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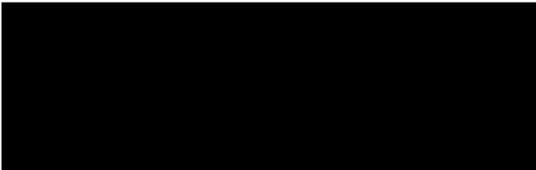
Applicant:



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 District Director, Cleveland, Ohio, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jordan. On September 20, 1991, at the Rainbow Bridge, Buffalo, New York, Port of Entry, the applicant's spouse attempted to smuggle the applicant into the United States by using a photo-substituted passport. The applicant's spouse was placed in exclusion proceedings and the applicant was turned over to Canadian immigration officials. The record of proceeding reflects that the applicant entered the United States without a lawful admission or parole in October 1991. On April 13 1993, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on her. The applicant filed a Request for Asylum in the United States (Form I-589) with the immigration court. On February 9, 1994, an immigration judge denied her request for asylum and withholding of deportation. On the same date the immigration judge found the applicant deportable pursuant to section 241(a)(1)(A) of the Immigration and Nationality Act (the Act), as an alien excludable at time of entry, pursuant to section 212(a)(7)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(7)(B)(i)(II), for being a nonimmigrant not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, and granted her voluntary departure until May 9, 1994, in lieu of deportation. An appeal filed with the Board of Immigration Appeals (BIA) was dismissed on November 30, 2000. The applicant was permitted to depart 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. The applicant's failure to depart the United States within 30 days of the date of the BIA's order changed the voluntary departure order to an order of deportation. On March 30, 2001, the BIA, granted the applicant's motion to reopen her deportation proceedings and the record was remanded for further proceedings. On April 4, 2003, an immigration judge administratively closed the case. The applicant is a derivative beneficiary of an approved Petition for Alien Relative (Form I-130) filed on behalf of her 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 remain in the United States and reside with her spouse and U.S. citizen children.

The District Director determined that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, as an applicant who presented false documents and statements in order to gain entry into the United States. In addition, the District Director determined that the applicant did not submit an Application for Waiver of Grounds of Inadmissibility (Form I-601) simultaneously with the Form I-212 with the American Consul abroad or the Immigration Judge as required by the regulation at 8 C.F.R. 212.2(d). The District Director then denied the Form I-212 accordingly. *See District Director's Decision* dated August 12, 2004.

On appeal, counsel states that the District Director improperly denied the Form I-212 pursuant to section 212(a)(6) of the Act. Counsel further states that the applicant is in exclusion proceedings and, therefore, under the old exclusion rules. In addition, counsel states that in her February 7, 2003 decision the immigration judge properly found that the District Director had jurisdiction to review the Form I-212. On the Notice of Appeal to the AAO (Form I-290B) counsel also states that she will be submitting a brief and/or evidence to the AAO within 30 days. On November 28, 2006, the AAO forwarded a fax to counsel informing her 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 has not responded to the AAO's fax. The appeal was filed on September 9, 2004, and to this date, over two years later, no documentation has

been received by the AAO. Therefore, the AAO will adjudicate the appeal based on the documentation contained in the record of proceeding.

The AAO notes that the District Director did not deny the Form I-212 pursuant to section 212(a)(6) of the Act, as stated by counsel. In addition, the AAO notes that the record of proceeding does not contain a decision by an immigration judge dated February 7, 2003, and counsel did not provide a copy the decision. The record of proceeding reflects that on April 4, 2003, an immigration judge administratively closed the case. Several sections of the Act were added and amended by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Sections 212(a)(9)(A)(i) and (ii) of the Act roughly correspond to former sections 212(a)(6)(A) and (6)(B) of the Act. According to the reasoning in *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of the legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996, and since that date all aliens are considered to be in removal proceedings regardless of the date of the original notice.

The AAO finds that the District Director erroneously denied the Form I-212 pursuant to the regulation at 8 C.F.R. § 212.2(d). The regulation at 8 C.F.R. § 212.2(d) pertains to applicants for immigrant visas who are not physically present in the United States. The applicant, in the present matter, is physically present in the United States and applied for adjustment of status. Therefore, the regulation at 8 C.F.R. § 212.2(e) relates to her, and she is permitted to file a Form I-212 with the district office that has jurisdiction over her place of residence.

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.

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).

To recapitulate, on November 30, 2000, the applicant was permitted to depart 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 and, therefore, she is inadmissible under sections 212(a)(9)(A) of the Act and must receive permission to reapply for admission.

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 children, and the fact that she is a derivative beneficiary of an approved Form I-130.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to be smuggled into the United States, her illegal entry in October 1991, 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 arrests for theft, 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.

ORDER: The appeal is dismissed.