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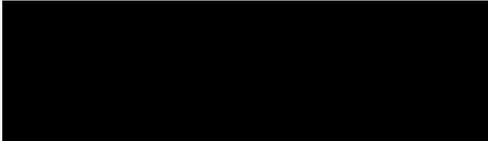
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal 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 Ecuador who, on November 11, 2000 applied for admission into the United States at the Miami International Airport. The applicant presented a passport with a photo-substituted non-immigrant visa. The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(C)(i) for having attempted to procure admission into the United States by fraud, and section 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. The applicant was interviewed by an asylum officer to determine credible fear of persecution. On December 1, 2000, it was determined that the applicant met the credible fear standard and a Notice to Appear (NTA) for a removal hearing before an Immigration Judge was issued on December 4, 2000. On February 14, 2001, the applicant failed to appear for a removal hearing and was subsequently ordered removed in absentia by an Immigration Judge. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was rejected on May 9, 2001. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on May 14, 2001. On May 22, 2001, the applicant filed a Motion to Reopen (MTR) with the BIA. The electronic database of Citizenship and Immigration Services (CIS) indicates that a final removal order was issued on November 21, 2001. 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 child.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Acting Director's Decision* dated July 29, 2004.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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 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 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, a copy of the NTA, an affidavit from the applicant, a copy of the applicant's child's birth certificate, a copy of a notice of approval of a Form I-130, and proof that the applicant's spouse owns real estate in the United States and is gainfully employed. In his brief counsel states that the applicant refutes the Director's finding that the unfavorable factors outweigh the favorable ones. In addition, counsel states that after the applicant was found to meet the standard of credible fear, she never received an NTA with a scheduled date for a hearing. Additionally, counsel states that because of the applicant's fear for her life she cannot return to Ecuador and she cannot take her U.S. citizen child with her to Ecuador subjecting her to eminent [sic] danger and depriving her of the rights and safety she is afforded as a U.S. citizen. In her affidavit, the applicant states that she never received an NTA for a scheduled removal hearing. In addition, she states that she never worked in the United States as stated in the decision. Furthermore, the applicant states that she did not leave the United States because she knew that if she returned to Ecuador her life would be in danger and because a few days after the February 14, 2001 decision she gave birth to her child. Finally, the applicant states that she cannot imagine her life without her child and that if she is forced to return to Ecuador not only would her life be endangered but her family would be broken apart.

The record of proceedings does not include a copy of an NTA scheduling the applicant for a removal hearing on February 14, 2001. The record indicates that the applicant received an NTA on December 4, 2001, in which it is stated that the date to appear before an Immigration Judge is: "TO BE DETERMINED." A notice for a master hearing on January 9, 2001, was issued on December 13, 2000. Based on the above facts, the AAO agrees with counsel that it appears that the applicant never received a scheduled notice to appear for a removal hearing. The AAO's finding does not change the fact that the applicant was ordered removed from the United States on February 14, 2001. The AAO does not have jurisdiction over orders of removal made in immigration courts. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act and the proceeding in the present case is limited to the issue of whether or not the applicant meets the requirements for a waiver of inadmissibility.

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 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 child; the approval of a petition for alien relative; the lack of any criminal record; and the prospect of general hardship to her family.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to enter the United States by fraud, 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 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.