

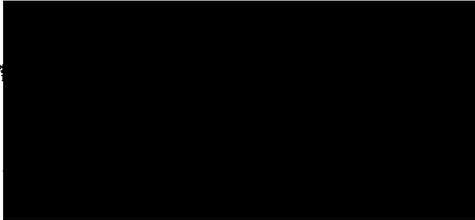
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U.S. Citizenship
and Immigration
Services

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H4

FILE:



Office: MANILA, PHILIPPINES

Date: **JAN 13 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
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 Immigration Attaché, Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines who was admitted into the United States in possession of a non-immigrant visa on or about June 7, 1990. The applicant applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) on March 1, 1993. On May 4, 1993, the applicant was interviewed for asylum status and was subsequently referred to an Immigration Judge for a court hearing. On October 18, 1994, an Immigration Judge granted the applicant voluntary departure in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on April 10, 1995, and she was permitted to depart from the United States voluntarily within 30 days from the date of the BIA's order. The applicant filed an appeal with the United States Court of Appeals for the Ninth Circuit, which was denied on June 21, 1996 and the applicant was granted voluntary departure until July 21, 1996. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to July 21, 1996, changed the voluntary departure order to an order of removal. On August 21, 2002, the applicant was removed from the United States pursuant to section 241(a)(1)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1251(a)(1)(C)(i) as a nonimmigrant who failed to maintain the conditions of her status. The applicant is the beneficiary of an Application for Alien Relative (Form I-130) filed by her U.S. citizen 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 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 travel to the United States and reside with her U.S. citizen spouse.

The Acting Immigration Attaché determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Acting Immigration Attaché's Decision* dated December 3, 2003.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

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(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 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 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 brief in which he states that the Officer in Charge (OIC) did not address the positive factors in the applicant's case, and denied the application without balancing the various factors. In addition, counsel states that the applicant submitted substantial documentation to establish a family relationship in the United States, long periods of residence, hardship to her ill U.S. citizen spouse, hardship to the elderly patients at her caregiver employment facility and good moral character as a regular church attendee. Additionally, counsel states that the applicant presented evidence to show proof of her constant local residence, her long pending Form I-130 and documentation indicating the disbarment of her previous attorney. Counsel states that the OIC concluded that the only favorable evidence was the applicant's marriage to a U.S. citizen and the character reference letters, and concluded that her immigration history indicated a serious disregard for the laws. Furthermore, counsel states that the applicant appeared for all her immigration court hearings and there is absolutely no evidence of visa misstatement or fraudulent documents. Moreover, counsel states that absent from the decision is any discussion regarding the applicant's many years of loyalty to her ill husband, the very aged patients at her place of employment and the fact that she and her husband calmly awaited notification by CIS for their visa interview. According to counsel, the OIC should have allocated at least some of the blame for the applicant's plight to her previous counsel who has been excluded from further immigration law practice. Counsel states that the decision could at least have mentioned this aged couple's reliance on the efficiency of CIS in ordering their appearance for an I-130 interview. Finally, counsel requests that the ages of the applicant and her U.S. citizen spouse be considered and the fact that their current separation and resulting difficulties will likely shorten their few remaining years.

The proceeding in the present case is for the application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss CIS' backlog in adjudicating petitions for alien relatives. The fact that the applicant's previous attorney was disbarred does not change the fact that the applicant failed to depart the United States after the Ninth Circuit Court of Appeals granted her voluntary departure until July 21, 1996.

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.

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.

The applicant in the present matter married her U.S. citizen spouse on October 28, 1995, over two years after she was placed in deportation proceedings. The applicant's spouse should reasonably have been aware of the applicant's immigration violations, and the possibility of her being removed from the United States 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 tie in the United States, her U.S. citizen spouse, an approved Form I-130, the prospect of general hardship to her spouse, the favorable letters of recommendation and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her authorized period, after she was admitted as non-immigrant, her failure to depart the United States after she was granted voluntary departure, her periods of unauthorized employment 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 she was placed in deportation proceedings and after a voluntary departure order 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 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.