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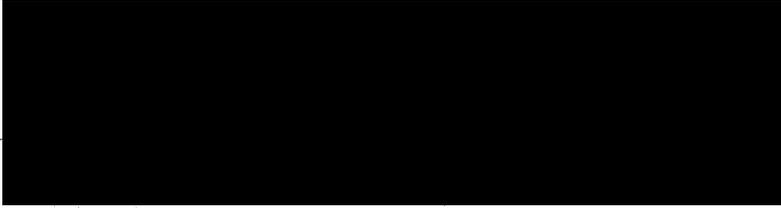
U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2004

IN RE: Applicant: [Redacted]

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico who was present in the United States without a lawful admission or parole on November 22, 1994. In a sworn statement the applicant admitted that he first entered the United States without inspection in 1980, departed in April 1989 to visit family in Mexico and reentered in August 1989 without inspection. Additionally he admitted that since 1985 he had been using a Social Security Card and a Temporary Resident Card that belonged to his dead brother. An Order to Show Cause was served on the applicant on November 22, 1994, and on December 13, 1994, he was released on a \$1,000 bond. On April 18, 1995, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation was issued on October 6, 1995. On November 1, 1995, the applicant was removed from the United States at the Otay Mesa Port of Entry. The record reflects that the applicant reentered the United States two or three weeks after his removal without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of Act, 8 U.S.C. § 1326. The record further reflects that the applicant married a U.S. citizen on April 30, 1999, and according to his own statement departed voluntarily on January 1, 2000. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 travel to the United States to reside with his U.S. citizen spouse.

The Director determined that the applicant was inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more and that the applicant is not eligible for a waiver under this section of the Act. Additionally 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). See *Director's Decision* dated December 10, 2003.

On appeal, counsel states that the Director's statement that the applicant is not eligible for any exceptions or waiver because he is inadmissible under section 212(a)(9)(B) of Act, for being unlawfully present in the United States for a period of one year or more, is incorrect as a matter of law.

The AAO agrees with counsel and finds that the Director erred in his decision stating that the applicant is inadmissible without exceptions or waivers pursuant to section 212(a)(9)(B) of the Act. If the applicant is found inadmissible under section 212(a)(9)(B) of the Act, he is eligible to file an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The proceeding in the present case is for the application for permission to reapply for admission into the United States after deportation or removal and therefore the AAO will not discuss the applicant's inadmissibility under section 212(a)(9)(B) of the Act.

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

(A) Certain alien 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 five 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 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 General has consented to the alien's reapplying for admission.

On appeal, counsel asserts that the applicant is entitled to seek relief under the law that governed at the time of his deportation and that section 212(a)(9) of the Act is impermissible insofar as it is being applied retroactively without a clear indication from Congress that such a result is intended. In support of his assertion, counsel cites *INS v. St. Cyr*, 533 U.S. 293, 316 S. Ct. 2271 (June 25, 2001). The *St. Cyr* decision is distinguishable from the case at hand in both the law and the facts. The Supreme Court decision specifically addressed the application of section 212(c) of the Act, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The Supreme Court determined that the ultimate repeal of section 212(c) was not retroactive and that section 212(c) relief remains available to those aliens that entered into plea agreements prior to the repeal. The current matter is based on an application for permission to reapply for admission into the United States after Deportation or Removal. *INS v. St. Cyr* specifically relates to the settled expectations of individual aliens who enter into plea agreements with the government. *INS v. St. Cyr* at 291. As there is no evidence that the applicant in the current matter plead guilty as a result of a plea bargain, the reasoning of *St. Cyr* is not applicable to the case at hand.

Several sections of the Act were added and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). According to the reasoning in *Matter of Soriano*, Interim Decision 3289 (BIA, A.G. 1996) the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of the 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. 969, 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. *Mater of George*, 11 I&N Dec. 419 (BIA 1965). *Mater of Leveque*, 12 I&N Dec. 633 (BIA 1968).

The AAO finds that the applicant is subject to the provisions of section 212(a)(9) of the current Act.

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 an affidavit from the applicant's spouse in which she states that she would suffer extreme hardship if her husband were not permitted to enter the United States. Additionally she states that she currently resides in Tijuana, Mexico and she is the sole source of income for the family.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied.

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.*

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 entered the United States in August 1989 was ordered removed on April 18, 1995, was removed in November 1995, reentered the United States and married his spouse on April 30, 1999, years after his removal and reentry without permission. He now seeks relief based on that after-acquired equity.

The AAO finds that the favorable factors in this case are the applicant's family tie to a U.S. citizen, his spouse, the approval of a petition for alien relative and the absence of a criminal record

The AAO finds that the unfavorable factors in this case include the applicant's illegal entries into the United States in 1980 and 1989, his failure to appear for removal proceedings, his failure to depart the United States after a final removal order was issued by an Immigration Judge, his unlawful reentry without permission after his November 1, 1995, removal, his employment without authorization, his fraudulent use of documentation that did not belong to him and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only 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 to a U.S. citizen, gained after his removal from the United States, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.