

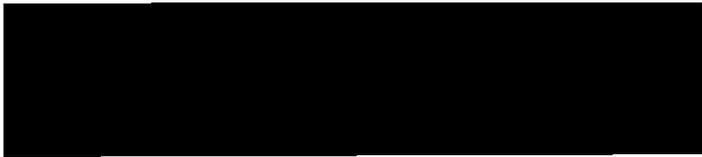


U.S. Citizenship
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FILE: Office: CALIFORNIA SERVICE CENTER Date: AUG 13 2008

IN RE: 

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: Self-represented

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 Director, California 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 sustained and the application approved.

The applicant is a native and citizen of Peru who, on July 12, 2003, was admitted to the United States as a nonimmigrant visitor. On December 24, 2003, the applicant filed an Application to Extend/Change Nonimmigrant Status (Form I-539). The applicant remained in the United States past her authorized stay, which expired on January 10, 2004. On June 8, 2004, the applicant's Form I-539 was denied. The applicant departed the United States on July 10, 2004. On January 25, 2005, the applicant attempted to enter the United States at Miami International Airport by presenting the nonimmigrant visa she had previously used to enter the United States. The applicant was then referred to secondary inspection where it was discovered that the applicant had remained in the United States past her authorized stay and had engaged in unauthorized employment during her previous stay in the United States. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant without valid entry documents. On January 26, 2005, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). On September 26, 2005, [REDACTED], a U.S. citizen, filed a Petition for Alien Fiancée (Form I-129F) on behalf of the applicant, which was approved on March 27, 2006. On October 13, 2006, the applicant filed the Form I-212. In February, 2007, the applicant married [REDACTED]. On July 17, 2007, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on February 12, 2008. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 return to the United States and reside with her U.S. citizen fiancé and his two U.S. citizen children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated March 26, 2007.

On appeal, [REDACTED] contends that the applicant's application should be approved so that they can be together. *See Personal Statement of [REDACTED]* dated April 25, 2007. In support of his contentions, [REDACTED] submitted the referenced personal statement, original photographs of the family and copies of documentation previously provided. 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] do not appear to have any children together. [REDACTED] has a 14-year old son and a ten-year old son from a prior relationship who are both U.S. citizens by birth. The applicant and [REDACTED] are in their 30's.

On appeal, [REDACTED] states that the applicant never intended to violate U.S. immigration laws and she left the United States immediately after her Form I-539 was denied. He states that he came to know the applicant in 2003. He states that the San Francisco Archdiocese office with whom she consulted on her Form I-539 filing led her to believe that she was authorized to stay in the United States while the application was pending. However, the AAO notes that the applicant is not subject to section 212(a)(9)(A)(i) of the Act because she remained in the United States beyond her authorized stay but because she was removed from the United States under section 235(b)(1) of the Act. Having been expeditiously removed, she is required to remain outside the United States for five years from the date of her departure, unless she receives permission to reapply for admission through the filing of the Form I-212.¹

To determine whether the applicant's Form may be approved, the AAO now turns to a consideration of positive and adverse factors in the present case.

On appeal, [REDACTED] states that if the applicant had remained in the United States she would have been eligible for adjustment of status in the United States. He states that the applicant attempted to return to the United States in 2005 because they missed each other very much and wanted to discuss their future. He states that he and the applicant only learned that she was ineligible to enter the United States when they attended the interview to obtain her fiancée visa on September 29, 2006. He states that the Form I-212 should be granted

¹ The AAO finds that the applicant's filing of the Form I-539 did not prevent the applicant from accumulating unlawful presence in the United States from January 10, 2004, until July 10, 2004, because the applicant engaged in employment in the United States without authorization. See section 212(a)(9)(B)(iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iv). The applicant accrued unlawful presence for a period of 182 days and was inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for being unlawfully present in the United States for more than 180 days but less than one year if she was seeking admission within three years of her last departure. However, it has been more than three years since the applicant's last departure from the United States and she is no longer inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act and does not require a waiver pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

for the sake of his two young sons who are very close to the applicant. He states that his children have long talked of the evening that they played checkers with the applicant. He states that the applicant was instrumental in his birthday plans for his youngest son's sixth birthday. He states that he believes that his sons came to accept the applicant and he was glad that they were able to see him and the applicant in love as he believes it was part of the healing process after his bitter divorce from their mother. He states that both of his sons learned to trust and come to love the applicant as best that they could during the limited time they spent together. He states that there is no choice in where his family will live when it comes to a choice between Peru and the United States. He states that he cannot take his sons to Peru to live because their mother will not be willing to give up her partial custody. He states that he could not go to Peru alone to live because it would be unconscionable to give up custody of his children. He states that he is a single father and the children do not have a proper mother role model. He states that he and his sons have been living in a home without a vital part of a normal domestic setting. He states that raising his children is the most important thing he will ever do. He states that Peru is far from the United States and the distance of travel would make travel by him or other family members financially unaffordable and rare. He states that he has no connections to Peru besides the applicant. He states that he has no emotional, familial, cultural or religious ties to Peru. He states that the lack of close family, the cultural differences, and the geographic remoteness of the country from the United States would make living there a terrible ordeal for him. He states that medical care in Peru is substandard, and there is a shortage of doctors and inadequate medical facilities. He states that his children would not receive the care and attention they need. He states that Peruvians live in fear for their lives because of the violence and crimes perpetrated by rampant and widespread gang activity. He states that it would be virtually impossible for him to find similar employment to that which he has in the United States because he does not speak Spanish. He states that, while he is educated and has specialized training, his skills will not lead to adequate employment in Peru's underdeveloped economy. He states that a denial of the applicant's Form I-212 will result in further and continued separation from his wife.

Recommendation letters from family members and the applicant's parish state that the applicant has tremendous personal drive, self discipline, excellent organizational skills and a strong work ethic. They state that she recently graduated with a degree in architecture and is prepared to make a professional contribution to society. They state that the applicant maintains a fit body, mind and spirit and has wonderful social skills, which account for the number and quality of her friends. They state that the applicant has respect, compassion and patience for all those whom she meets. They state that the applicant brings much happiness and peace to [REDACTED]'s family, her family and people that she meets. They state that the applicant needs to join her husband so that they can live as man and wife. They state that the applicant has the qualities of a good stepmother. They state that the applicant's stepsons are quickly learning Spanish in order to communicate better with the applicant and the applicant is also improving her English. They state that the applicant volunteers every week and is an honest person with good behavior.

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.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, her two U.S. citizen stepsons, the general hardship to her family, the letters of recommendation, the absence of a criminal record and an approved immigrant visa petition for alien relative. The AAO notes that the applicant's marriage, establishment of her legal relationship as stepmother to her two stepsons and the filing of the immigrant visa petition benefiting her occurred after the applicant was ordered removed, and are "after-acquired equities." The AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her nonimmigrant status; her unlawful presence and employment in the United States; and her attempt to enter the United States as an immigrant without valid documents.

The applicant's overstay of her nonimmigrant status, her unlawful presence and employment in the United States, and her attempt to enter the United States as an immigrant without valid documents, cannot be condoned. However, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application approved.