

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



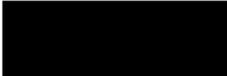
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

74



FILE:



Office: VERMONT SERVICE CENTER

Date: DEC 01 2006

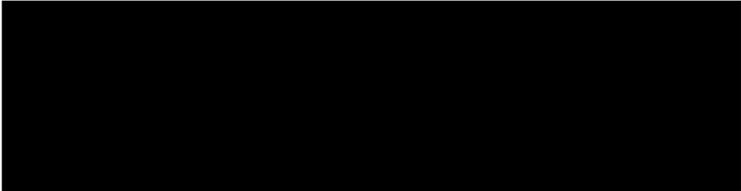
IN RE:

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, 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 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 Ghana who entered the United States on a date that is unclear from the record. On July 2, 1993, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On September 24, 1996, the applicant was interviewed for asylum status. Her application was referred to the immigration court and on October 8, 1996, an Order to Show Cause (OSC) for a hearing before an immigration judge was served on her. On January 25, 1999, an immigration judge found the applicant deportable pursuant to section 241(a)(1)(A) of the Immigration and Nationality Act (the Act), as an alien excludable at time of entry, pursuant to 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I), for being an immigrant not in possession of a valid immigrant visa or other valid entry document, and granted her voluntary departure until January 3, 2000, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart the United States on or before January 3, 2000, changed the voluntary departure order to an order of deportation. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her Lawful Permanent Resident (LPR) spouse. The applicant is 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 LPR spouse and U.S. citizen children.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Acting Director's Decision* dated January 12, 2006.

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, 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 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 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/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief and a copy of a Notice of Action (Form I-797A) indicating that the applicant was admitted into the United States as a nonimmigrant visitor for pleasure on April 11, 1990, until October 1, 1990. In his brief, counsel asserts that the applicant did not enter the United States on February 13, 1993, nor did she ever use fraudulent documents while applying for entry into the United States as stated in the Acting Director's decision. In addition, counsel states that the applicant inadvertently claimed her nephew and stepdaughter as foster children on her tax returns. Additionally, counsel states that the applicant's name was misspelled and the Service never updated her current address. Furthermore, counsel states that the applicant is not permanently barred for permission to reapply for admission pursuant to section 241(a)(5) of the Act, and requests that the decision be reconsidered.

The AAO agrees with counsel regarding the fact that section 241(a)(5) of the Act does not apply in this case. In order for section 241(a)(5) of the Act to apply, an individual must have reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal. Although the applicant, in the present case, has a final deportation order, she never departed the United States and, therefore, never reentered illegally as required for section 241(a)(5) of the Act to apply. The issue is moot, however, as there is no indication that the applicant was ever found to be subject to section 241(a)(5) of the Act. The applicant is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission. The AAO finds the facts that the Acting Director misspelled the applicant's name and did not update her address to be harmless errors since they do not affect the outcome of the decision.

Counsel's assertion that the applicant did not enter the United States on February 14, 1993, or use fraudulent documents is not persuasive. Counsel submits a Form I-797A that reflects that the applicant entered on April 11, 1990, with an authorized period of stay until October 10, 1990. During the applicant's asylum interview she stated, under oath, that she entered the United States on February 14, 1993, with what she believed to be a fraudulent passport. In addition, during her deportation proceedings the immigration judge found the applicant deportable because at the time of her admission she was not in possession of a valid immigrant visa or other valid entry document. If, in fact, the applicant arrived on April 11, 1990, as she now claims, then her statements regarding her arrival made during her asylum interview, and confirmed at her removal hearing, must have been fraudulent.

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 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 LPR spouse on May 18, 1999, over two and one half years after she was placed in deportation proceedings and approximately four months after she was granted voluntary departure. The applicant's spouse should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of her being removed. She now seeks relief based on that after-acquired equity. Therefore, hardship to her spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her LPR spouse and U.S. citizen children, an approved Form I-130, and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's entry into the United States with fraudulent documents, (or, if her April 11, 1990, arrival is correct, making fraudulent statements under oath at her asylum interview), her failure to depart the United States after she was granted voluntary departure, and after her voluntary departure order became a final order of deportation, her periods of unauthorized employment, and her lengthy presence in the United States without authorization. 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 an LPR, gained after she was placed in deportation proceedings, 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 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.