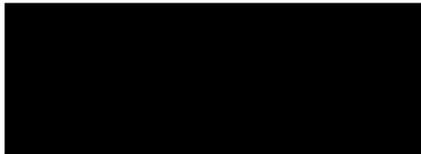


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FILE: 

Office: VERMONT SERVICE CENTER

Date: **MAR 12 2007**

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 Brazil who entered the United States without a lawful admission or parole on January 14, 1989. On January 16, 1989, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on January 23, 1989, an Order to Show Cause (OSC), for a hearing before an immigration judge was served on her. On January 24, 1989, an immigration judge ordered the applicant deported from the United States pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. Consequently, on January 30, 1989, the applicant was deported to Brazil. The record reflects that the applicant reentered the United States, on an unknown date, but shortly after her deportation without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). The applicant is the derivative beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140) filed on behalf of her 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 Lawful Permanent Resident (LPR) spouse and U.S. citizen children.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. In addition, the Acting Director determined that section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), may apply in this matter and the applicant will not be eligible for any relief or benefit from the Act. The Acting director then 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 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 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, 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 from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief and a psychological evaluation regarding the applicant's spouse and children. In his brief, counsel states that the applicant has an LPR spouse and two U.S. citizen children who would lose everything if the applicant is removed from the United States, unlike the applicant in *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973) who had no family members in this country. In addition, counsel states that the Service's contention that the applicant's marriage while in proceedings is a negative factor is without merit because she remains married and has two children. Additionally, counsel states that the applicant was "turned away" approximately 30 days after being detained in Los Angeles and she did not know whether she had been deported or merely returned, nor could she be held liable with such knowledge as her understanding of what happened was limited by her confinement and the stress of the situation. Counsel does not dispute the fact that the applicant reentered the United States 30 days later, but states that she did so because she was looking for a better life and did not realize that her actions violated the immigration laws of the United States. Counsel further states that the fact that the applicant remained in the United States illegally does not show a disregard for the immigration laws because this can be mitigated by the fact that her family was in the United States. Furthermore, counsel states that the fact that the applicant's spouse works very long hours suggests that the applicant is needed to care for their children. Counsel further states that the fact that the applicant wants what is good for her family should be sufficient to warrant a favorable exercise of discretion. Moreover, counsel states that except for the applicant's illegal entry there are no allegations of fraud or any other violations of law. Finally, counsel states that the applicant is not subject to section 241(a)(5) of the Act since she was not given written notice as required pursuant to 8 C.F.R. 241.8(b).

The court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 citizen spouse on February 19, 1997, approximately seven years after she was placed in deportation proceedings and after she had reentered the United States illegally. 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.

Counsel's assertion that the applicant was not aware that she was deported is not convincing. The record of proceeding reflects that the applicant was served with an OSC, she was present at her deportation proceedings and she was given a copy of the immigration judge's deportation order. In addition, on January 30, 1989, the applicant withdrew her right to file an appeal and requested in writing that the Immigration and Naturalization Service deport her to Brazil as soon as possible.

In addition, counsel's statement that the applicant's illegal stay in the United States does not show a disregard for the immigration laws is not persuasive. The Commissioner stated in *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978), 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 fact that the applicant's spouse works long hours does not prevent him from caring for and supporting their children. The record reflects that the applicant's spouse earns a salary well above the poverty level for a family of four and no evidence has been provided to show that if the applicant is removed from the United States her spouse would not be able to afford day care services for their children.

The AAO notes, that the applicant was never given a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required pursuant to 8 C.F.R. 241.8(b). Consequently, the applicant's prior deportation order was not reinstated at the time she filed the Form I-212, and, therefore, the AAO will weigh the discretionary factors in this case.

The psychological evaluation submitted by counsel states that the applicant's spouse has developed an Adjustment Disorder with Mixed Anxiety and Depressed Mood, as a direct result of his fear that the applicant might be removed from the United States. In addition, the report states that if the applicant is removed from the United States her children would develop some, or all, of the symptoms of separation anxiety disorder. The report further states that the applicant's older child would develop a separation anxiety disorder and depressive symptomatology that would have a major impact on her academic and social functioning. In addition, the psychologist states that the applicant's younger child suffers from asthma and allergies and because of traffic congestion in Brazil and the fact that there are fewer hospitals which are not as well staffed as those in New Jersey, his life may be at risk if he relocates to Brazil with the applicant. Finally, the evaluation states that it would be in the best interest of the applicant's family if she were permitted to remain in the United States with them. Based on the foregoing counsel requests that the Form I-212 be granted.

The psychological report was based on one interview with the applicant's spouse and children and there is no indication of an ongoing relationship with the psychologist. The statements contained in the report are speculative as to the future effects that separation or relocation of the family may cause. The AAO therefore gives the evaluation little weight.

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 AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her LPR spouse and her U.S. citizen children, the fact that she is a derivative beneficiary of an approved Form I-140, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, her illegal reentry subsequent to her deportation, her periods of unauthorized employment, and her lengthy presence in the United States without a lawful admission or parole. The applicant has shown a complete disregard for the immigration laws of the United States.

The applicant's actions in this matter cannot be condoned. Her equity, marriage to an LPR, gained after she was placed in deportation proceedings, and after her illegal reentry subsequent to her deportation, 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.