



U.S. Citizenship  
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FILE:



Office: PHOENIX, ARIZONA

Date:

MAR 12 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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

The applicant is a native and citizen Mexico who entered the United States without a lawful admission or parole on or about May 30, 1993. The applicant departed the United States on an unknown date and on January 6, 2001, at the Nogales, Arizona, Port of Entry she applied for admission into the United States. The applicant presented a valid Mexican passport containing a non-immigrant visa that did not belong to her. The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(C)(i) for having attempted to procure admission into the United States by fraud. Consequently, on the same date, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reveals that the applicant reentered the United States immediately after her removal without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). 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)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 U.S. citizen spouse and child.

The Acting District Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Acting District Director's Decision* dated December 29, 2005.

On the Notice of Appeal to the AAO (Form I-290B) counsel 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 of November 28, 2006. The appeal was filed on January 30, 2006, and to this date, over one year 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.

On appeal, counsel states that assuming, but not conceding, that a waiver of excludability is necessary, the applicant asserts that she has demonstrated that her qualifying relative would suffer extreme hardship. Counsel states that the Service did not consider "the indirect effect on the qualifying relative based on the existence of US citizenship children which is a factor that cannot be ignored." In addition, counsel states that the Service did not address each and every factor presented in the application to determine whether in the "aggregate or cumulatively" she has met her burden. Additionally, counsel states that the Service ignored the fact that the applicant is applying for adjustment of status and not suspension of deportation, that the bars of inadmissibility are not crimes, but a technical violation of the Act, and that waivers under section 212(i) of the Act usually apply to misconduct or misrepresentation when in this case it was a matter of travel outside the United States. According to counsel the standard is different, but if the standard requires a weighing of the factors, this factor should be significant.

Counsel refers to waivers of excludability, section 212(i) of the Act and caselaw related to extreme hardship. These would be relevant in an appeal of a Form I-601, Application for a Waiver of Excludability. The AAO

notes that the applicant filed a Form I-601, but according to the Director's decision the Form I-601 would be processed for a refund following the denial of the Form I-212. The AAO wishes to clarify that this proceeding involves the Form I-212, permission to reapply for admission, and not the Form I-601 waiver of excludability.

Counsel states that the applicant has U.S. citizen children but provides no documentary evidence to support her statement. The record of proceeding contains only one birth certificate regarding a child born to the applicant. 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.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years 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, 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 from being present in the United States without lawful admission or parole.

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 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 initial illegal entry on May 30, 1993, her attempt to reenter the United States by fraud, her illegal reentry subsequent to her removal, her periods of unauthorized employment, 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 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.