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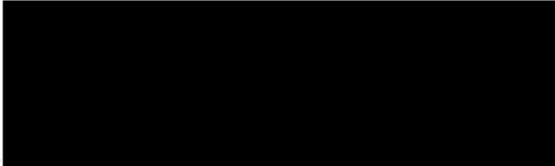
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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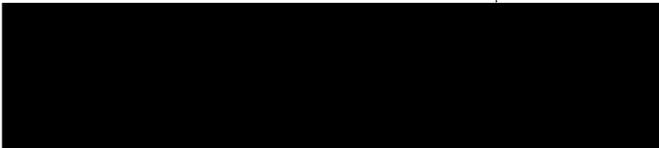


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 27 2007

IN RE: [REDACTED]

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 Acting Director, Vermont Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who, on December 30, 1979, was granted voluntary return until January 1, 1980, after she overstayed her nonimmigrant status. The applicant failed to comply with the voluntary return and was placed into immigration proceedings on July 30, 1980. On July 29, 1980, the applicant pled guilty to and was convicted of grand theft over \$500. The applicant's sentence was suspended in favor of 12 months of probation. On March 10, 1981, the immigration judge granted the applicant voluntary departure until May 10, 1981. The district acting director extended the applicant's voluntary departure until February 28, 1982. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On November 9, 1982, a warrant for the applicant's removal was issued. On November 16, 1982, the applicant filed an Application for Stay of Removal, which was denied on November 29, 1982. The applicant failed to comply with the order of removal. On June 14, 1983, the applicant was convicted of theft and was sentenced to 36 months of probation. On April 25, 1996, the applicant married her spouse, [REDACTED]. On November 7, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed on her behalf by Mr. [REDACTED]. On December 4, 1998, the Form I-130 was approved. On September 22, 1999, the applicant's Form I-485 was denied. On February 3, 2004, the applicant filed the Form I-212. On July 17, 2003, the applicant was removed from the United States and returned to El Salvador, where she has since resided. The applicant is inadmissible under section 212(a)(9)(A)(ii) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien applying for admission within ten years of having been removed from the United States. 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 reside in the United States with her U.S. citizen spouse and U.S. citizen daughter.

The acting director determined that the applicant is inadmissible to the United States pursuant to section 212(a)(8)(A) of the Act, 8 U.S.C. § 1182(a)(8)(A), as an alien ineligible for citizenship, for which there is no waiver available. The acting director determined that the applicant's application for permission to reapply for admission should be denied, in the exercise of discretion, because she is mandatorily inadmissible to the United States. The acting director denied the Form I-212 accordingly. *See Acting Director's Decision* dated October 17, 2005.

On appeal, counsel contends that the applicant should not be barred under section 212(a)(8)(A) of the Act and she should be given the chance to return to the United States. *See Memorandum of Law*, dated October 28, 2005. In support of his contentions, counsel submits the referenced memorandum of law and copies materials published by the American Immigration Lawyers Association (AILA). The entire record was reviewed in rendering a decision in this case.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States

and who again seeks admission within five years of the date of such removal (or within 20 years 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.

- (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 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 on a 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 of Homeland Security] has consented to the alien's reapplying for admission.

The applicant failed to comply with an order of voluntary departure that became a final order of removal. The applicant has also failed to comply with the order of removal until July 17, 2003. The AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

The record reflects that Mr. [REDACTED] is a U.S. citizen by birth. The applicant and Ms. [REDACTED] have a 16-year old daughter who is a U.S. citizen by birth. The applicant and Mr. [REDACTED] are in their 40's.

On appeal, counsel asserts that the applicant is not inadmissible pursuant to section 212(a)(8)(A) of the Act because her theft convictions occurred prior to November 29, 1990, the date of enactment of the aggravated felony definitions in the Act. *See Immigration Act of 1990*, Pub. L. No. 101-649, 104 Stat. 4978 (IMMACT90). The AAO finds, however, that the applicant cannot be found inadmissible pursuant to section 212(a)(8)(A) of the Act because this section of the Act only applies to persons who are barred from naturalization as a result of their military service evasion and does not include persons who were convicted of aggravated felonies. *See Matter of Kanga*, 22 I&N Dec. 1206 (BIA 2000). As the applicant is female and is not subject to military service requirements for naturalization she is not inadmissible pursuant to section 212(a)(8)(A) of the Act.

On appeal, counsel asserts that the applicant is not permanently barred from entering the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude, because she has never been admitted to the United States as a lawful permanent resident and is therefore eligible for a waiver pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(a)(h). The AAO notes that the acting director did not find that the applicant was permanently barred from admission pursuant to section 212(a)(2)(A)(i)(I) of the Act and merely noted that the applicant is inadmissible under that section of the Act, which is a factor to be considered in exercising discretion.

On appeal, counsel asserts that the applicant is a reformed person and would be a credit to the United States. Counsel asserts that the applicant should be given the chance to live in the United States with her U.S. citizen spouse and child. Counsel asserts that it has been more than two years since the applicant was removed from the United States.

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 7th Circuit Court of Appeals 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-Munoz 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 AAO finds these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's U.S. citizen spouse, the applicant's U.S. citizen daughter and an approved immigrant visa petition.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her nonimmigrant status; her failure to comply with a grant of voluntary return; her convictions for grand theft and theft and her inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act; her failure to comply with an order of voluntary departure; her failure to comply with a removal order; her extended unlawful residence in the United States; her unauthorized employment; and her inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, between September 22, 1999, the date on which her Form I-485 was denied, and July 17, 2003, the date on which she departed the United States, and seeking readmission within ten years of her last departure.

The applicant in the instant case has multiple immigration violations and criminal convictions. While the AAO notes the applicant's marriage, birth of her daughter and the approval of the immigrant visa petition benefiting the applicant, all of these events occurred after the applicant was placed into proceedings and ordered removed. Accordingly, these factors are "after-acquired equities" and the AAO will accord them diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish 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.