

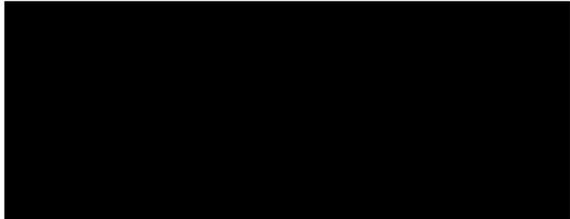
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

HL4



FILE:

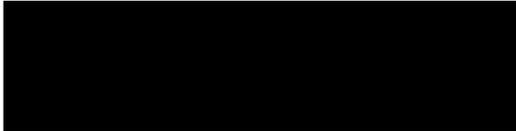


Office: VERMONT SERVICE CENTER

Date: OCT 23 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 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 Colombia who on August 26, 1990, was admitted into the United States as a non-immigrant visitor for pleasure with an authorized period of stay until February 25, 1991. The applicant overstayed her authorized period of stay. On August 25, 1998, she withdrew an Application to Register Permanent Residence or Adjust Status (Form I-485) she had filed based on her marriage to a U.S. citizen. On September 17, 1998, a Notice to Appear (NTA) for a removal hearing before an immigration judge was issued. On November 19, 1998, the applicant failed to appear for the removal hearing and she was subsequently ordered removed *in absentia* by an immigration judge pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act (the Act), for having remained in the United States longer than permitted. On December 7, 1998, a Warrant of Deportation (Form I-205) was issued, and a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that she appear at the Newark, New Jersey district office in order to be removed from the United States. The applicant failed to surrender for removal or depart from the United States. On August 7, 2003, Immigration and Customs Enforcement (ICE) agents apprehended the applicant, and on August 14, 2003, she was removed from the United States. The applicant is the beneficiary of an approved Petition 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 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 United States and reside with her U.S. citizen spouse and child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones, and denied the Form I-212 accordingly. See *Director's Decision* dated June 21, 2005.

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 in others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (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, letters from doctors regarding the applicant's son's medical conditions, a letter from the applicant's psychologist and a letter from the church where the applicant's son's is a parishioner. In his brief, counsel does not dispute the fact that the applicant overstayed her authorized period of stay but states that she did so because she married an individual who died three days before she gave birth to a child. In addition, counsel states that the applicant's son suffers from asthma and Attention Deficit Disorder (ADD) for which he receives medication. Counsel further states that the applicant's child developed depression because of his separation from the applicant. Furthermore, counsel submits a letter that states that the applicant has been receiving weekly consultations, and because of her removal from the United States, she suffers from "temporary depressive symptoms as well as anxieties and somatization in all her digestive system." Finally counsel requests that the Form I-212 be granted because the applicant has shown that her U.S. citizen child has suffered extreme hardship, and because if her child relocates to Colombia he will not receive proper medical attention.

The record contains no evidence to indicate that adequate health care and medication for the applicant's son are unavailable in Colombia, and no evidence was provided to show that is unable to function normally while in the care of his step-father. A letter from the pastor of the son's church indicates that he was "informed that Juan Luis suffers bouts of depression due to the absence of his mother and the fear that he, too, will be deported." The letter does not note the source of this information, the source's qualifications to make this diagnosis or the extent that these bouts of depression are affecting the child's life.

Matter of Pilch, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation.

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 AAO will consider the hardship to the applicant's child, but it will be just one of the determining factors.

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 U.S. citizen spouse on May 21, 1999, eight months after removal proceedings were initiated and over six months after a final order of removal was issued. The applicant's spouse should reasonably have been aware at the time of their marriage of 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 U.S. citizen spouse and child, an approved Form I-130, the prospect of general hardship to her family and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after her initial lawful admission, her failure to appear for a removal hearing, her employment without authorization 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 a U.S. citizen, gained after she was placed in removal proceedings and after a final order of removal 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 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.