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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAR 19 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 Director, California 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 Guatemala who entered the United States without a lawful admission or parole on June 4, 1985. On the same date the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS) apprehended the applicant and she was placed in exclusion proceedings. On July 7, 1986, the applicant failed to appear for the exclusion hearing and she was subsequently ordered excluded and deported, *in absentia*, by an immigration judge pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection. The applicant filed a Motion to Reopen (MTR) exclusion proceedings which was denied by an immigration judge on August 23, 2001. The record reflects that a final removal order was issued on February 20, 2003. The applicant is the beneficiary of an approved 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 remain in the United States and reside with her U.S. citizen spouse, and children, and her Lawful Permanent Resident (LPR) children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Director's Decision* dated September 17, 2004.

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 in which he states that the Director abused his discretion when he failed to consider all the discretionary factors and relied on case law that is inapplicable. Counsel notes that in his decision the Director stated that because the positive factors in this case were acquired after the removal order little weight should be given to them, and cited four precedent decisions: *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) and *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992). Counsel states that the Director relied on precedent decisions from the Fifth and Seventh Circuits Courts, which should not be binding in the instant case because the applicant resides in the Ninth Circuit. In addition, counsel states that in one of the case laws cited by the Director, the applicant had exhibited flagrant disregard for the immigration laws of the United States by illegally entering several times, and in another case the applicant misrepresented or committed fraud on her immigration visa application. Counsel asserts that the applicant in the present case entered the United States on one occasion, did not use false documents and never misrepresented any facts on her immigration applications. Additionally, counsel states that two of the cases cited by the Director examined the extreme hardship requirement in suspension of deportation cases and section 212(c) of the Act cases and not permission to reapply for admission, as is the present case. Furthermore, counsel states that the applicant in the present case has U.S. citizen and LPR children, a U.S. citizen spouse, a lengthy history of volunteering in civic and community affairs, has consistently participated in her children's schools and, therefore, has demonstrated strong roots in the United States. Finally, counsel states that the uprooting of the applicant would go far beyond the extreme hardship requirement.

The AAO notes that the Director cited the above preceding decisions in order to demonstrate that less weight may be give to equities acquired after an order of deportation was issued and not to compare the applicant's actions with the applicants in the cases cited. The AAO further notes that although the applicant resides within the jurisdiction of the Ninth Circuit Court of Appeals, the published decisions of the other Circuits are considered persuasive evidence regarding issues not directly decided by the Ninth Circuit. Therefore, the AAO finds that the Director properly used case law from other Circuits.

The applicant in the present matter married her U.S. citizen spouse on June 10, 1993, approximately eight years after she was placed in exclusion proceedings and seven years after a deportation order was issued. 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 his spouse will not be accorded great weight.

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 spouse and children, 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 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 children, and her LPR children, 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 initial illegal entry, her failure to appear for exclusion proceedings, her failure to depart the United States after her MTR was denied and after a final removal order was issued, 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 exclusion proceedings, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh 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 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.