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U.S. Citizenship
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Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

NOV 17 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:

SELF-REPRESENTED

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, 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 citizen of Honduras who was admitted into the United States as a nonimmigrant visitor for pleasure on April 9, 1992, with an authorized period of stay until October 8, 1992. On May 9, 1995, Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) encountered the applicant after she was arrested for shoplifting. On May 10, 1993, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on her. On June 9, 1994, the applicant failed to appear for the 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 remained in the United States longer than permitted. The applicant failed to surrender for removal or depart from the United States and on March 11, 2000, a Warrant of Deportation (Form I-205) was issued. On August 25, 2004, the applicant appeared at a CIS office for a scheduled interview regarding an application for adjustment of status. Based on the Form I-205 the applicant was apprehended, placed in custody, and consequently on October 19, 2004, she was removed from the United States. The record reflects that on August 30, 1995, the applicant was convicted of the offense of burglary in the 1st degree. The record further reflects that the applicant has two prior convictions for the offense of petty theft, on April 12, 1993, and August 30, 1993. 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 applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude and that she is not eligible for any exceptions or waivers under the Act based on the severity of the crimes. Additionally, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the Form I-212 accordingly. *See Director's Decision* dated October 13, 2005.

The AAO finds that the Director erred, stating in his decision, that the applicant is inadmissible without exceptions or waivers under the Act. If the Form I-212 is granted the applicant will be eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(h) of the Act, based on her marriage to a U.S. citizen.

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will weigh the discretionary factors in this case in order to determine whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived. This is the only issue that will be discussed.

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, filed by the applicant's spouse, he states that he is submitting a psychologist's report regarding the applicant's daughter, bank records regarding money transfers to the applicant in Honduras, a psychological evaluation and character references on behalf of the applicant.

The psychological evaluation submitted on behalf of the applicant was conducted in December 2002, and it was done at the request of the applicant's employer with regard to her criminal record. In addition, no psychological report regarding the applicant's daughter was submitted. The applicant's spouse submitted a letter from the school's social worker.

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. The AAO will consider the hardship to the applicant's spouse and child, 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 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 June 24, 2002, over nine years after she was placed in deportation proceedings and approximately eight years after an order of deportation was issued. The applicant's spouse should reasonably have been aware at the time of their marriage of 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 in the United States, her U.S. citizen spouse and child, an approved Form I-130, the prospect of general hardship to her family and the letters of recommendation.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after her initial lawful admission, her failure to appear for deportation proceedings, her convictions of crimes involving moral turpitude, (petty theft and burglary), her periods of employment without authorization and her lengthy presence in the United States without authorization. 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 she was placed in deportation proceedings, 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.