



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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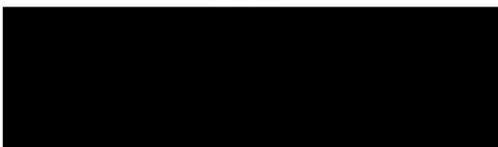
File: [Redacted] Office: ANCHORAGE, ALASKA

Date: FEB 2 2001

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:



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prevent identity misappropriation

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 District Director, Anchorage, Alaska, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was deported from the United States on May 22, 1997. He subsequently reentered the United States without inspection in June 1997. In October 1995, the applicant married a lawful permanent resident who subsequently naturalized as a United States citizen in August 1998. He is the beneficiary of an approved petition for alien relative and 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) in order to remain in the United States and reside with his spouse and children.

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

On appeal, counsel asserts that the district director did not allow the applicant to present evidence in support of his application, applied the wrong legal standard by requiring a showing of extreme hardship in order to qualify for the waiver, relied on erroneous factual assertions which were unsupported in the record, failed to consider the substantial favorable equities present in the case, and failed to give individualized consideration to the effect that the applicant's removal would have on his United States citizen spouse and children.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon an 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) 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 continuous 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 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 "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 record reflects that the applicant claims to have initially entered the United States in December 1990. In early 1995, he was apprehended by U.S. Border Patrol agents in California and in May 1995, was again apprehended. Subsequent to his May 1995 apprehension, he was released to the Anchorage Police Department Warrants Division on a \$75.00 failure to appear ticket. A year later, a second APD warrant was issued for failure to appear.

On May 18, 1995, the Service executed an Order to Show Cause along with a grant of voluntary departure in lieu of deportation, without expense to the government, giving the applicant until March 25, 1996 to depart the United States. In October 1995, the applicant married a United States citizen who filed a petition for alien relative on the applicant's behalf. The applicant failed to depart

on March 25, 1996 and a Warrant of Deportation was issued on July 25, 1996. The applicant was removed from the United States on May 22, 1997.

On May 20, 1998, following an audit of a local Anchorage employer, Service officers encountered and arrested the applicant at his place of employment. He claimed to have reentered the United States without inspection shortly after his deportation in May 1997. At the time of his processing, the applicant failed to disclose his prior immigration history with Service officers but did admit to having obtained unlawful employment by presenting a fraudulent alien registration card and social security number of another person.

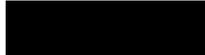
The applicant's equities in this matter include the applicant's family ties and the approved petition for alien relative filed in his behalf. The favorable factors include his lack of a criminal record, family responsibilities and the financial and emotional hardship he and his family would face if her were required to depart 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 unfavorable factors in this matter include the applicant's lengthy unlawful residence in the United States; his failure to depart voluntarily in lieu of deportation prior to May 25, 1996; his failure to report for removal and subsequent deportation on May 22, 1997; his reentry without inspection, and without prior permission to reapply, subsequent to his removal; his inadmissibility under § 212(A)(6)(c)(i) for having obtained unlawful employment by presenting false documents; and his failure to voluntarily disclose his immigration history to Service officers when questioned in May 1998.

The applicant's actions in this matter cannot be condoned. His equity (marriage) gained while being unlawfully present 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 that he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.