

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H14

FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **DEC 15 2005**

IN RE:

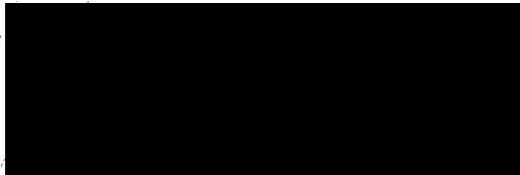
Applicant:



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)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center, 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 Pakistan who was admitted into the United States as a non-immigrant visitor for pleasure on October 1, 1991, with an authorized period of stay until March 30, 1992. The applicant remained in the United States beyond her authorized period of stay and on February 3, 1993, she applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On April 22, 1996, the applicant was interviewed for asylum status and was subsequently referred to an Immigration Judge for a court hearing. On August 15, 1996, the applicant failed to appear for a court hearing and was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on August 28, 1996. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. The record reflects that the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on January 30, 1997. On September 16, 1998, the Form I-485 was rejected as not properly filed since the applicant was under deportation proceedings and the Los Angeles District office did not have jurisdiction over the Form I-485. The record further reflects that an Authorization for Parole of an Alien into the United States (Form I-512) was issued to the applicant on May 6, 1997. The applicant departed the United States on an unknown date, after the issuance of the Form I-512, and was paroled into the United States on July 29, 1997. The applicant is 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). 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) in order to remain in the United States and reside with her U.S. citizen spouse and children.

The Director determined that section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) applies in this matter, and that the applicant was inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. The Director concluded that the applicant is not eligible for any relief or benefit from her application. Furthermore, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated October 17, 2003.

Section 241(a)(5) of the Act states:

Detention, release, and removal or aliens ordered removed.-

(5) reinstatement of removal orders against aliens illegally reentering.- if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

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

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver.- The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. . .

On appeal, counsel submits a brief, statements from the applicant and her spouse, copies of the applicant's Forms I-512, and I-94, a copy of the applicant's spouse's naturalization certificate, copies of the applicant's children's birth certificates and green card, copies of medical records of the applicant's child and mother-in-law, letters of recommendation from individuals regarding her good moral character, copies of receipts of charitable contributions, copies of tax returns, documentation regarding business and property ownership, copy of a court disposition, and documentation regarding ineffective assistance by the applicant's prior counsel.

In his brief, counsel states that the Director's denial of the Form I-212 was based on erroneous assumptions of law and fact. Counsel states that the applicant is not inadmissible pursuant to section 212(a)(9)(B) of the Act because she never departed the United States after being paroled on July 29, 1997. Counsel further states that even if the applicant is to be considered to have unlawful presence after April 1, 1997, the date of enactment of unlawful presence provisions under the Act, she could not possibly have more that 90 days and therefore, she would not be inadmissible pursuant to section 212(a)(9)(B) of the Act. In addition, counsel states that section 241(a)(5) of the Act does not pertain to the applicant because she reentered the United States legally in possession of an advance parole document. Furthermore, counsel states that the Director did not take into consideration all factors when he held a finding of "an insufficient amount of positive factors." Counsel states, that the applicant was unaware of the order of deportation due to inefficient assistance by her previous attorney. According to counsel, the applicant's prior attorney, who has since officially resigned from the bar, specifically advised the applicant that she did not need to appear at her court hearing and that the Notice to Deportable Alien (Form I-166) was issued in error. He further incorrectly advised the applicant that she was automatically entitled to adjust her status at the district office and advised her to file Forms I-485 and I-131. Counsel states that the applicant never intentionally evaded the immigration laws because she was acting on the advice of her attorney. Counsel further states that one of the applicant's children and her mother-in-law have medical conditions that cannot be treated in Pakistan. Additionally, counsel states that all of the applicant's family resides in the United States and they would suffer adverse psychological, emotional, and physical hardship if she were to depart. Finally, counsel states that although the applicant was convicted of petty theft, she is completely reformed and rehabilitated, and is not inadmissible because she qualifies for the

petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. Counsel concludes that the favorable factors in the present case clearly outweigh the unfavorable ones and the applicant warrants the favorable exercise of the Secretary's discretion, and requests that the AAO overturns the Director's decision.

In his decision, the Director states that the Service must revoke the Form I-512, but no action to rescind the Form I-512 has been initiated by the Service. The fact remains that on July 29, 1997, the applicant was inspected and paroled into the United States based on an advance parole document issued by the Los Angeles District Office. Therefore, the applicant did not reenter the United States illegally and she is not subject to section 241(a)(5) of the Act.

In the present case, the AAO agrees with counsel and does not find the applicant inadmissible pursuant to section 212(a)(9)(B)(II) of the Act. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until the date of her departure from the United States. As noted above the applicant's date of departure is unknown, but she was paroled into the United States on July 29, 1997, and therefore, she could not have accrued unlawful presence for a period of one year or more.

The record indicates that on August 17, 1998, in the Municipal Court of South Bay Judicial District, County of Los Angeles, State of California, the applicant was convicted of California Penal Code 484(a), theft of property. The applicant was sentenced to three years probation, one-day imprisonment, and a fine of \$870.00

The AAO finds that the applicant is not inadmissible to the United States due to her conviction of a crime involving moral turpitude.

Section 212(a)(2) of the Act states in pertinent part, that:

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The California Penal Code states in pertinent part:

489. Grand theft is punishable as follows:

(a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, 2, or 3 years.

(b) In all other cases, by imprisonment in a county jail not exceeding one year or in the state prison.

490. Petty theft is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both.

In the present case, it is unclear if the applicant was convicted of grand theft or petty theft. Even if the applicant was convicted of grand theft, the maximum penalty is not to exceed one year of imprisonment since her conviction was not for theft of firearms. The applicant was sentenced to three years probation, one day of imprisonment and a fine of \$870. Thus, the applicant's conviction falls within the petty offense exception pursuant to section 212(a)(2)(ii)(II) of the Act.

The AAO does not have jurisdiction over the applicant's deportation order or the filing of the Form I-485 at the District office due to ineffective assistance of counsel. The fact remains that the applicant did not appear at her court hearing, she did not depart after she was ordered deported and therefore, she is inadmissible under section 212(a)(9)(A)(ii) of the Act. The AAO finds that although the applicant is not subject to section 241(a)(5) of the Act, she is clearly inadmissible under section 212(a)(9)(A) of the Act and therefore must receive permission to reapply for admission.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens 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 . . . [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 [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

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 for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

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 condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

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.*

The Director's decision states that the unfavorable factors in the applicant's case include her continued disregard for and abuse of the laws of this country, and the lack of any reformation or rehabilitation. The Director concluded that these factors outweigh the fact that the applicant is the spouse and parent of citizens and a lawful permanent resident of the United States.

The AAO does not find that the applicant has shown a continued disregard for and abuse of the laws of the United States. The applicant filed a non-frivolous asylum application and based on poor advice from her attorney, did not appear at her court hearing, did not depart after a deportation order was issued, and filed a Form I-485 with the district office rather than with the court. The record contains an attorney profile from the State Bar of California indicating that her prior attorney was disciplined in 1994 and resigned with charges pending in 1997. This lends credibility to the applicant's claims that her transgressions were the result of ineffective counsel and not due to any affirmative actions on her part to abuse immigration laws.

The AAO finds that the Director failed to consider the applicant's family ties in the United States, her U.S. citizen spouse and two children and her LPR child, the potential of general hardship to her family, the fact that she has filed tax returns as required by law and the numerous letters of recommendation regarding her character.

The unfavorable factors in this case include the applicant's failure to appear for a court hearing, her failure to depart the United States after an Immigration Judge issued a final removal order and her arrest.

While the applicant's failure to attend a court hearing and her failure to depart the United States after a final removal order was issued are very serious matters that 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

adverse factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

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