be inadmissible to the United States and was ordered removed under section 235(b)(1) of the Act. It is noted that when the applicant was advised that she was being removed, she attempted to flee the inspection area. In the process, she punched an immigration officer and had to be handcuffed.

The applicant and her spouse were married in France on January 16, 1999. A visa petition filed on the applicant's behalf by her United States citizen spouse was approved by the Service on August 31, 1999. On October 30, 2000, a consular officer found the applicant inadmissible to the United States. The applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the instant Application for Waiver of Inadmissibility (Form I-601) on March 27, 2001. Both applications were denied by the officer in charge on October 15, 2001.

Section 212(a) of the Act states:

CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-
Except as otherwise provided in this Act, aliens who are ineligible 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.



* * *

(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 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.-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(i) of the Act states:

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).

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.

Nothing could be clearer than Congress's 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).

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 section 212(a)(9)(A)(i) and (ii). 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. Section 212(a)(9)(A)(i) of the Act provides that aliens who have been ordered removed from the United States through expedited removal proceedings or removal proceedings initiated on the alien's arrival in the United States and who have actually been removed (or departed after such an order) are inadmissible for 5 years.

Although guidelines for considering permission to reapply for admission applications were promulgated 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. It is specifically noted that the Commissioner in *Matter of Lee*, referred to the intent of Congress in enacting former sections 212(a)(16) and (17) of the Act, 8 U.S.C. § 1182(a)(16) and (17), in the conclusions and recommendations of the Senate Committee on the Judiciary in their report dated 1950. The Committee also reviewed section 3 of the 1917 Act in their study.

Even though the decisions in *Tin* and *Lee* have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in their intent, and in the legislation and in their decisions, that individuals who violate immigration law are viewed unfavorably. 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.

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. 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 Service, following more recent judicial decisions and the Congressional amendments, has accorded less weight to an applicant's equities gained following the commencement of removal proceedings, if the equities were gained while the applicant was unlawfully present in the United States or after a violation of law. The statute provides in section 240 of the Act, 8 U.S.C. § 1229, for the consideration of a certain amount of continuous physical presence in the United States for aliens seeking cancellation of removal. The present applicant is not seeking cancellation of removal.

The favorable factors in this matter are the applicant's marriage to a United States citizen and the prospect of general hardship to her spouse due to separation. The unfavorable factors include the applicant's two attempts to enter the United States by willfully misrepresenting material facts and her removal under a Service order.

The applicant's actions in this matter cannot be condoned. Her equity (marriage) gained after having sought to procure admission into the United States by willful misrepresentation can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Attorney General's discretion is warranted. Accordingly, the appeal of the denial of the Form I-212 will be dismissed. The decision of the officer in charge to deny the Form I-601 will be withdrawn.



ORDER: The appeal of the denial of the Form I-212 is dismissed. The decision of the officer in charge to deny the Form I-601 is withdrawn.