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U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

APR 14 2005

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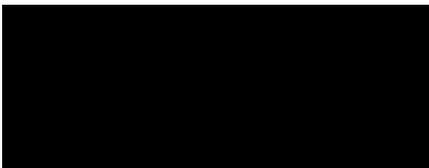
Applicant:



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, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, Vermont 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 Ecuador who entered the United States without inspection on or about November 8, 1994. On February 6, 1995, the applicant applied for asylum. On March 14, 1995, an Immigration Officer interviewed the applicant for asylum status. Her application was denied and an Order to Show Cause was issued on March 21, 1995. On May 30, 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 (Form I-205) was issued on July 12, 1995. The applicant is therefore inadmissible pursuant to 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 U.S. citizen children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212). See *Director's Decision* dated June 30, 2004.

On appeal counsel asserts that the applicant is not subject to section 212(a)(9)(A)(ii) of the Act because she never left the United States after an order of deportation was issued. Counsel refers to two memos from Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) that suggest that section 212(a)(9)(A) of the Act applies to aliens who have been physically removed or deported from the United States.

Counsel's assertion is not persuasive. The memos referred to by counsel were interim guidance. The clear language of section 212(a)(9)(A)(ii) of the Act does not require the alien to actually be removed, only to have been ordered removed. Further, there is a provision in 8 C.F.R. §212.2(j) that allows an alien residing in the United States to apply for consent to reapply in advance where departure from the U.S. will execute an outstanding warrant of removal.

Counsel also states that permission to reapply for admission in similar circumstances has been granted where the immigration violations of the applicant have been far more egregious. Counsel refers *Matter of Carbajal*, Interim Decision 2765 (Comm.1978) in which the applicant had entered the United States illegally on four occasions and his wife and children were foreign nationals. *Matter of Carbajal* is distinguishable from the present proceeding in that the alien in that case was immediately eligible for the issuance of an immigrant visa. There is no evidence that the applicant is the beneficiary of an approved petition and has a visa available.

In addition, counsel states that applicant's spouse's employer has filed an application for lawful permanent resident status on his behalf and the applicant would obtain an immigrant visa as a derivative beneficiary. A search of CIS electronic records failed to reveal an approved petition filed on behalf of the applicant's spouse. CIS electronic records reveal that the applicant's spouse also has a final removal order issued by an immigration judge.

Section 212(a)(9) states in pertinent part:

Aliens previously removed.-

(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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' 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 favorable factors in this case include the applicant's family ties to her U.S. citizen children, the absence of a criminal record and the fact that she filed tax returns.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States on or about November 8, 1994, her failure to appear for deportation proceedings, her failure to depart the United States after a final removal order was issued by an immigration judge, 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 that she is eligible 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.