



U.S. Department of Justice

Immigration and Naturalization Service

HB

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



FILE# [REDACTED]

Office: Vermont Service Center

Date:

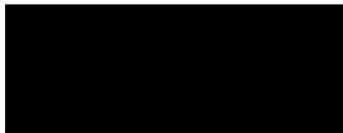
AUG 13 2001

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:



Public Copy

INSTRUCTIONS:

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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 P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is before the Associate Commissioner on a motion to reopen. The motion will be dismissed, and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Egypt who was admitted to the United States on August 1, 1992, as a nonimmigrant visitor with authorization to remain until February 1, 1993. He remained longer without Service authorization. On March 31, 1993, an Order to Show Cause was issued in his behalf. On June 9, 1993, the applicant's former counsel filed a motion to withdraw representing the applicant because the applicant has left for New York without consulting counsel and could not be located. On June 11, 1993, an immigration judge ordered the applicant deported *in absentia*. Therefore he 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). A Warrant of Deportation was issued in his behalf on June 11, 1993. The bond conditioned for his release was breached on July 31, 1993.

On December 21, 1994, the Vermont Service Center received his Request for Asylum. On May 11, 1995, the applicant was scheduled for interview but requested a rescheduling because he could not find an interpreter and he notified the Service of his change of address. No further action was taken on that application. On March 24, 1997, the applicant married a native of Ecuador and naturalized U.S. citizen. A Petition For Alien Relative was filed in his behalf on October 27, 1997, which remains adjudicated in the record. 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 reside with his wife.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel argues that the new laws under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) cannot be applied retroactively to the applicant.

As previously stated, 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.

On motion, counsel further states that the favorable factors outweigh the unfavorable ones, the fact that he married after the deportation order of 1993 is irrelevant and the applicant applied for adjustment of status under section 245(i) of the Act, 8 U.S.C. 1255(i), which has been interpreted as a kind of blanket waiver.

Section 212(a)(9)(A) of the Act provides, in pertinent 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.

In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgments 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).

Although guidelines for considering permission to reapply for admission applications have been 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 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.

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.

On December 21, 2000, the Legal Immigration Family Equity Act Amendments (LIFE Act) were enacted. The LIFE Act 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.

Service regulations at 8 C.F.R. 245.1 before and after IIRIRA listed 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 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.

Certain persons are listed as covered under section 245(i) of the Act and include individuals who entered the United States illegally; who worked in the U.S. illegally; who failed to maintain a continuously lawful status; who entered under the Visa Waiver Pilot Program; who entered as a foreign crewman; and who entered as foreign traveler in transit without visa. Persons who entered illegally and have been ordered removed and have failed to depart and persons who entered illegally and have been removed and who re-entered illegally are not specifically listed as eligible for section 245(i) benefits.

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, supra. 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).

Counsel states that the applicant resided in the United States for eight years during which he established a family and a life here. The applicant was ordered deported in 1993, but he failed to depart.

The statutes provide in section 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 1992, remained longer than authorized, was ordered deported, failed to depart and married his spouse in 1997. He 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 and the pending petition for alien relative.

The unfavorable factors in this matter include the applicant's remaining longer than authorized, his failure to appear for the deportation hearing, his failure to depart, his employment without Service authorization, and his lengthy unauthorized presence in the United States. 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. His equity (marriage) gained while being out of status in the United States (and entered into while in deportation proceedings) can be given only minimal weight. 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 he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the order dismissing the appeal will be affirmed.

ORDER: The motion is dismissed. The order of June 29, 2000, dismissing the appeal is affirmed.