



H4

U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

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



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

FILE



Office: Phoenix

Date:

FEB 28 2003

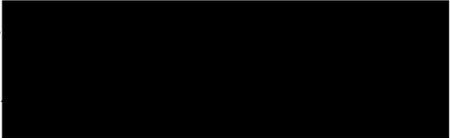
IN RE: Applicant:



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)

IN BEHALF OF APPLICANT



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole on several occasions prior to September 1982 and she was granted voluntary departure. She was apprehended on September 14, 1982, and served with an Order to Show Cause. She was granted voluntary departure. After failing to depart, a Warrant of Deportation was issued on January 23, 1984, and she was deported on March 12, 1984. Therefore, she is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The applicant was present in the United States again without a lawful admission or parole on May 15, 1984, and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony).

The applicant was apprehended on April 10, 1985, attempting to drive a vehicle containing nine illegal aliens. The applicant initially told the Service officers that she was a United States citizen.

On April 16, 1985, the applicant was convicted of a violation of 8 U.S.C. § 1325, illegal entry. She was sentenced to time served, eight days, and released. The applicant was granted voluntary departure, and the Order to Show Cause issued against her on April 10, 1985, was cancelled. The applicant was present in the United States again without a lawful admission or parole in June 1985 and without permission to reapply for admission in violation of section 276 of the Act.

The applicant married a native of Mexico in November 1984, who became a naturalized U.S. citizen on September 27, 1996, and she is the beneficiary of an approved Petition for Alien Relative. 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 district director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, counsel states that the Service failed to correctly assess the emotional, financial and psychological damage to the U.S. citizen spouse and children.

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.

(ii) Any alien not described in clause (i) who-

(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.

(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 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 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. 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).

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. 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.

In support of this conclusion it is noted that the statute now provides at section 212(a)(6)(A)(i) of the Act that an alien who is unlawfully present in the United States without a lawful admission or parole after April 1, 1997, is inadmissible and there is no waiver available. There is an exception for battered aliens. Such an alien cannot seek adjustment of status except for certain aliens eligible under section 245(i) of the Act. Therefore, many of the considerations listed in *Tin* in 1973 are now moot based on this IIRIRA amendment by Congress. In order for the alien to have the ground of inadmissibility under section 212(a)(6)(A)(i) of the Act removed, the alien must depart the United States.

It is also noted under section 212(a)(9)(C) of the Act, that aliens who were unlawfully present in the United States for an aggregate period of more than one year after April 1, 1997, and subsequently departed or who were previously ordered removed (and actually left the United States) and who subsequently enter or attempt to reenter the United States without being admitted on or after April 1, 1998, are inadmissible until they have resided outside the United States for at least 10 years. Therefore, many of the considerations listed in *Tin* in 1973 are now moot based on this IIRIRA amendment by Congress.

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 court held in *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993). 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 after-acquired equities, referred to as "after-acquired family ties" in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant was unlawfully present in the United States, was served with an Order to Show Cause in September 1982, was deported in March 1984, unlawfully reentered the United States in May 1984 and married her spouse in November 1984. She now seeks relief based on that after-acquired equity.

The record is devoid of documentation to establish fianancial or psychological damage to the applicant's family. The applicant has been granted advance parole each year since 1997 to return to Mexico.

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, the approved Petition for Alien Relative, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's numerous unlawful entries, her false claim to U.S. Citizenship, her deportation, her felonious reentry without permission to reapply, and her lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only 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 applicant's actions in this matter cannot be condoned. Her equity (marriage) gained while being unlawfully present in the United States (and entered into following her deportation and reentry without permission to reapply for admission) 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 that the applicant is eligible 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 will be dismissed.

ORDER: The appeal is dismissed.