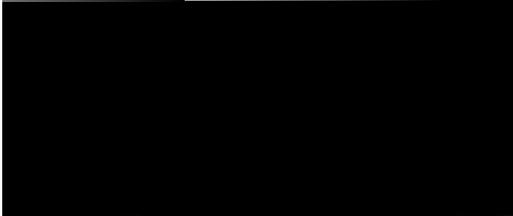




U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: OCT 10 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 sustained and the application approved.

The applicant is a native and citizen of Fiji who was admitted into the United States as a non-immigrant visitor for pleasure on October 17, 1992, with an authorized period of stay until April 16, 1993. The applicant was a dependent on a Request for Asylum in the United States (Form I-589) filed by her father on February 23, 1993. On January 5, 1999, her father's asylum application was referred to the immigration court and a Notice to Appear (NTA) for a hearing before an immigration judge was served on the applicant. On April 22, 2002, an immigration judge found the applicant removable pursuant to section 237(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 May 22, 2002, in lieu of removal. The applicant's father filed an appeal with the Board of Immigration Appeals (BIA), which on September 4, 2003, affirmed, without opinion, the immigration judge's decision. The applicant 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 on or prior to October 3, 2003. The applicant's failure to depart the United States on or prior to September 3, 1997, changed the voluntary departure order to an order of removal. On October 5, 2003, a Warrant of Removal/Deportation (Form I-205) was issued and on February 4, 2004, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that she appear at the San Francisco, California district office in order to be removed from the United States. The record reveals that the applicant departed the United States on March 25, 2004, executing the removal order. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse at the American Embassy in Fiji. 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 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 travel to 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 Form I-212 accordingly. *See Director's Decision* dated October 26, 2005.

The AAO notes that the record contains a Notice of Entry of Appearance as Attorney or Representative (Form G-28) that is signed by the applicant's spouse and not the applicant herself. Therefore, the AAO will not be sending a copy of the decision to the attorney mentioned on the Form G-28, but this office will accept the submitted information.

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, the applicant states that she was unaware of the BIA's decision because the decision was forwarded to her father's last known address but he was not living there and it was returned as undelivered. The applicant states that when she received a "bag and baggage" letter she reported to the San Francisco office as requested and departed the United States on March 25, 2004. In addition, the applicant states that had she received the notice she would have complied with the BIA order. Additionally, the applicant states that she had lived in the United States for eleven years, where she had been educated and received a nursing certificate, has an approved Form I-130, departed the United States at her own expense, has numerous family members in the United States and is married to a U.S. citizen. Finally, the applicant requests that she be allowed to reenter the United States as the spouse of a U.S. citizen.

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 and 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.*

In his decision, the Director determined that the applicant did not establish any favorable factors to offset her disregard for the laws of the United States and denied the application accordingly.

The AAO does not find that the applicant has shown a continued disregard for the laws of the United States. As noted above, the applicant was authorized to stay in the United States until April 16, 1993, and she was a dependent on a Form I-589, which was filed on February 23, 1993. The applicant was a dependent on her father's asylum application, and although it was subsequently denied, she was entitled to exhaust all means available to her by law in an effort to legalize her status in the United States. The appeal conferred on her a status that allowed her to remain in the United States while it was pending.

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 Form I-130, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's failure to depart the United States after the BIA dismissed her father's appeal, and periods of unauthorized presence. The unauthorized presence was from October 3, 2003, the date her voluntary departure order expired, to March 25, 2004, the date she departed the United States. The applicant cannot be held accountable for her failure to depart the country after the immigration judge granted her voluntary departure because at the time she was a minor.

While the applicant's actions cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal of the denial of the Form I-212 is sustained and the application approved.