



U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: WASHINGTON, D.C.

Date: SEP 28 2006

IN RE:

Applicant:

[REDACTED]

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:

[REDACTED]

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 District Director, Washington, D.C., 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 September 1, 1991. On December 30, 1991, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On July 31, 1992, the applicant was interviewed for asylum status. On April 1, 1994, her asylum application was denied and an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was issued. On December 5, 1994, the applicant was ordered deported 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 filed an appeal with the Board of Immigration Appeals (BIA). On September 6, 1995, the BIA dismissed the applicant's appeal from the denial of asylum and withholding of deportation and sustained her appeal from the denial of voluntary departure. The applicant was permitted to depart from the United States voluntarily within 30 days from 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 4, 1995. The applicant's failure to depart the United States on or prior to October 4, 1995, changed the voluntary departure order to an order of deportation. On October 22, 1996, a Warrant of Removal/Deportation (Form I-205) was issued and a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that she appear at the Los Angeles, California district office in order to be removed from the United States. The applicant failed to appear as requested. The record reflects that on April 20, 1998, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an allegedly approved Petition for Alien Worker (Form I-140). The applicant submitted a fraudulent Notice of Action (Form I-797) to show that a Form I-140 had been approved on her behalf. On February 13, 2002, the Form I-485 was denied due to fraud. The applicant is the beneficiary of an approved 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 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 and child.

The District Director determined that a *nunc pro tunc* approval of the Form I-212 was not to be considered and denied the application accordingly. See *District Director's Decision* dated September 23, 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 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 states that the District Director erred in her decision to deny the application for adjustment of status and the Form I-212, because the evidence presented with the applications clearly demonstrates that the petitioner, a U.S. citizen, will suffer extreme hardship if the applicant is not granted lawful permanent residence. Counsel states that the Form I-485 was denied without given the applicant the opportunity to rebut the derogatory evidence. Counsel further states that the applicant has strong ties in the United States, since she has been here since 1991, and her spouse and child reside in the United States. In addition, counsel states that the evidence presented clearly demonstrated that the applicant and her spouse would suffer extreme hardship if she were not granted lawful permanent residence, because both the applicant and her spouse have no possibility of employment in the Philippines. Counsel further states that country conditions in the Philippines are extremely unstable due to the high incidence of criminal activities and unemployment. Counsel refers to case law relating to family ties and exceptional hardship. Additionally, counsel states that the regulation at 8 C.F.R. § 212.2(i) provide for the retroactive approval of a Form I-212 and the District Director erred when she failed to consider the request for a *nunc pro tunc* approval. In his brief, counsel asserts that the applicant is entitled to a retroactive approval of the Form I-212 and refers to *Matter of Garcia*, 21 I&N Dec. 254 (BIA 1996). Counsel points out that *Matter of Garcia* states that there are two situations in which a Form I-212 can be granted retroactively: (1) where the only ground of deportability or inadmissibility would thereby be eliminated; and (2) where the alien would receive a grant of adjustment of status in conjunction with the grant of any appropriate waivers of inadmissibility. Finally, on the Notice of Appeal to the AAO (Form I-290B), counsel states that he needs 60 days to submit a brief and/or evidence to the AAO.

On August 18, 2006, the AAO forwarded a fax to counsel informing him that this office had not received a brief or evidence related to this matter and unless counsel responded within five business days the appeal may be summarily dismissed. Counsel responded to the AAO's fax and stated that he did not file an additional brief or evidence to support the appeal. Therefore, the AAO will adjudicate the appeal based on the documentation within the record of proceeding.

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 not discuss the denial of the Form I-485. These

proceedings 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 AAO agrees with counsel regarding the retroactive approval of a Form I-212. The regulation at 8 C.F.R. § 212.2(i) states in pertinent part:

(i) Retroactive approval.

. . .

(2) If the alien filed Form I-212 in conjunction with an application for adjustment of status under section 245 of the Act, the approval of Form I-212 shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States.

If the Form I-212 is granted the applicant would not be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act.

The rest of counsel's assertions are not persuasive. *Matter of Garcia, supra*, is not applicable in this case. Section 212(a)(9)(A)(ii) of the Act is not the applicant's only ground of inadmissibility. As noted above, the applicant attempted to adjust her status based on a fraudulent Form I-797 and, therefore, she is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182 (a)(6)(C)(i), for having attempted to procure an immigration benefit by fraud. On September 25, 2005, an Application for Waiver of Grounds of Inadmissibility (Form I-601) pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i) was denied.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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 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.

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 December 28, 2001, over seven and one half years after she was placed in deportation proceedings and over six years after the date of her deportation order. 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, and the prospect of general hardship to her family.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after her initial lawful admission, 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, her attempt to adjust status by fraud, her unauthorized employment 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 and ordered deported, 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.