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

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[Redacted]

FILE [Redacted] Office: VERMONT SERVICE CENTER

Date: SEP 09 2003

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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9).

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (I-212) was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the applicant is a native and citizen of Nigeria. It appears he first entered the United States (U.S.) as a non-immigrant visitor in 1992.¹ Documents in the record indicate that he entered fraudulently. He was ordered removed by an immigration judge on July 27, 1999 and was removed from the United States on August 4, 1999. Citizenship and Immigration Services (CIS) records also indicate that he had a prior order of deportation dated December 3, 1993 that resulted from his failure to appear at a hearing before an immigration judge. On May 17, 1994 a warrant was signed ordering him to appear for deportation on June 20, 1994. He did not appear as ordered. The record indicates further that the applicant has a United States citizen son, born on June 2, 2000, and that the applicant's wife, whom he married in 1996, is also a United States citizen. The applicant seeks permission to reapply for admission into the U.S. after removal, in order to reside with his wife and child.

The director concluded that the favorable factors in the applicant's case did not outweigh the unfavorable factors and denied the application accordingly.

Counsel asserts on appeal that the director based his decision on erroneous information and that the applicant has established that he, his wife and his child will suffer hardship if the applicant is not granted permission to reapply for admission into the U.S. after removal.

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), states in pertinent part:

(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 the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal. . . is inadmissible.

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

¹ The applicant's I-212 states that he has resided in the U.S. since 1982, however, the biographical information contained in the I-212, as well as CIS records, indicate 1992.

(I) has been ordered removed under section 240 or any other provision of law [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 [now the Secretary of Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

Approval of Form I-212 Application for Permission to Apply for Admission after Deportation or Removal (I-212) requires that the favorable aspects of the applicant's case outweigh the unfavorable aspects.

In determining whether the consent required by statute should be granted, all pertinent circumstances relating to the applicant which are set forth in the record of proceedings are considered. These include but are not limited to the basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitation, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

Matter of Tin, 14 I&N Dec. 373, 374 (Comm. 1973.)

In *Matter of Tin*, the Regional Commissioner held that 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. 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.

In addition, 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. 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 after-acquired equities, referred to as "after-acquired family ties" in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter was ordered deported in 1993 and married his spouse in 1996. He now seeks relief based on that after-acquired equity.

The unfavorable factors listed by the director were that 1) the applicant entered the U.S. illegally and fraudulently; 2) the applicant was found removable and ordered removed by an immigration judge on July 27, 1999; 3) the applicant failed to depart the United States and has remained in the U.S. illegally; 4) the applicant has been working illegally in the U.S.; and 5) the applicant failed to notify the CIS of his change of address.

Counsel claims that after being ordered removed on July 27, 1999, the applicant was detained and subsequently removed from the U.S. by the Immigration and Naturalization Service, and that he has remained in Nigeria since his removal. Counsel additionally states that the applicant did not work illegally in the U.S. because he obtained work authorization after filing for adjustment of status through his wife. Counsel further asserts that the applicant notified the Service of his current address on his I-485 adjustment of status application.

Counsel is correct in asserting that the applicant was deported after the July 27, 1999 order, however, there is no evidence that he departed after his December 1993 order of deportation. Therefore, this remains a negative factor. Counsel is also correct in his assertion that the applicant had permission to work beginning in 1997. As there is no evidence in the record that he worked prior to 1997, the director's finding of illegal employment will not be used as a negative factor. While it is accurate that the applicant provided his proper address on his I-212 application, it is unclear if he kept the Service apprised of his current address in 1993, as he failed to appear on two occasions when given notice to appear before the Service.

The favorable factors in the applicant's case are his approved I-130 petition for alien relative, his U.S. citizen wife and child and the fact that he appears to have no criminal record.

The negative factors are his entering the U.S. through fraudulent means, his lengthy residence without CIS authorization, his failure to appear at a deportation hearing and his failure to leave the U.S. after being ordered to do so.

As the applicant's marriage to his U.S. citizen wife and birth of his U.S. citizen son took place after his initial order of deportation they can be given only minimal weight. The positive factors in this case do not outweigh the negative factors.

The burden of proving eligibility for the immigration benefit rests with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.