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U.S. Citizenship
and Immigration
Services



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 10 2005

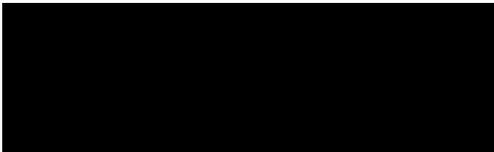
IN RE:

Applicant:



APPLICATION: Application for Permission to Reapply for Admission into the United States after
Deportation or Removal 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 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 dismissed.

The applicant is a native and citizen of Mexico who entered the United States without a lawful admission or parole on or about January 3, 1994. On April 8, 1994, the applicant applied for asylum. On August 8, 1994, the applicant was interviewed for asylum status by the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)) and was subsequently referred to an Immigration Judge for a court hearing. On February 7, 1995, an Immigration Judge granted the applicant voluntary departure until May 31, 1995, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to May 31, 1995, changed the voluntary departure order to an order of deportation. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant 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 remain in the United States and 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. In addition the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Director's Decision* dated October 14, 2004.

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

(B) Aliens Unlawfully Present.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

.....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver.- The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. . .

On appeal, counsel submits a brief in which she states that the Director erred in denying the application because the applicant has demonstrated the requisite family ties and paid the requisite fee. Counsel states that the applicant entered the United States sometime in 1987 without inspection and filed for asylum status with the assistance of a notary public. According to counsel the applicant was not aware that he did not qualify for asylum status but became a victim of a notary public due to his desperation for lawful status. In addition counsel states that although the applicant wanted to abide by the Immigration Judge's order he did not do so

because he could not afford to return to Mexico in order to provide for himself and his family. Furthermore counsel states that the applicant's deportation order occurred almost 10 years ago; he has resided in the United States for about 17 years; he has never been convicted of any crimes; he is a person of good moral character and his removal would result in hardship to his spouse, other family members, relatives and friends. Finally counsel states that based on a recent Ninth Circuit Court of Appeals decision if the application is granted the applicant would not be inadmissible under section 212(a)(9)(B) of the Act.

The AAO concurs with counsel in part. In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated could nonetheless obtain adjustment of status if his Form I-212 was granted. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez* that: "Given the fact that Perez-Gonzalez applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief." The Court further states: "Prior administrative decisions of the Bureau of Immigration Appeals confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in which the petitioner receives permission to reapply for admission after he or she has already reentered the country." Finally the Court found that: "... if permission to reapply is granted, the approval of Form I-212 is retroactive to the date on which the alien entered the country, and therefore, the alien is no longer subject to the grounds of inadmissibility in § 212(a)(9)."

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time he filed the Form I-212. Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. The applicant is eligible to file a Form I-212. It is noted, however, that *Perez-Gonzalez* only allows for the filing of a Form I-212. It is not a guarantee that permission to reapply will be granted. The District Director did not deny the applicant the opportunity to apply for permission to reapply for admission.

The applicant remains inadmissible under section 212(a)(9)(A) of the Act and therefore must receive permission to reapply for admission.

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

(A) Certain aliens 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 . . . [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 contiguous territory, the

Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (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, with limited exceptions, 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.

If, as claimed, an individual defrauded the applicant, the fact remains that he signed an Application for Asylum and Withholding of Deportation (Form I-589), appeared at his scheduled asylum interview where he presented a claim of past persecution, appeared for a hearing before an Immigration Judge and was granted voluntary departure, but never left the United States. The proceeding in the present case is limited to the issue of whether or not the applicant's inadmissibility under section 212(a)(9)(A)(ii) of the Act may be waived. The AAO will not discuss the circumstances surrounding his application for asylum.

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.

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 condone the alien's acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

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.

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 seeking 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.

The applicant in the present matter married his now naturalized U.S. citizen spouse on January 13, 1998, approximately three years after he was granted voluntary departure and over three and one half years after the voluntary departure order became a final order of deportation. The applicant's spouse should reasonably have been aware of the applicant's immigration violations and the possibility of his being removed at the time of their marriage. 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, an approved petition for alien relative and the absence of any criminal record.

The unfavorable factors in this case include the applicant's illegal entries into the United States in 1987 and on January 3, 1994, his failure to depart the United States after he was granted voluntary departure, his employment without authorization 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 he failed to depart 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 the applicant 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.