



U.S. Department of Justice

Immigration and Naturalization Service

H14

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [Redacted] Office: Lima

Date: AUG 22 2000

IN RE: Applicant: [Redacted]

APPLICATION: Applications for Waiver of Grounds of Inadmissibility under §§ 212(a)(9)(A)(iii) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii), and 8 U.S.C. 1182(a)(9)(B)(v)

IN BEHALF OF APPLICANT: Self-represented

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The Form I-212 and Form I-601 applications were denied by the Officer in Charge, Lima, Peru, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal of the Form I-212 application will be dismissed and the appeal of the Form I-601 application will be rejected.

The applicant is a native and citizen of Peru who was found to be inadmissible to the United States by a consular officer under § 212(a)(9)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having been unlawfully present in the United States for an aggregate period of one year or more. The applicant is the beneficiary of an approved petition for alien relative as the spouse of a U.S. citizen whom she married in Peru in June 1999. The applicant seeks a waiver of the permanent bar under §§ 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(i) and 1182(a)(9)(B)(v), to rejoin her spouse in the United States.

The applicant initially was admitted to the United States as a nonimmigrant visitor in 1992 and remained longer than authorized. The applicant applied for political asylum and entered college. On April 11, 1995, an immigration judge denied her application for asylum and granted her until June 15, 1995 to depart voluntarily in lieu of deportation. The applicant failed to depart by the date specified and an appeal of that decision was dismissed in February 1996. She received her first notice of deportation on March 26, 1996 to surrender for deportation on May 15, 1996. She failed to surrender. The applicant was finally arrested on December 11, 1998 and she was removed on December 16, 1998. Therefore, the applicant is also inadmissible under § 212(a)(9)(A)(ii) of the Act, 8 U.S.C. 1182(a)(9)(A)(ii).

The officer in charge denied both applications as a matter of discretion after concluding that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative.

On appeal, the applicant states that the Service failed to recognize the hardship that her husband will suffer if she is not allowed to return to the United States. The applicant husband states that separation from his wife will ruin his chance to have a normal marriage, from having children, and will have a negative impact on his business. The applicant's spouse states that the separation is causing a financial hardship and he cannot move to or live in Peru because he does not know the language and could not find employment. The applicant's spouse also discusses his wife's gall bladder problems which have been discounted by the medical examination conducted in Peru which revealed that his wife has benign polyps that can be removed surgically and that Peru has some outstanding physicians in this field.

Section 212(a)(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(ii) OTHER ALIENS.-Any alien not described in clause (i) who-

(I) has been ordered removed under § 240 of the Act 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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) ALIENS UNLAWFULLY PRESENT.-

(i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

(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.

(iii) EXCEPTIONS.-

(I) MINORS.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(v) WAIVER.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Prior to 1981, an alien who was arrested and deported from the United States was perpetually barred. In 1981 Congress amended former § 212(a)(17) of the Act, 8 U.S.C. 1182(a)(17), eliminated the perpetual debarment and substituted a waiting period. The Service argued that most precedent case law relating to permission to reapply for admission was effectively negated by the new statute in 1981, and as a consequence, granting of these applications required an applicant to meet a higher standard of eligibility since the bar is no longer insurmountable.

A review of the 1996 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, (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 reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact

of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Matter of Lee, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

The favorable factors in this matter are the applicant's family tie, the absence of a criminal record, the approved petition for alien relative, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant being found deportable, her failure to depart voluntarily, her failure to surrender for removal on May 15, 1996, her employment without Service authorization, and her lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, that he could only relate a positive factor of residence in the United States 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 has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish she warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal of the Form I-212 application will be dismissed and the appeal of the Form I-601 application will be rejected.

ORDER: The appeal of the Form I-212 application is dismissed and the appeal of the Form I-601 application is rejected.