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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



HL4

Date: **DEC 15 2011**

Office: NEW YORK

FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, 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.

The record reflects that the applicant is a native and citizen of Ecuador who entered the United States in December 1990 without inspection, and was ordered deported *in absentia* following a hearing before the immigration judge on December 22, 1993. The applicant continued to reside unlawfully in the United States until 2009. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The applicant is seeking 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 in the United States with her Lawful Permanent Resident husband, her US Citizen son, and her Lawful Permanent Resident mother.

The District Director determined that the applicant was inadmissible under section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), and denied the Form I-212 accordingly. *See District Director's Decision, dated April 19, 2011.*

On appeal, the applicant contends that the District Director failed to acknowledge the hardship suffered by the applicant's US Citizen son, and Lawful Permanent Resident husband and mother, the applicant's strong moral character, the applicant's length of time in the United States, and the fact that the applicant has paid income taxes from 1995 to 2008.

The record contains the following: a brief filed by the applicant's attorney; statements by the applicant, and statements by the applicant's spouse, son, mother, and siblings; evidence of the applicant's apprehension in August 1993, and the immigration judge's order of December 23, 1993 that the applicant be removed; the applicant's Form I-589 Request for Asylum in the United States, signed on November 5, 1993; the applicant's Form I-485 Application to Register Permanent Residence or Adjust Status, dated August 26, 1999, based upon the applicant's derivative status to her husband's approved I-140 Immigrant Petition for Alien Worker; evidence of Form I-130 Immigrant Visa Petitions filed on behalf of the applicant by the applicant's spouse on January 16, 2006, and the applicant's son on September 28, 2008; and copies of federal income tax returns from 1995 to 2008.

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 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that the applicant entered the United States without inspection in December 1990. The applicant was apprehended on August 18, 1993 and issued an Order to Show Cause and Notice of Hearing to appear before an immigration judge on November 4, 1993. On December 22, 1993, the applicant failed to appear at a hearing before the immigration judge and was ordered deported in absentia. The applicant did not report for removal from the United States after being ordered deported in 1993, but remained in the United States until voluntarily returning to Ecuador in 2009. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

The record further reflects that the applicant was married in 1986, prior to entering the United States, and has one child, born in Ecuador in 1986. The record also shows that after the applicant was apprehended in 1993, the applicant filed Form I-485 Application to Register Permanent Residence or Adjust Status on August 26, 1999 as the derivative beneficiary of her husband's approved I-140 Immigrant Petition for Alien Worker. This application was denied because of the applicant's deportation order, and on January 16, 2006 the applicant's lawful permanent resident spouse filed a Form I-130 Immigrant Visa Petition on the applicant's behalf. On September 28, 2008, the applicant's U.S. Citizen son filed a Form I-130 Immigrant Visa Petition on the applicant's behalf. In addition, the record shows that the applicant resided in the United States from 1990 to 2009, and provided evidence that the applicant paid income taxes and filed federal income tax returns for the

years 1995 to 2008. In addition, the applicant's mother and sister are lawful permanent residents of the United States.

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 applicant has equities in her favor. The applicant's lawful permanent resident husband and her US Citizen son reside in the United States, and, according to statements included in the record, her husband and son will suffer hardship if she is denied admission to the United States. In addition, the applicant's lawful permanent resident mother and lawful permanent resident sister are in the United States. The applicant lived in the United States from 1990 to 2009, and during this period of time, the applicant made at least four separate attempts at legalizing her status to remain in the United States with her husband and son. There is no evidence in the record that the applicant was ever involved in any criminal activity. And although the applicant was not authorized employment in the United States, the record shows that the applicant paid income taxes and filed federal income tax returns for the years 1995 to 2008.

The applicant's violations of the immigration laws occurred many years ago. In *Becerra-Jimenez v. INS*, 829 F.2d 996 (10th Cir. 1987), the court noted that the immigration judge did not give weight to deportation hearings in 1958 and 1968 because of long passage of time, but did consider an unlawful entry in 1975.

Although 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, and that 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, the AAO notes that the applicant married her lawful permanent resident spouse in 1986 in Ecuador, prior to entering the United States, and therefore prior to the commencement of the applicant's deportation proceedings.

The AAO finds that the unfavorable factors in this case include the applicant's original unlawful entry into the United States; her unauthorized employment in the United States; and her unlawful presence in the United States.

The totality of the evidence demonstrates that the unfavorable factors in the present matter are outweighed by the favorable factors. The applicant's spouse is a lawful permanent resident and her son is a U.S. Citizen. The record indicates that the applicant's family will suffer hardship if she is denied admission to the United States. There is no evidence that the applicant has any criminal record. The positive factors, including her length of residence and ties in the United States, the payment of taxes and lack of a criminal record, and hardship to her family members in the United States, outweigh the negative factor of her deportation order in 1993 and subsequent unlawful presence in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that the favorable factors in her application outweigh the unfavorable factors, and that the applicant has established that a favorable exercise of the Secretary's discretion under section 212(a)(9)(A)(iii) of the Act, permitting the applicant to reapply for admission to the United States, is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.