

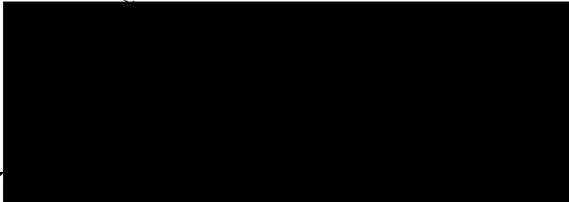


U.S. Department of Justice

Immigration and Naturalization Service

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

H4



FILE: [Redacted] Office: Oklahoma City

Date: NOV 27 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
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Officer in Charge, Oklahoma City, Oklahoma, 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 present in the United States without a lawful admission or parole in June 1982 at the age of 10 years accompanying her parents and grandmother. The applicant became the beneficiary of an approved preference visa petition with a priority date of February 22, 1984. On June 6, 1989, an Order to Show Cause was issued in behalf of the applicant and her family. On December 13, 1989, the applicant and her family were ordered deported in absentia. They self-deported on January 23, 1990 when the applicant was 17 years and 6 months old. 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 was present in the United States again without a lawful admission or parole shortly thereafter on January 30, 1990 and still under the age of 18 years 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). When the family's priority date became current, they were issued an appointment letter by the American Consulate to appear on December 8, 1992 for interviews. The applicant's father, mother, and sister were lawfully admitted for permanent residence on August 13, 1993. The applicant was no longer eligible for a derivative immigrant visa as she married her present spouse on December 14, 1991 in Oklahoma. Her husband became a naturalized U.S. citizen on March 29, 1996, and the applicant is the beneficiary of an approved petition for alien relative. She was granted employment authorization on October 15, 1996. 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 reside with her spouse and two U.S. citizen children in the United States.

The officer in charge denied the application under the provisions of § 241(a)(5) of the Act, 8 U.S.C. 1231(a)(5), after concluding that the applicant is not eligible and may not apply for any relief under this Act.

On appeal, counsel states that the Service erred in not applying applicable case law in this matter. Counsel states that the Service did not properly examine the evidence previously submitted instead based it's decision upon the wrong interpretation of the law.

Section 241.(a) DETENTION, RELEASE, AND REMOVAL OF ALIENS ORDERED REMOVED.-

(5) REINSTATEMENT OF REMOVAL ORDERS AGAINST ALIENS ILLEGALLY REENTERING.-If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to

being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act [chapter], and the alien shall be removed under the prior order at any time after reentry.

The provision under § 241(a) (5) which states that "the alien is not eligible and may not apply for any relief under this Act" has been reviewed by the Service and it has been determined that this provision applies solely to aliens who are present in the United States. Once the alien departs from the United States, the § 241(a) (5) bar would no longer apply.

The record indicates that the applicant was taken into custody under the provisions of § 241(a) (5) of the Act and removed from the United States on February 13, 1998. She still remains in Mexico. Therefore the decision of the officer in charge will be withdrawn.

On appeal, counsel discusses the medical problems of the applicant's children, the youngest has a possible hole in her heart and must undergo future testing and her eldest was born without an anus and had to undergo seven surgeries. The eldest child appears to be in good health but has recurring fever that cannot be diagnosed. Counsel states that the applicant and her spouse have amassed significant debt and their prospects for any type of favorable existence in Mexico are minimal. The applicant's husband has been promised his job back upon his return to the United States.

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).

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 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).

In Matter of Tin, the Regional Commissioner held that such an unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following Tin, an equity gained while in an unlawful status can be given only minimal weight.

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a (removal) deportation order has been entered. Further, 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 (removal) deportation proceedings, with knowledge that the alien might be deported. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993).

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as "after-acquired family ties") in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter unlawfully entered the United States for the second time in 1990 and married her spouse in December 1991. She now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties, the absence of a criminal record, the need for the applicant's presence to care for two minor children, the approved immigrant visa petition, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's unlawful entry, her being found deportable in absentia, her felonious reentry without permission (all while being a minor), and her lengthy presence in the United States without a lawful

admission or parole. The Commissioner stated in Matter of Lee, supra, 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.

It must be noted that the applicant's initial unlawful entry at the age of 10 years accompanying her parents, her removal at the age of 17 years and her felonious reentry at the age of 17 years will not be given full consideration as an unfavorable factor when the statute in other matters provides for exceptions under § 212(a)(2)(A)(ii) of the Act, 8 U.S.C. 1182(a)(2)(A)(ii), for an alien who commits only one crime while under the age of 18 years and under § 212(a)(9)(B)(iii) of the Act, 8 U.S.C. 1182(a)(9)(B)(iii), for an alien who is unlawfully present in the United States and under the age of 18 years.

Although the applicant's actions in this matter cannot be condoned, and her equity (marriage) gained while being unlawfully present in the United States (and entered into while in removal proceedings) can be given only minimal weight, the applicant's violations were committed while she was a minor and a ward of her parents. Had the applicant not married when she did, she would have been eligible to receive a derivative immigrant visa based on another eligibility which was not after-acquired and she would have immigrated with her parents and sister. It is concluded in this matter that the applicant has 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 establish that she warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The officer in charge's decision is withdrawn and the application is approved.