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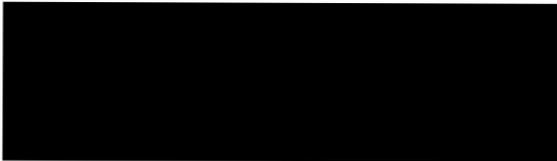
Applicant:



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, Chief
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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines who was admitted into the United States as a non-immigrant visitor for pleasure on June 20, 1992, with an authorized period of stay until December 19, 1992. The applicant applied for and received an extension of stay until December 18, 1993. The applicant remained in the United States beyond her authorized period of stay and on March 28, 1995, she filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). The applicant failed to appear for an asylum interview. Her application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an immigration judge was issued on June 19, 1995. On October 2, 1995, an immigration judge found the applicant deportable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having remained in the United States longer than permitted, and granted her voluntary departure until November 2, 1995, in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on May 5, 1997, and she was permitted to depart from the United States voluntarily within 30 days of the date of the BIA's order. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart the United States within 30 days of the BIA's order changed the voluntary departure order to an order of deportation. The applicant is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140). The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of 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.

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 June 1, 2005.

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, 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 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 in others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (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 in which he states that the fact that an immigration judge and the BIA denied the applicant asylum does not mean that the applicant's fear of persecution is unfounded. Counsel states that one of the BIA members wrote a dissenting opinion and was in favor of sustaining the appeal and granting the applicant asylum. In addition, counsel states that it is not true that the applicant was only granted work authorization in February 2005, as stated by the Director. In an affidavit by the applicant, she stated that she was granted employment authorization because she had a pending asylum application. Counsel states that the applicant's stay beyond her initially authorized period of stay is of no importance. Counsel states that since the applicant was subsequently granted work authorization, her stay was lawful. Counsel further states that her stay after her appeal was dismissed was justified because she really had a fear of persecution in the Philippines. Additionally, counsel states that the Director should first determine whether the grant of a waiver would make the applicant eligible to receive a grant of adjustment of status and refers to the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Furthermore, counsel states that the applicant has resided in the United States since 1992 and whether her status was lawful or not is of no consequence, and should be considered favorably. Counsel further states that the applicant's illegal residence and work without authorization does not affect her eligibility to adjust her status under section 245(i) of the Act. Counsel states that the Director failed to consider the applicant's hardship if she were to be removed to the Philippines and, as her affidavit states, she would not be able to be gainfully employed in the Philippines because the unemployment rate there is among the highest in the world. Finally, counsel states that based on the foregoing, the positive factors far outweigh the negative ones and a favorable exercise of discretion is warranted.

The proceedings in the present case are limited to the issue of whether or not the applicant meets the requirements to overcome the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act. The applicant was not found to have a well-founded fear of persecution upon return to the Philippines by the immigration judge and the BIA. The AAO is not in a position to reconsider these decisions. The record of proceedings does not reflect that the applicant was issued an Employment Authorization Card (EAD) prior to February 2005, and counsel does not provide any documentary evidence to show otherwise. The mere filing a Form I-589 does not automatically authorize an applicant to accept employment. The fact that the applicant remained in the United States beyond her authorized period of stay and worked without authorization demonstrates her disregard for the laws of the United States and are to be considered as unfavorable factors.

In *Perez-Gonzalez*, the court found that the Service denied the Form I-212 erroneously on the ground that permission to reapply is only available to aliens who are outside the United States, applying at a port of entry, or paroled into the United States. The court ruled that the alien, who returned to the United States following a

deportation and had his deportation order reinstated, could still adjust status if his Form I-212 were granted. The applicant in the present case was allowed to file a Form I-212 and the Director adjudicated the application pursuant to section 212(a)(9)(A)(iii) of the Act. The AAO notes that *Perez-Gonzalez* states that “. . . if permission to reapply is granted the approval of Form I-212 is retroactive . . . and therefore, the alien is no longer subject to the grounds of inadmissibility under section 212(a)(9).” The operative word is “if.” In the present case, the application was denied because the Director determined that the unfavorable factors in the applicant’s case outweighed the favorable factors. Permission to reapply was not granted and, therefore, the applicant remains inadmissible.

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 if the application were denied. The AAO will consider the hardship to the applicant, but it will be just one of the determining factors.

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 AAO finds that the favorable factors in this case are the approved Form I-140, and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant’s overstay after her initial lawful admission, her failure to attend an asylum interview without explanation, her failure to depart the United States after she was granted voluntary departure and after her voluntary departure order became a final order of deportation, and her periods of unauthorized presence and employment. 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 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.