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U.S. Citizenship
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A14

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JUL 15 2005

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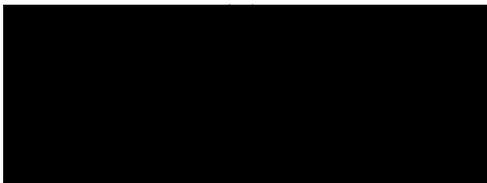
Applicant:



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 application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Armenia who entered the United States on December 29, 1991, as a non-immigrant visitor for pleasure. The applicant was a dependent on an asylum application filed by her former spouse on April 27, 1992, with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)). On January 22, 1996, her former spouse's asylum application was referred to an Immigration Judge for a court hearing. On February 5, 1996, the applicant was served with an Order to Show Cause for a hearing before an Immigration Judge. The record reflects that on June 7, 1999, an Immigration Judge granted the applicant voluntary departure in lieu of deportation until September 1, 1999. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on September 12, 2002, and she was granted voluntary departure until October 11, 2002. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to October 11, 2002, changed the voluntary departure order to an order of deportation. The record further reflects that the applicant married a U.S. citizen on August 28, 2003, and she is the beneficiary of a Petition for Alien Relative (Form I-130) filed by her current spouse. The applicant 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). She now 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.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Director's Decision* dated October 21, 2004.

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.

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, with limited exceptions, 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 submits a brief, affidavits from the applicant and her spouse and a psychological evaluation. In the brief counsel states that the affidavits from the applicant and her spouse provide evidence to show that they reside together as husband and wife. The psychological evaluation states that the applicant and her spouse would suffer extreme hardship if the applicant were forced to depart the United States. Counsel further states that the applicant's spouse is the primary income earner of the family and the separation would cause emotional and marital hardship to the family. Finally counsel states that the applicant has not broken any criminal laws in the United States.

In the psychological evaluation it is stated that the applicant's spouse does not want to depart the United States and relocate with the applicant in Armenia, because he has never been there and, due to the high unemployment rate, he would not be able to support his family. The psychological report further states that if the applicant and her son are removed from the United States the applicant's spouse's symptoms of anxiety will deepen and increase to a severe degree and his depression would develop into a severe major depressive disorder.

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.

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 *Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

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 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 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 August 28, 2003, ten months after her voluntary departure order had expired. 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 AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her U.S. citizen spouse, an approved petition for alien relative and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her initial authorized period of stay, her failure to depart the United States after she was granted voluntary departure, 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. Her equity, marriage to a U.S. citizen, gained after her voluntary departure order had expired, 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 Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.