U.S. Department of Justice

Immigration and Naturalization Service

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

FILE: [redacted] Office: Vermont Service Center Date: AUG 2 1 2001

IN RE: Applicant: [redacted]

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)

IN BEHALF OF APPLICANT:

[redacted] 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

Robert A. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India who was admitted to the United States in August 1991 as a nonimmigrant visitor with authorization to remain until February 2, 1992. She remained beyond her authorized period of stay. On May 28, 1993, the applicant filed a request for asylum. On February 25, 1994, an order to show cause was issued in her behalf. On August 9, 1994, an immigration judge denied the applicant's request for asylum and ordered her deported, therefore she is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The immigration judge stated that her only relief was a motion to reopen. The applicant failed to depart.

The applicant is now the beneficiary of an approved employment-based visa petition. In November 1999, counsel requested the Service to join in a motion to reopen the applicant's deportation case. The Service, noting that applicant came forward after five years when she had a visa petition approved, did not join in a motion to reopen. The applicant 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), to be allowed to adjust her status to lawful permanent resident.

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

On appeal, counsel states that the applicant has a well founded fear of persecution on account of race or political opinion upon her return to India. The Associate Commissioner will not address that issue at this time. An immigration judge has already entered a ruling regarding the applicant's request for asylum in the United States in another proceeding.

On appeal, counsel states that the applicant's U.S. citizen son would suffer extreme hardship if the applicant and her husband were denied the opportunity to apply for adjustment of status and compelled to return to India. Counsel states that the petitioner would be compelled to search for the service of another Indian cook. Counsel states that the decision incorrectly places crucial emphasis on the fact that the applicant is currently in the United States illegally and ignores the fact that she is otherwise eligible for adjustment of status. Counsel argues that, even if the applicant were found to have a "callous" attitude towards violating immigration laws, section 245(i) of the Act, 8 U.S.C. 1245(i), was enacted by Congress with the specific intent to overcome such a negative factor.

Section 212(a)(9)(A) of the Act provides, in part, that:

(i) 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.

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

(I) has been ordered removed under section 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) 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 sections 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former section 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 unless the Attorney General has consented to the alien's reapplying for admission. The provision holding aliens inadmissible for 10 years after the issuance of an exclusion or deportation order applies to such orders rendered both before and after April 1, 1997.

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. 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 section 212(a)(17) of the Act and eliminated the perpetual debarment and substituted a waiting period.

In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgements or decisions under certain sections of the Act, created a new expedited removal proceeding, and established major new grounds of inadmissibility. Nothing could be clearer than Congress' desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration law. 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).

After reviewing the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, and after noting that Congress has increased the bar to admissibility from 5 to 10 years, has also added a bar to admissibility for aliens who are unlawfully present in the United States, and 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.

Although the guidelines for considering permission to reapply for admission applications were set forth in Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973), and in Matter of Lee, 17 I&N Dec. 275 (Comm. 1978), these holdings were rendered long before Congress amended the Act from 1981 through the present 1996 IIRIRA amendments and beyond. Even though these decisions have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in the legislation and in their decisions that less weight should be given to individuals who violate immigration law. The later statutes and judicial decisions have effectively negated most precedent case law rendered prior to 1981. Such case law is still considered but less weight is given to favorable

factors gained after the violation of immigration laws following those statutory changes and judicial decisions.

Even the Regional Commissioner in Tin held that an alien's unlawful presence in the United States 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.

On December 21, 2000, the Legal Immigration Family Equity Act Amendments (LIFE Legalization) was enacted. LIFE Legalization provides relief for certain aliens who have an immigrant visa immediately available but entered without inspection or otherwise violated their status and seek to become lawful permanent residents. The LIFE Act allows the alien to apply for adjustment of status under section 245(i) of the Act if they pay a $1,000 penalty and extends the ability to preserve eligibility for this provision of law until April 30, 2001.

In order for an alien to be eligible for adjustment of status to that of lawful permanent resident under LIFE Legalization, the following criteria must be met:

> First, an alien must prove that he or she, before October 1, 2000, filed a written claim with the Attorney General for class membership in one of the three legalization class action lawsuits: (1) Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) (CSS); (2) League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) (LULAC); or (3) Zambrano v. INS, vacated, 509 U.S. 918 (1993) (Zambrano), to be considered an eligible alien for adjustment to lawful permanent resident under LIFE Legalization. Applicants who were denied class membership in the CSS, LULAC, or Zambrano legalization class action lawsuits by the Service are still eligible to apply for adjustment of status under LIFE Legalization.
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> Second, an eligible alien must submit evidence to establish that he or she:
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> 1. Properly files an application for adjustment under LIFE Legalization;

2. Entered the United States before January 1, 1982, and resided continuously in the United States in an unlawful status since that date through May 4, 1988;

3. Was continuously physically present in the United States during the period from November 6, 1986, through May 4, 1988;

4. Is not inadmissible to the United States for permanent residence under any provisions of the Act; and

5. Establishes basic citizenship skills as required.

The applicant has failed to establish eligibility for LIFE Legalization.

Service regulations at 8 C.F.R. 245.1 before and after IIRIRA list categories of aliens who were (b) restricted from applying for adjustment of status unless they established eligibility under section 245(i) of the Act and 8 C.F.R. 245.10, including aliens who are not inadmissible from the United States under any provision of section 212 of the Act, or for whom all grounds for inadmissibility have been waived; and (c) aliens who are ineligible to apply for adjustment of status under section 245 of the Act, including any alien (after IIRIRA) who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act; and (before IIRIRA) any alien who seeks to adjust status based upon a marriage which occurred on or after November 10, 1986, and while in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto.

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, supra. 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 Tin, the Regional Commissioner held that such an unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also in that early decision 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.

Counsel states that the applicant's spouse is a very successful businessman and they would suffer extreme hardship and great financial loss as a result of having to return to India.

The director and the Associate Commissioner, following more recent judicial decisions, have accorded less weight to the applicant's equities gained after the deportation order was entered. Even 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. The statutes provide in § 240 of the Act, 8 U.S.C 1229, for the consideration of a certain amount of continuous physical presence in the United States for aliens seeking cancellation of removal. The present applicant is not seeking cancellation of removal.

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 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 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 an "after-acquired family tie" 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 entered the United States in 1991, remained longer than authorized, was ordered removed and failed to depart. She now seeks relief based on her after-acquired equity, employment certification.

The favorable factors in this matter are the applicant's family ties, the absence of a criminal record, the approved employment-based visa petition, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's remaining longer than authorized, her failure to appear for the removal hearing, her failure to depart, 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.

The applicant's actions in this matter cannot be condoned. 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 will be dismissed.

ORDER: The appeal is dismissed.