

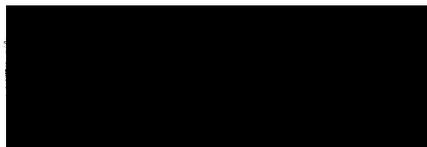
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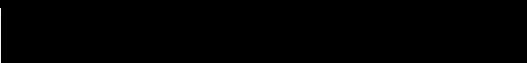
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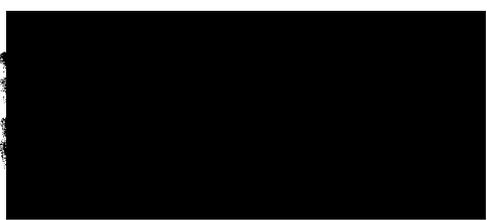
H4

FILE:  Office: CALIFORNIA SERVICE CENTER Date: **JUL 15 2005**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Peru who entered the United States without a lawful admission or parole on or about June 24, 1989. On June 30, 1995, the applicant applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)). On August 10, 1995, the applicant was interviewed for asylum status. She was denied asylum status and an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued on August 24, 1995. The record reflects that on September 27, 1995, an Immigration Judge ordered the applicant removed from the United States pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on August 20, 1996. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on October 26, 1996. On June 21, 1997, the applicant married a subsequently naturalized U.S. citizen who filed a Petition for Alien Relative (Form I-130) on her behalf. 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 to reside with her U.S. citizen spouse and child.

The Director determined that the applicant was inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. In addition the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. See *Director's Decision* dated October 12, 2004.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

(B) Aliens Unlawfully Present.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

. . . .

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver.- The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. . .

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and therefore the AAO will not discuss the applicant's potential grounds of inadmissibility under section 212(a)(9)(B) of the Act. If the applicant is found inadmissible under section

212(a)(9)(B)(i)(II) of the Act, he is eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) based on her marriage to a U.S. citizen. This ground of inadmissibility in and of itself does not preclude the applicant applying for permission to reapply for admission. The proceeding in the present case is limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act, to be waived.

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 . . . [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.

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 for others, (2) has added a bar, with limited exceptions, 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.

On appeal, counsel submits a Notice of Appeal to the AAO (Form I-290B). On the Form I-290B the applicant states that her moral character, family responsibilities and hardship to herself and her family were not taken into consideration. In addition she states that she entered the United States in 1995 and worked as a baby sitter until she got married in 1997.¹ Furthermore she states that she supports her mother who lives in Peru, she has no criminal convictions, she is a college student, and she is a hard-working individual and a good wife and mother.

¹ Although the applicant states on the Form I-290B that she entered the United States in 1995, the record of proceedings contains other documentation that indicates that she entered the United States without a lawful admission or parole on or about June 24, 1989.

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 for 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.

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 court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter married her U.S. citizen spouse on June 21, 1997, approximately two years after she was ordered deported by an Immigration Judge and ten months after the BIA dismissed her appeal. The applicant's spouse should reasonably have been aware of the applicant's immigration violations

and the possibility of her being removed at the time of their marriage. She now seeks relief based on that after-acquired equity.

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 petition for alien relative and the absence of any criminal record.

The unfavorable factors in this case include the applicant's illegal entry into the United States on or about June 24, 1989, her failure to depart the United States after a final deportation order was issued by an Immigration Judge, her employment without authorization 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. Her equity, marriage to a U.S. citizen, gained after a final order of deportation was issued, can be given only minimal weight. 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 the applicant 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.