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U.S. Citizenship
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FILE:



Office: MANILA, PHILIPPINES

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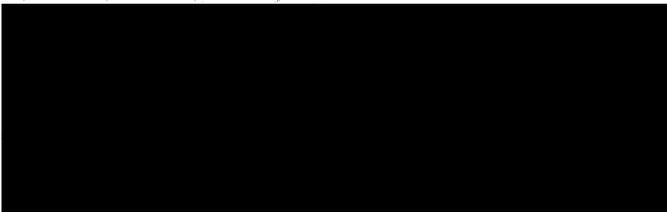
Applicant:



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)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Immigration Attaché Manila Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and a citizen of Fiji who entered the United States on May 21, 1992, in possession of a valid B-2 non-immigrant visa. The applicant applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)). She was interviewed for asylum status by an asylum officer and was referred to an Immigration Judge for a court hearing. The record reflects that on September 16, 1996, an Immigration Judge granted the applicant voluntary departure until October 16, 1996. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on March 23, 1998. On April 21, 1998, she filed a petition of Stay of Deportation with the United States Court of Appeals for the Ninth Circuit, which was denied on July 17, 1999, and the applicant was granted voluntary departure until August 13, 1999. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to August 13, 1999, changed the voluntary departure order to an order of removal. The applicant filed a motion to reopen with the BIA that was denied on August 22, 2000. Furthermore on March 8, 2002, the applicant filed an application for adjustment of status that was denied on November 22, 2002. The applicant appeared at a CIS office on November 22, 2002, and she was removed from the United States on December 5, 2002. She is therefore inadmissible pursuant to 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 is the beneficiary of an approved Petition for Alien Relative and an approved petition for a K-3 nonimmigrant visa filed on Form I-129F as the spouse of a U.S. citizen. She 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 Acting Immigration Attaché determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Acting Immigration Attaché's decision* dated February 27, 2004.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

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

- (I) has been ordered removed under section 240 or any other provision of law, or
- (II) departed the United States while an order of removal was outstanding, and 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

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 in most instances and to 20 years for others, (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.

On appeal, counsel asserts that CIS failed to correctly adjudicate the Form I-212. Counsel states that since the applicant applied for a nonimmigrant visa the Acting Immigration Attaché in making his decision should have considered the following:

The risk of harm to society if the applicant is admitted;

The seriousness of the applicant's prior violations;

The person's reasons for wishing to enter the United States and

There is no need to show a compelling reason for the visit [*Matter of Hranka*, 16 I & N Dec. 491 (BIA 1978)].

The regulation at 22 CFR § 41.81 discusses the eligibility for the issuance of a "K" visa.

22 C.F.R. 41.81 provides, in pertinent part, that:

Fiancé(e) or spouse of a U.S. citizen and derivative children.

(b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.

....

(4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, including the requirements of subsection (d).

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under subsections (a), (b) or (c) of this section as if the alien were an applicant for an immigrant visa, except that the alien must be exempt from the vaccination

requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

Based on the above the AAO finds counsel's assertions unpersuasive and the Acting Immigration Attaché correctly applied the standards applicable to an immigrant visa applicant.

Counsel further states that since the applicant is applying for a non-immigrant visa the regulation at 8 C.F.R. 212.2(b) should apply. 8 C.F.R. 212.2(b) refers to aliens applying to consular officers for nonimmigrant visas or nonresident alien border crossing cards. 8 C.F.R. 212.2(b) is of no consequence because, as stated above, although the applicant is applying for a nonimmigrant visa the standards applicable to an immigrant visa apply in this case.

In his brief counsel asserts that if the applicant is not permitted to travel to the United States her U.S. citizen spouse and child would suffer extreme hardship. Counsel submits a letter from a doctor in Fiji in which he states that the applicant's child needs a psychiatric evaluation by a pediatric psychiatrist and that no pediatric psychiatric is available in Fiji. In addition counsel submits a psychological evaluation for the applicant's spouse in which it is stated that he meets the criteria for major depression.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this

country, and he concluded that approval of an application for permission to reapply for admission would be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The court held in *Garcia-Lopes 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. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie 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. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter married her U.S. citizen spouse on April 21, 1999, years after she was placed in removal proceedings. The applicant's spouse should reasonably have been aware of the applicant's immigration violations and the possibility of her being removed at the time of their marriage. She now seeks relief based on that after-acquired equity.

The Acting Immigration Attaché's decision states that the unfavorable factors in the applicant's case include the denial of her application for asylum including all the appeals filed subsequently to her denial and her failure to depart the country timely, the denial of her adjustment application and her removal from the United States.

The Acting Immigration Attaché concluded that these factors outweighed the fact that the applicant is married to a U.S. citizen and has a U.S. citizen child.

Any alien has the right to file a non-frivolous asylum application. The AAO finds that the applicant's application for asylum and subsequent denial of her asylum application are not unfavorable factors as noted in the Acting Immigration Attaché's decision. The AAO further finds that the applicant was entitled to exhaust all means available to her by law and therefore applying for benefits under the Act in an effort to legalize her status in the United States is not an unfavorable factor. Her various applications and appeals conferred on her a status that allowed her to remain in the U.S. while they were pending.

In his decision the Acting Immigration Attaché's indicates only one favorable factor for the applicant, her ties to U.S. citizens, her spouse and child. The AAO finds that the Acting Immigration Attaché failed to consider other favorable factors, including the fact that the applicant has no criminal history, the approval of a petition for alien relative and the prospect of general hardship to her family due to the unavailability of pediatric psychiatrists in Fiji.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her authorized stay and her failure to depart the country after she was granted voluntary departure and after a final decision was issued by the BIA.

While the applicant's overstay of her initial authorized period of stay in the United States and her subsequent failure to depart the United States cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted.

ORDER: The appeal of the denial of the Form I-212 is sustained and the application approved.