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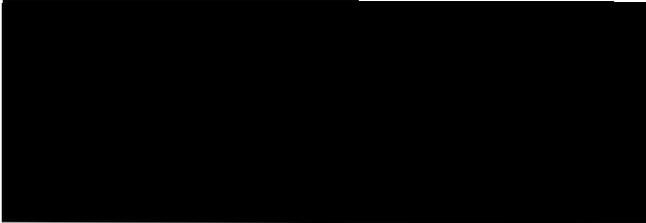
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **NOV 06 2006**

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, 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 Bolivia who entered the United States without a lawful admission or parole. On March 23, 1995, the applicant 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)). On the Form I-589 the applicant stated that she entered the United States on February 17, 1988, but on her Application to Register Permanent Residence or Adjust Status (Form I-485) and in an affidavit dated October 11, 2005, the applicant states that she entered without inspection on January 2, 1993. The applicant failed to appear for an asylum interview and on June 12, 1995, 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 January 19, 1996, the applicant failed to appear for a deportation hearing and she 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) for having entered the United States without inspection. On March 4, 1996, a Warrant of Removal/Deportation (Form I-205) was issued, and on August 13, 1996, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that she appear at the New York district office in order to be removed from the United States. The applicant failed to surrender for deportation or depart from the United States. On January 21, 2003, the applicant appeared at a CIS office for a scheduled interview regarding a Form I-485. Based on the Form I-205 the applicant was apprehended, placed in custody, and consequently on January 22, 2003, she was removed from the United States. The applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. 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 travel to the United States and reside with her U.S. citizen spouse and child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones, and denied the Form I-212 accordingly. See *Director's Decision* dated August 19, 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 for 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 deterring 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, a copy of the applicant's U.S. citizen child's birth certificate, and affidavits from the applicant and her spouse. In his brief, counsel states that the director gave too much weight to the negative factors and not enough to the positive ones. Counsel asserts that the applicant was motivated by desperation and not criminal intent when she entered illegally. In addition, counsel states that an individual falsely promised the applicant an employment authorization card and a green card and filed a form I-589 without her knowledge. Counsel further states that the applicant's failure to appear for an asylum interview and for her deportation hearing is because the person who filed the Form I-589 on her behalf never informed her of the hearings. Additionally, counsel states that it was not until the applicant appeared at CIS that she found out that she had been ordered deported in absentia. Furthermore, counsel states that after her removal the applicant gave birth to a U.S. citizen and there is an obvious and significant extreme hardship to the newborn and to the applicant's spouse, who is faced with the unenviable decision of whether to raise his child by himself in the United States or remain in Bolivia with the applicant. Finally, counsel states that the applicant has been living in Bolivia for over 33 months and has met the burden of extreme hardship to her U.S. citizen husband and child, and merits a favorable exercise of discretion on her Form I-212.

In her affidavit, the applicant states that she entered the United States on January 2, 1993, and not February 17, 1988, as noted on her Form I-589. She states that a person posing as an ex-employee of immigration told her that he could help her get a work permit. In addition, she states that she was unaware that this person filed an asylum application on her behalf, that the address on the application was made up by him, and she failed to appear for her asylum interview and deportation proceedings because she never received any correspondence related to the hearings. Additionally, the applicant states that if she knew that she had been ordered deported, she would not have appeared at CIS for her adjustment of status interview. The applicant further states that she has never been arrested and did not intentionally file an asylum claim, and that the negative factors were given too much weight. Finally, she states that her spouse is suffering extreme hardship because he resides in Bolivia with her, and he and their child will continue to suffer extreme hardship if he decides to return to the United States and raise their child on his own. The applicant's spouse submits an affidavit in which he states that in Bolivia medical assistance for himself and his son is limited, the crime rate is high, the educational system is poor, the standard of living is low, the economy is very unstable, his child will not learn English as

his primary language and he himself is suffering being away from his own mother who resides in the United States. The applicant's spouse further states that the applicant was misled by a person whom she trusted to obtain legal status for her, and his son has a right to reside in the United States. He requests that the Form I-212 be approved.

The statements that the applicant was unaware of filing an asylum application are not persuasive. The applicant signed the Form I-589 and it was her responsibility to review the application and make sure that the information provided was true and correct. In addition, it was her responsibility to assure that the correct address was provided to the Service. Although the applicant states that she never received correspondence regarding her asylum interview and her deportation hearing, the record of proceeding reveals that documentation forwarded to the applicant's last known address was not returned as undeliverable. Only one envelope, containing the Form I-166, was returned as unclaimed. The regulations at 8 C.F.R. § 103.5a(b) discuss service by mail and state that service by mail is complete upon mailing.

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. The AAO will consider the hardship to the applicant's U.S. citizen spouse and child, but it will be just one of the determining factors. 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."

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 court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 25, 2001, over six years after she was placed in deportation proceedings and over eight years after she illegally entered the United States. The applicant's spouse should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of her being removed. She now seeks relief based on that after-acquired equity. Therefore, hardship to her spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties to U.S. citizens, her spouse and child, an approved Form I-130, the prospect of general hardship to her family, and the absence of any criminal record

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, her failure to attend an asylum interview, her failure to appear for deportation proceedings, her periods of 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 an U.S. citizen, gained after she was placed in deportation proceedings and after a deportation order was issued, 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 eligibility 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.