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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship and Immigration Services

[Redacted]

H4

APR 05 2005

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Applicant: [Redacted]

APPLICATION: Application for Permission to Reapply for Admission after Removal into the United States after Deportation 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the Director, California Service Center, and 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 a citizen of Guatemala who was admitted to the United States as a visitor for pleasure on November 9, 1990. The applicant was a dependent on an asylum application filed by her mother, with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). Her mother's application was referred to an Immigration Judge and an Order to Show Cause and Notice of Hearing was issued on January 28, 1994. On January 27, 1995, the applicant failed to appear for a deportation hearing and she was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation was issued on May 1, 1995. The record of proceedings reveals that on March 27, 1994, the applicant departed the United States and reentered on June 18, 1994, as a visitor for pleasure in possession of a valid nonimmigrant visa. On January 17, 1999, the applicant married a U.S. citizen and filed an application for adjustment of status. The applicant is inadmissible under 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 Director determined that since the applicant had been unlawfully present in the United States for more than one year and upon departure she would become inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), she is not eligible for an advance approval since she cannot obtain a waiver for all grounds of inadmissibility prior to departure. The Director then denied the application accordingly. See *Director's Decision* dated March 4, 2004.

On appeal, counsel states that the applicant has presented ample evidence to establish that she is eligible for the waiver and that the Director erred in his decision because the applicant has not departed the United States since her last entry on June 18, 1994, and therefore the "10 year bar" does not apply in this case.

The AAO agrees with counsel and finds that the Director erred in his decision stating that the applicant is inadmissible section 212(a)(9)(B)(i)(II) of the Act, since she has not departed the United States. If the applicant departs the United States she would be found inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The Ninth Circuit Court of Appeals stated in its August 14, 2004, decision, [REDACTED] F.3d 783 (9th Cir. 2004), that: "...if permission to reapply is granted, the approval of Form I-212 is retroactive to the date on which the alien entered the country, and therefore, the alien is no longer subject to the grounds of inadmissibility in § 212(a)(9). See 8 C.F.R. § 212.2(i)(2). . ."

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.

Since this case arises in the Ninth Circuit, [REDACTED] is controlling. If the Form I-212 is granted the applicant would not be subject to the grounds of inadmissibility in section 212(a)(9) of the Act.

Section 212(a)(9). Aliens previously removed states in pertinent part:

(A) Certain alien 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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

A review of the 1996 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 reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a 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 of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

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.*

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 be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The AAO finds that the favorable factors in this case are the applicant's family ties to U.S. citizens, her spouse and child, the approval of a petition for alien relative, the absence of a criminal record, the fact that she was a minor when she entered the United States and applied for asylum and the prospect of general hardship to her family.

The AAO finds that the unfavorable factors in this case include the applicant's failure to appear for removal proceedings and periods of unlawful presence in the United States.

While the applicant's actions cannot be condoned, the AAO finds that given all of the circumstances in 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.