

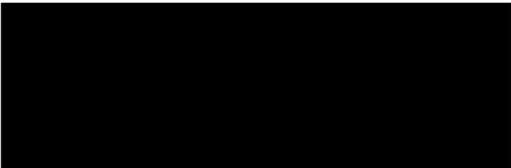


U.S. Citizenship
and Immigration
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAR 08 2007

IN RE:

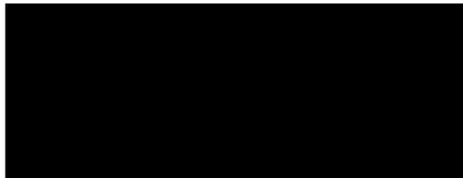
Applicant:



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, 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 Mexico who entered the United States in July 1986 without a lawful admission or parole. On August 24, 1994, in the Superior Court of California, County of Orange, the applicant was convicted of the offense of inflicting injury upon a child, in violation of section 273d of the California Penal Code. On May 12, 1997, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on May 13, 1997, a Notice to Appear (NTA) for a removal hearing before an immigration judge was served on her. On June 6, 1997, an immigration judge ordered the applicant removed from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i), for having been present in the United States without being admitted or paroled, and 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 a crime involving moral turpitude. Consequently, on June 5, 1997, the applicant was removed from the United States. 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 under 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 children.

The Director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act and that she is not eligible for any exceptions or waivers under the Act based on the severity of her crime. Additionally, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated March 23, 2006.

The AAO finds that the Director erred by 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, 8 U.S.C. § 1182(h), based on her relationship to U.S. citizens, her spouse and children.

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, and (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 in which he states that the Director failed to consider the totality of factors in the determination of extreme hardship. Counsel states that the Director based his decision on the fact that the applicant was convicted of the offense of unlawfully inflicting cruel and inhuman corporal punishment and injury, resulting in a traumatic condition upon a child. In addition, counsel states he believes that the Director erred by utilizing the stringent requirement of extremely unusual and exceptional hardship and that the Director's sole reliance on the applicant's conviction to deny the application is abusive and in error. Counsel further states that the factors to be considered in determining extreme hardship must be considered in their totality and aggregate. Further, counsel states that the applicant has a U.S. citizen spouse and is the mother of three U.S. citizen children. Counsel states that since the applicant's removal, her spouse has been forced to support himself and their three children which has caused extreme financial hardship on them. In addition, counsel states that the applicant's children need her and the Director failed to take any of these hardship factors into consideration. Finally counsel states that it would be unfair to the applicant to compare her to the applicant in *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980), because the applicant in *Matter of Flores* had a history of entries without inspection following deportation and a conviction for selling fraudulent entry documents, while the applicant in the present matter does not have a history of entries without inspection following deportation.

The AAO notes that the Director did not compare the applicant with the applicant in *Matter of Flores* but simply used *Matter of Flores* to define the applicant's conviction as an act of moral turpitude.

The case law referred to by counsel deals with suspension of deportation and waivers of inadmissibility where extreme hardship is taken into consideration. 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 children, 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 applicant's family ties in the United States, her U.S. citizen spouse and children, an approved Form I-130, the prospect of general hardship to her family and the fact that she did not reenter or attempt to reenter the United States after her removal.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry, her conviction of a crime involving moral turpitude, her 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. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable factors.

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.

The AAO notes that the applicant states that she resides in Mexico and there is no documentary evidence to show otherwise. On June 5, 2007, it will be ten years since the applicant's date of removal. Therefore, the applicant will no longer be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act.

The AAO further notes that although the applicant will no longer be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, on June 5, 2007, she remains inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act and will be required to file a Form I-601.

ORDER: The appeal is dismissed.