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U.S. Citizenship
and Immigration
Services

114

FILE:

Office: LOS ANGELES, CA

Date: **MAR 17 2009**

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting 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 District Director, Los Angeles, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who on January 5, 1997 attempted to enter the United States at the San Ysidro port of entry presenting a photo-altered Mexican passport and a fraudulent I-551 stamp. The applicant was removed to Mexico on January 9, 1997. In February 1997 she reentered the United States without inspection. 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 remain in the United States and reside with her U.S. citizen spouse and children.

The district director determined that the applicant was inadmissible to the United States under section 212(a)(6)(C)(i) of the Act and that she did not qualify for a waiver of inadmissibility. The district director then found that because the applicant's waiver application was denied, her application for permission to reapply for admission (Form I-212) cannot be approved. The director denied the Form I-212 accordingly. *Director's Decision*, dated September 30, 2008.

On appeal, counsel states that the district director erred in denying the applicant's Form I-212 without affording her the opportunity to appeal her waiver application. In addition, counsel states that the applicant's Form I-212 should be approved because of the hardship her family will face if she is removed and her good moral character. *Form I-290B*, dated October 28, 2005.

The proceedings in the present case are for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission into the United States by fraud. This decision is limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(i) of the Act to be waived.

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 5 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.

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.

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 unfavorable factors in the present case are the applicant's attempt to entry the United States on fraudulent documents, her re-entry into the United States without inspection after being removed from the United States and her residing in the United States in unlawful status.

The favorable factors in the present case include the applicant's U.S. citizen husband and two children; the applicant's role as the primary caretaker to her two children, one with autism and one with asthma; the applicant's lack of a criminal record and, as indicated by the declaration of the applicant's spouse, the support and dedication she shows to her husband and family.

The AAO notes that the record includes an Individualized Education Program (IEP) for the applicant's son showing that her son has autism and is receiving special care. *IEP*, dated March 6, 2008. In a declaration from the applicant's spouse, the applicant's spouse states that after his son was diagnosed with autism, his daughter experienced a severe asthma attack and was hospitalized for three days. *Spouse's Statement*, dated March 25, 2008. He states that they found out that their daughter has an active form of asthma and that the pediatrician directed the applicant in how to care for their daughter, use the special child's inhaler and administer the asthma medication. He states that since 2003, his daughter's asthma has been under control thanks to the dedication and vigilance of the applicant in caring for their daughter. The applicant's spouse asserts that their son is very attached to the applicant and that she acts as his teacher and counselor as well as his loving mother. He states that the applicant works with their son daily on his language skills, does her best to give him guidelines for better behavior, and is the person best equipped to handle their son when he misbehaves. The applicant's spouse asserts that taking the applicant away would devastate their son and exacerbate his symptoms. He states that he will suffer because he has not had to deal with his

son on the same basis as the applicant and he is unfamiliar with how to care for a child with autism. He states that both children have deep emotional ties to their mother because she raised them emotionally and physically and his heart breaks to think about the applicant being removed from the United States. *Id.* The AAO also notes that the record includes a letter from the applicant's daughter's doctor, [REDACTED], which states that the applicant's daughter was diagnosed with asthma and was hospitalized twice in 2003. *Letter from [REDACTED]* dated January 15, 2004. [REDACTED] states that the applicant's daughter continues to have recurrent episodes of wheezing, requiring medical treatment and daily medications. *Id.* Thus, the record indicates that the applicant's son has autism, her daughter has asthma, and that the applicant is their primary caretaker.

The applicant's actions in this matter cannot be condoned, however, the applicant has established by supporting evidence that the favorable factors in her case 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 that 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.