

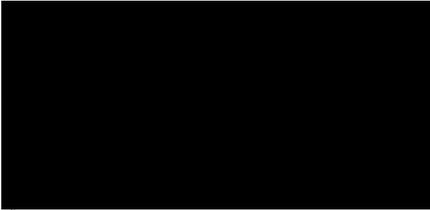
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



HL

FILE:



Office: VERMONT SERVICE CENTER

Date: **DEC 23 2004**

IN RE:

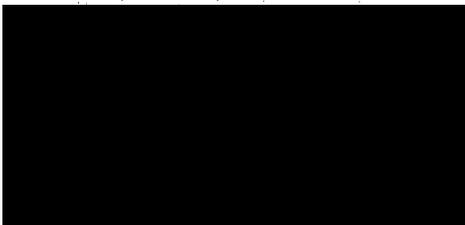
Applicant:



APPLICATION:

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

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, Director
Administrative Appeals Office

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

The applicant is a native of Syria who entered the United States on August 9, 1988, as a student. The applicant failed to attend school and on December 14, 1988, he was served with an Order to Show Cause for a hearing before an Immigration Judge and he was released on a \$2,000 bond. On February 13, 1989, an Immigration Judge granted the applicant voluntary departure until May 13, 1989, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States and a Warrant of Removal/Deportation was issued on September 5, 1997. The applicant's failure to depart on or prior to May 13, 1989, changed the voluntary departure order to an order of deportation. On May 21, 2001, the applicant was removed from the United States at JFK International Airport. In September 1995, the applicant married a Lawful Permanent Resident (LPR) whom he divorced on November 6, 1996, and remarried on February 1, 2001. His spouse is now a U.S. citizen and the applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 return to the United States to reside with his U.S. citizen spouse and children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. See *Director's decision* dated March 24, 2003.

Section 212(a)(9). Aliens previously removed.-

(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 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.

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 in most instances and to 20 years for others, (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.

On appeal, counsel submits a brief, copies of the applicant's marriage certificate, an affidavit from the applicant's spouse, copies of his children's birth certificates, a medical report regarding his daughter's medical condition, letters of recommendation regarding his character and other supporting documentation.

In her affidavit the applicant's spouse states that she would suffer extreme hardship if the applicant were not permitted to reside in the United States. The medical report submitted on behalf of the applicant's daughter states that a possibly malignant brain tumor was detected and she will need to be operated on. In his brief counsel states that the applicant is a person of good moral character, has no criminal record, has made significant contributions to his community, has filed tax returns, was only nineteen years old when he did not depart the United States subsequent to the voluntary departure order and has made efforts to comply with the law.

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 of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held 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.*

The court held in *Garcia-Lopes 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. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz 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*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d

631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter married his U.S. citizen spouse for the first time in September 1995 and for a second time on February 1, 2001, years after his voluntary departure order expired. The applicant's spouse should reasonably have been aware of the applicant's immigration violations and the possibility of him being removed at the time of their marriage. He now seeks relief based on that after-acquired equity.

In his decision the Director states that the unfavorable factors in the applicant's case are his failure to attend school after he was admitted as a F-1 student, his failure to depart the United States after he was granted voluntary departure and his removal on May 21, 2002. The Director concluded that these factors outweigh the fact that the applicant is the beneficiary of an approved Form I-130 and is the father of three U.S. citizen children.

The AAO finds that the Director failed to consider the other favorable factors including the fact that the applicant has a U.S. citizen spouse, no criminal record since entering the United States, and has filed tax returns, as required by law. There is also the prospect of hardship to his family, specifically his daughter's medical condition and the strain that will cause his wife, and the favorable recommendations attesting to his good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's failure attend school after he was admitted as a student and his failure to depart the country after he was granted voluntary departure.

While the applicant's failure to depart the United States after being granted voluntary departure cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted.

ORDER: The appeal of the denial of the Form I-212 is sustained and the application approved.