

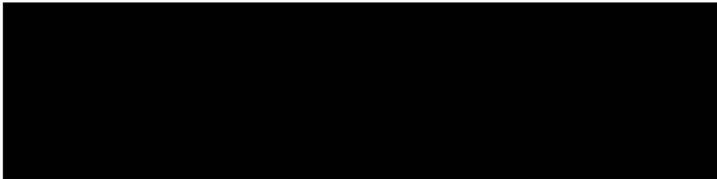
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Date: MAR 20 2008

IN RE:

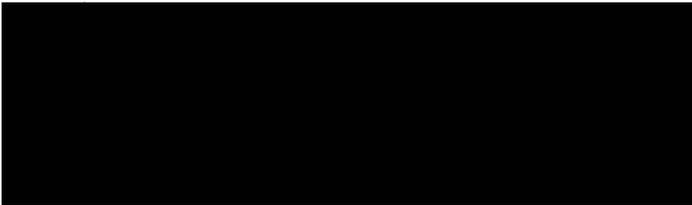
Applicant:



APPLICATION:

Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under Section 212(a)(9)(A) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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 after removal was denied by the Director, Vermont Service Center, and 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 married [REDACTED], a Peruvian citizen, on December 9, 1983, in Peru. On October 2, 1994, the applicant entered the United States on a B-2 nonimmigrant visa, with authorization to remain in the United States until April 1, 1995. On January 22, 1995, the applicant's son, [REDACTED] was born in Virginia. On February 6, 1996, an Order to Show Cause (OSC) was issued for the applicant. The applicant's husband filed a Request for Asylum (Form I-589). On September 30, 1996, an immigration judge denied the Form I-589, but granted the applicant's family voluntary departure. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On July 28, 1999, the BIA affirmed the immigration judge's decision. The applicant failed to depart the United States as required, and on August 14, 2000, a Warrant of Removal/Deportation (Form I-205) was issued against the applicant. On October 19, 2001, [REDACTED] filed an Immigrant Petition for Alien Worker (Form I-140) on behalf of the applicant. On February 22, 2002, the applicant's Form I-140 was approved. On July 19, 2004, [REDACTED], filed a Form I-140 on behalf of the applicant. On September 27, 2005, the applicant's second Form I-140 was approved. The applicant filed a motion to reopen the BIA's decision, which the BIA denied on August 23, 2007. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). She now 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 with her Peruvian citizen husband, two Peruvian citizen children, and one United States citizen child.

The Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for unlawful presence in the United States, and denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Director's Decision*, dated July 28, 2006. The AAO finds that the applicant is also inadmissible under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered removed from the United States.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

- (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
...
 - (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
- ...
 - (v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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, the applicant, through counsel, contends that the Director "abused [his] discretion while weighing the positive factors of the applicant against the negative factors as evidenced by the record." *Form I-290B*, filed August 28, 2006. The AAO finds that the Director erred in determining that the applicant was married to a United States citizen while in proceedings. The AAO notes that the applicant married a Peruvian citizen

on December 9, 1983, in Peru, before she even entered the United States, and there is no evidence in the record that the applicant's husband is a United States citizen. Counsel claims that the applicant "is a person of good moral character who has paid her federal taxes (copies of tax returns for 10 years), who has never been arrested or detained by law enforcement, who is respected by her peers (reference letters) and supported by her numerous family members residing legally in the US...In addition, applicant's services are essential for the well-being of her child (attested in her affidavit) who has been assessed to suffer with a developmental delay and to the care of whom she currently devotes her entire effort." *Appeal Brief*, filed August 28, 2006. The applicant states her son, [REDACTED] "has been struggling at school and was assessed by a committee of the Virginia School System to have a developmental delay. He requires extended assistance and constant monitoring. [She has] gladly accepted the challenges offered by his condition and [has] dedicated [her] time to his improvement. [She] read[s] top him and help[s] him with his homework, [she] also take[s] him to community activities and sporting events, where he meets other children. [She is] told by the doctors that all this activities will help him overcome his deficiencies." *Affidavit from the applicant*, dated October 26, 2005. The AAO notes that the applicant's son, [REDACTED] participates in the Individualized Education Program for a specific learning disability, which he was diagnosed with in May 2004. *See Loudoun County Public Schools Individualized Education Program documents*, dated October 19, 2005. The applicant states that if she has to return to Peru, she and "[her] family...would be emotionally and economically devastated. The immigrant petition filed on [her] behalf by [REDACTED] had just been approved and [she] look[s] forward to beginning employment with them as a cook. [Her] income will be essential to the maintenance of [her] entire family but mostly to the well-being of [her] son [REDACTED]. [She has] reasons to believe that if [she is] required to depart from the US, [REDACTED] will suffer extreme emotional hardship. [They] have a very close relationship and because of [her] involvement in his life he has grown extremely attached to [her]." *Affidavit from the applicant, supra*. The AAO notes that 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 son, but it will be just one of the determining factors.

The record of proceedings reveals that on September 30, 1996, an immigration judge granted the applicant voluntary departure. On July 28, 1999, the BIA affirmed the immigration judge's decision and ordered the applicant to depart the United States within 30 days. The applicant failed to depart the United States as ordered, and a Warrant of Removal/Deportation was issued for the applicant on August 14, 2000. Based on the applicant's previous order of deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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 *Tim*, 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.*

The favorable factors in this matter are the applicant's family ties to a citizen of the United States, her son, general hardship he may experience, no criminal record, a history of paying taxes, letters of recommendation, and the approval of a petition for alien worker.

The AAO finds that the unfavorable factors in this case include the applicant's failure to abide by an order of voluntary departure and periods of unauthorized presence.

While the applicant's actions cannot be condoned, the AAO finds that given all 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. The AAO notes, however, that she will need to obtain a waiver of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

ORDER: The appeal is sustained and the application approved.