

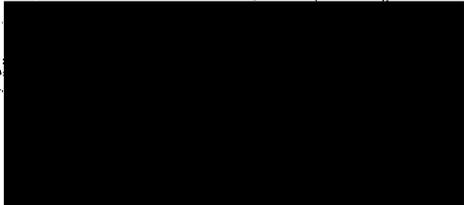


U.S. Department of Justice

Immigration and Naturalization Service

H 24

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



FILE: [Redacted]

Office: San Francisco

Date:

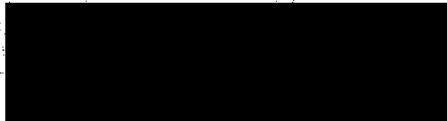
DEC 14 2000

IN RE: Applicant: [Redacted]

APPLICATION:

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

IN BEHALF OF APPLICANT:



Public Copy

INSTRUCTIONS:

prevent clearly understood invasion of personal privacy

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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Francisco, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was initially admitted to the United States as a nonimmigrant visitor in 1989. The applicant remained to reside with her immediate family. After making several other entries as a nonimmigrant, she was detained for a hearing on August 14, 1993. On January 6, 1995, she was found to be inadmissible by an immigration judge and she was excluded and deported on January 10, 1995. The applicant unlawfully reentered the United States in January 1995 by saying "yes" to the immigration inspector's question, "Are you a United States citizen?" and without permission to reapply for admission in violation of § 276 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1326 (a felony). Therefore she is inadmissible under § 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii).

The applicant is also inadmissible under § 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or misrepresentation. Since the applicant committed the fraudulent act prior to September 30, 1996, she is not inadmissible under § 212(a)(6)(C)(ii) of the Act, 8 U.S.C. 1182(a)(6)(C)(ii), based on her false claim to U.S. citizenship.

On February 4, 2000, the Associate Commissioner rejected a Form I-601 waiver application filed by the applicant under § 212(i) of the Act, 8 U.S.C. 1182(i), seeking to waive her inadmissibility under § 212(a)(6)(C)(i) of the Act, because the record failed to show that she had been granted permission to reapply for admission. 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 on Form I-601.

The applicant is the beneficiary of an approved petition for alien relative as the daughter of a U.S. citizen. The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to remain with her immediate family who are either U.S. citizens or lawful permanent residents.

The district director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, counsel states that the applicant was permitted to withdraw her application for admission and to depart voluntarily, thus, she was never excluded and deported nor does she require permission to reapply for admission.

On January 6, 1995, the immigration judge found the applicant excludable from the United States. The judge granted the applicant's request to withdraw her application for admission

provided she departs on or before the date set by the district director. If she fails to depart before such date, the exclusion order shall become immediately effective. The record fails to contain any indication of a departure date set by the district director or the immigration judge. The record does contain a record of exclusion and deportation reflecting that the applicant departed on January 10, 1995 and a warning that, if she desired to reenter the United States within one year from the date of deportation, she must request permission to reapply for admission. According to the record, it appears that the immigration judge's order had become effective and the applicant was excluded and deported on January 10, 1995.

On appeal, counsel states that the applicant's father and sister are U.S. citizens, her mother and three brothers are lawful permanent residents, she has resided in the United States since 1989, she has only elderly relatives living in Mexico, she is furthering her education at Foothill College, she has not resided in Mexico since she was 15 years old and she violated the immigration law solely for the purpose of being united with her family.

The record reflects that the applicant had been living in the United States since she, her mother and three brothers came to the United States in 1989. The applicant stated under oath that she attended high school in Riverside, California for three years and graduated. The applicant indicated that she listed her citizenship as U.S. for school purposes. The applicant stated under oath on October 14, 1993 that she had gone to Mexico to visit her family (her grandmothers) in Mexico and was returning home to the United States and planned to remain indefinitely.

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 contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former §§ 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former § 236 of the Act, 8 U.S.C. 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

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).

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have unlawfully entered the United States and/or remained in the United States without authorization. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

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.

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 1 or 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 ties, the absence of a criminal record, the approved visa petition, and the prospect of general and emotional hardship to the applicant's parents and family.

The unfavorable factors in this matter include the applicant's false claim to U.S. citizenship, her being ordered excluded from the United States, her felonious reentry without permission, and her lengthy presence in the United States beyond her authorized period of admission. 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.

Although the applicant's actions in this matter cannot be condoned, her initial admission at the age of 15 years was for the purpose of accompanying her parents, she made a false claim to U.S. citizenship at the age of 19 years for the same purpose as an adult and must account for this action. The applicant gained no after-acquired equities with her actions and following Matter of Acosta, her family ties are an important consideration in this matter. Further, the record does cast some doubt about whether she departed voluntarily before or after a date set by the immigration judge or the district director. The applicant has now 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 now established she warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The district director's decision is withdrawn and the application is approved.