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U.S. Citizenship and Immigration Services

[redacted]

H4

FILE: [redacted] Office: CHICAGO Date: DEC 19 2006

IN RE: [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 District Director, Chicago, Illinois, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 Poland who, on September 29, 1988, was admitted to the United States as a refugee. On September 26, 1989, the applicant's first U.S. citizen sister was born. On October 17, 1994, the applicant's second U.S. citizen sister was born. On September 27, 1995, the applicant's refugee status was rescinded because the applicant had obtained a visa and admission to the United States in 1988 through a fraudulently obtained approved Refugee/Asylee Relative Petition (Form I-730), filed on her behalf by her father. The record reflects that the applicant's father obtained the approved Form I-730 by filing a fraudulent Arrival/Departure Record (Form I-94) indicating that he was admitted to the United States as a refugee. On October 16, 1995, a Petition for Alien Relative (Form I-130) was filed on behalf of the applicant's mother, under which the applicant is a derivative beneficiary. On January 30, 1996, the applicant was placed into immigration proceedings. On April 16, 1999, the immigration judge found the applicant was eligible for relief pursuant to the Nicaraguan Adjustment and Central American Relief Act (NACARA) Pub. L. 105-100, 111 Stat. 2160, 2193. Citizenship and Immigration Services (CIS) filed an appeal with the Board of Immigration Appeals (BIA). On January 11, 2000, the Form I-130 was approved. On March 16, 2002, the BIA found that, since the applicant was excludable, she could not apply for adjustment of status pursuant to NACARA and ordered her removed. The applicant failed to depart the United States. On August 12, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On December 19, 2003, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 sisters and grandparents.

The district director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The district director denied the Form I-212 accordingly. *See District Director's Decision* dated June 22, 2004.

On appeal, counsel contends that the district director failed to reference section 212(k) of the Act, 8 U.S.C. § 1182(k), which is applicable to the applicant, in adjudicating the Form I-212. *See Applicant's Brief,* dated July 21, 2004. In support of the appeal, counsel submitted the above-referenced brief and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

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-
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> (I) has been ordered removed under section 240 or any other provision of law . . .

> and who 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.

The record of proceedings indicates that the applicant was ordered removed from the United States and failed to comply with the order of removal. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and, therefore, must receive permission to reapply for admission.

Counsel contends that the district director erred in failing to reference section 212(k) of the Act in denying the Form I-212. Counsel contends that the district director should have applied section 212(k) of the Act in adjudicating the applicant's Form I-212 because she was two years old at the time she entered the United States and could not have possibly been aware of the fraud perpetrated by her father. Section 212(k) of the Act provides, in pertinent part:

> **Attorney General's discretion to admit otherwise inadmissible aliens who possess immigrant visas.** Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a), who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

The AAO finds that the district director did not err in failing to reference section 212(k) of the Act in his decision because it is not applicable to the instant case. The BIA found that the applicant was excludable pursuant to section 212(a)(7)(A)(i) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i), as an immigrant without valid documents and did not exercise their discretion by applying section 212(k) of the Act when they ordered the applicant removed from the United States. The issue before the district director and the AAO is whether the applicant is eligible for permission to reapply for admission pursuant to section 212(a)(9)(A)(iii) of the Act. Section 212(k) of the Act does not apply to an application for permission to reapply for admission. However, the applicant's inability to determine that her entry was fraudulent is a favorable factor, which will be considered in this decision.

The district director found the applicant to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.SC. § 1182(a)(6)(C)(i), for having procured a visa and admission to the United States by fraud or willful misrepresentation and found this to be a negative factor in determining whether the applicant warranted a

favorable exercise of discretion. However, as discussed above, there is no evidence in the record to suggest that the applicant was capable of or did indeed willfully make a material misrepresentation of fact or willfully committed fraud.

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 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.*

The record reflects that the applicant's grandmother is a native of Poland who became a naturalized U.S. citizen in 1993. The applicant's grandfather is a native of Poland who became a naturalized U.S. citizen in 1995.

The favorable factors in this matter are the applicant's U.S. citizen sisters, the applicant's U.S. citizen grandparents, the absence of any criminal record since entering the United States, the applicant's age and inability to determine her inadmissibility at the time of entry into the United States, and an approved immigrant petition for alien relative under which she is a derivative beneficiary.

The AAO finds that the unfavorable factors in this case include the applicant's entry into the United States utilizing a fraudulently obtained visa, her extended unauthorized residence in the United States, and non-compliance with an order of removal.

While the applicant's entry into the United States utilizing a fraudulently obtained visa, her extended unauthorized residence in the United States, and non-compliance with an order of removal 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 is sustained and the application approved.