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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: MAR 03 2008

IN RE:



APPLICATION:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a citizen of Guatemala who entered the United States without inspection on March 16, 1991, was ordered deported from the United States *in absentia* on May 7, 1991 under a false identity [REDACTED] departed the United States in or around January 1992 and reentered the United States without inspection in or around April 1992. As such, the applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) and section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii).¹ The applicant now 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) in order to reside in the United States.

The director determined that the applicant failed to establish that a favorable exercise of discretion is warranted and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). *Director's Decision*, dated November 20, 2006.

On appeal, counsel asserts that the applicant is eligible to apply for readmission into the United States and the director failed to properly balance the applicant's negative and positive factors. *Brief in Support of Appeal*, dated January 30, 2007.

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

- (A) Certain alien previously removed.-

- (ii) Other aliens.- Any alien not described in clause (i) who-
 - (I) has been ordered removed under section 240 or any other provision of law, or
 - (II) departed the United States while an order of removal was outstanding, and 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney

¹ The AAO notes that section 212(a)(6)(A)(i) of the Act is a ground of inadmissibility for those who are present in the United States without being admitted or paroled. *Section 212(a)(6)(A)(i) of the Act*. Although the applicant entered the United States without inspection, he is the beneficiary of a Form I-140, Immigrant Petition for Alien Worker, which his employer filed on October 12, 1999. As such, the applicant would not be subject to section 212(a)(6)(A)(i) of the Act based on section 245(i) of the Act. *See Section 245(i) of the Act*.

General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

The Regional Commissioner held in *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) that:

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

Pursuant to *Matter of Lee*, the recency of deportation will not be considered as the record does not reflect that the applicant is a person of poor moral character.

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c), waiver of deportation, discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this case include the applicant's U.S. citizen child, general hardship to his child, lack of a criminal record and an approved I-140 petition which indicates the need for his services in the United States. A December 2003 evaluation of the applicant prepared by [REDACTED], a licensed psychologist, indicates that the applicant's child has a limited vocabulary and some difficulty with articulation. She finds that he appears to have developmental language delays and would suffer irreparable emotional damage if he were to be separated from the applicant. [REDACTED] states that because of the child's developmental delays and strong attachment to the applicant, he would be at particular risk for the development of a range of clinical disorders. A December 15, 2006 letter from a school counselor at Bailey's Elementary School for the Arts and Science reports that the applicant's child has unspecified health issues that affect his social, emotional and academic development. The record offers no evidence that the applicant's child has been or is being treated in connection with the developmental problems identified by [REDACTED] or the health issues noted by the school counselor. Neither does it demonstrate that the applicant's child is enrolled in special educational programs as a result of his problems.

The AAO notes the evidence submitted with regard to the applicant's child. It finds that the applicant's child, like the Form I-140 benefiting the applicant, is an after-acquired equity. Accordingly, both will be accorded weight, albeit diminished, in the AAO's consideration of the favorable and unfavorable factors in this matter.

On appeal counsel also asserts that the applicant's financial support of his parents in Guatemala should be considered a positive factor in the present case. The AAO notes that the applicant was in a period of authorized stay while his asylum application was pending from October 16, 1991 until March 6, 2007 and he has received Employment Authorization Cards for the majority of the time that he has been in the United States since 1991.

The AAO finds that the unfavorable factors in this case include the applicant's entry without inspection on two occasions, his limited period of unauthorized stay, his failure to attend his removal hearing and his use of a false identity during his removal hearing.

The AAO finds that the immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.