



U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUL 12 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application for permission to reapply for admission after removal was denied by the Director, California Service Center. A subsequent appeal was summarily dismissed by the Administrative Appeals Office (AAO). Counsel submits proof of filing a brief along with supporting documentation within the allotted period of time. Based on the documentation submitted by counsel the AAO will reopen the case, *sua sponte*, withdraw the previous decision and enter a new decision. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who on June 28, 1998, was found to be inadmissible to the United States pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa or other valid entry document. Consequently the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States on an unknown date without a lawful admission or parole and without permission to reapply for admission in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 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. In addition the Director determined that section 241(a)(5) of the Act, 8 U.S.C. 1231(a)(5) applies in this matter and the applicant is not eligible for any relief for benefit from her Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). Finally the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Director's Decision* dated September 30, 2004. On April 15, 2005, the AAO summarily dismissed an appeal filed by counsel due to failure to submit a brief, pursuant to 8 C.F.R. § 103.3(a)(1).

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.

Section 241(a) 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.

On appeal counsel submits copies of a brief, tax returns, the applicant's marriage certificate, her spouse's naturalization certificate, bank statements, letters of recommendation and an approval notice of a Form I-130 filed on behalf of the applicant. In his brief counsel states that the Director erred in finding the applicant inadmissible under 212(a)(9)(B)(i)(II) of the Act because she has not departed from the United States since her reentry. In addition counsel states that even if the applicant was found inadmissible pursuant 212(a)(9)(B)(i)(II) of the Act, she is eligible to file a waiver of inadmissibility based on her marriage to a U.S. citizen. Furthermore counsel states that based on a recent Ninth Circuit Court decision the applicant is eligible to file a Form I-212 and she is not subject to section 241(a)(5) of the Act, as stated in the Director's decision

The record reflects that the applicant was expeditiously removed from the United States on June 28, 1998, reentered on an unknown date and remained in the United States without a lawful admission or parole. There is no evidence in the record that the applicant has left the United States since her reentry after her removal. She is not inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act until she actually departs the United States. If the applicant departs the United States and is found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, she is eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) based on her marriage to a U.S. citizen.

In its August 14, 2004, decision, *Ashcroft*, (9<sup>th</sup> Cir. 2004), the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated may nonetheless obtain adjustment of status if his Form I-212 is granted. The Ninth Circuit Court of Appeals stated in that: "Given the fact that applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief." The Court further states: "Prior administrative decisions of the Bureau of Immigration Appeals confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in which the petitioner receives permission to reapply for admission after he or she has already reentered the country."

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time she filed the Form I-212. Since this case arises in the Ninth Circuit, controlling. The applicant is eligible to file a Form I-212.

This office finds that although the applicant is not subject to section 212(a)(5) of the Act, she is clearly inadmissible under section 212(a)(9)(A) of the Act.

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

(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 five 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 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 Illegal Immigration Reform and Immigrant Responsibility Act (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 states that the applicant's removal occurred over six years ago for not having a valid entry document. She further states that the applicant is person of good moral character, has no criminal history, is married to a U.S. citizen, has two permanent resident children and she contributes financially to the family. The applicant takes care of the children, cooks, cleans, washes clothing, transports and supervises the children and works part time as an independent business owner. Counsel states that if the waiver application is not granted the applicant's business would have to close and her spouse would face extreme difficulty in trying to take care of the children, maintaining his current job, expanding the applicant's business and maintaining their home. The applicant's spouse is not willing to relocate to Mexico with the applicant because he is a U.S. citizen and wishes for his children to remain in the United States where they are enrolled in school and have developed strong attachments to their friends and teachers. In addition, counsel states that if the applicant is not permitted to remain in the United States, she will suffer extreme hardship because she will not be able to find a job due to the high unemployment rate in Mexico. Finally counsel states that without the applicant's psychological, emotional and financial contribution to the family her spouse may have to request medical and financial assistance from the government. Counsel requests that the Form I-212 be approved because the favorable factors outweigh her unfavorable factors of being illegally in the country and her removal of June 26, 1998, and requests that the application be granted

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 seeking 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.

There are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." The uprooting of

family and separation from friends does not necessarily amount to extreme hardship but rather represent the type of inconvenience and hardship experienced by the families of most aliens being deported. *See Shooshtary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

Although counsel states that the applicant never committed a crime in the United States, the record of proceedings indicates that the applicant was arrested for burglary and for petty theft for which she was convicted. Based on the applicant's conviction she may be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The record of proceedings reveals that the applicant first entered the United States without a lawful admission or parole on February 10, 1989. She departed the United States on May 7, 1998, after a voluntary removal order, issued by an Immigration Judge, was extended by the District Director.

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 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.*

*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 AAO finds that the favorable factors in this case include the applicant's family ties in the United States, her U.S. citizen spouse and her lawful permanent resident children, and the approval of a Form I-130.

The unfavorable factors in this matter include the applicant's initial illegal entry into the United States on or about February 10, 1989, her attempt to enter the United States without proper documentation, her illegal re-entry subsequent to her June 27, 1998, removal, her criminal record, her employment without authorization 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. 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 he 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 Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.