



U.S. Citizenship
and Immigration
Services



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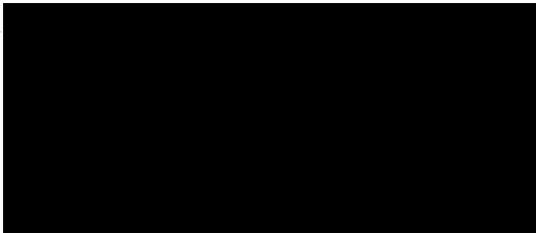
Applicant:



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 into the United States after Deportation or Removal (Form I-212) 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 in November 1981 without a lawful admission or parole. On April 4, 1984, in the Superior Court of California, County of San Francisco, the applicant was convicted of the offense of burglary in the first degree and he was sentenced to 365 days of imprisonment. On September 26, 1984, the applicant was deported from the United States pursuant to section 241(a)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1251(a)(4) as an alien who was convicted of a crime involving moral turpitude. The record reflects that the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, a violation of section 276 the Act, 8 U.S.C. § 1326. The applicant was apprehended and deported on March 10, 1989 and again on January 1, 1992, after he illegally reentered the United States. On January 10, 1992, in the Municipal Court Hayward, California, the applicant was convicted of the offense of petty theft and sentenced to 30 days imprisonment. On November 3, 1993, an Immigration Judge ordered the applicant deported to Mexico and consequently, the applicant was removed to Mexico. The record reflects that the applicant reentered the United States, on an unknown date, without a lawful admission or parole and without permission to reapply for admission, a violation of section 276 the Act. On August 16, 1995 in the Municipal Court Oakland, California, the applicant was convicted of the offense of "Inflict Corporal Injury on Spouse/Cohabitant" in violation of section 273.5(a) of the California Penal Code. The applicant was sentenced to 90 days imprisonment. He is the beneficiary of an approved Immigrant Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of 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 reside in the United States with his U.S. citizen spouse and children.

The Director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude and that he is not eligible for any exceptions or waivers under the Act based on the severity of the crime. Additionally, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the Form I-212 accordingly. *See Director's Decision* dated October 12, 2004.

On appeal, counsel submits a brief, a declaration from the applicant's spouse and documentation submitted previously with the Form I-212. In his brief counsel asserts that the Director erred in concluding that the applicant's convictions resulted in a ground of inadmissibility for which no waiver or exceptions are available, and that the Director abused his discretion in finding that the applicant's convictions of crimes involving moral turpitude did not warrant the Attorney General's favorable discretion in granting the Form I-212. Counsel states that the applicant is not inadmissible under section 212(a)(2)(B) of the Act, because although he has been convicted of two or more offenses, the aggregate sentence to confinement was not five years or more. In addition, counsel states that the Director's reference to good moral character is irrelevant in this case because the applicant is not applying for cancellation of removal under section 240A of the Act, or naturalization under section 316 of the Act. Furthermore, counsel states that although the applicant was convicted of two crimes of moral turpitude he would be eligible to file a waiver under section 212(h) of the Act. Finally, counsel states that the applicant has never been a lawful permanent resident and the part of section 212(h) related to aggravated felons is specific to those aliens who have been granted LPR status in the past. Counsel concludes that the Director denied the applicant's Form I-212 on the mistaken assumption that

the applicant did not qualify for any waivers and requests that the denial be set aside and a favorable decision be rendered.

The AAO agrees in part with counsel. The applicant is not subject to section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), since the aggregate sentence to confinement for his convictions of crimes involving moral turpitude was not five years or more. The AAO finds that the Director erred stating in his decision that the applicant is inadmissible without exceptions or waivers.

Section 212(h) of the Act provides, in pertinent part, that:

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

The record of proceedings does not reflect that the applicant was ever admitted into the United States as a lawful permanent resident. Therefore, the applicant is not barred from filing an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(h) of the Act, based on his conviction of an aggravated felony.

Although the Director refers to section 212(a)(2)(B) of the Act, relating to an alien who has been convicted of two or more offenses for which the aggregate sentences to confinement were 5 years or more; section 101(a) of the Act regarding aggravated felonies; and section 101(f) of the Act regarding good moral character, he did not finally deny the Form I-212 for those reasons. The Director denied the Form I-212 because he determined that the unfavorable factors outweighed the favorable factors, which is the proper standard.

The applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and these proceedings are limited to the issue of whether or not the applicant meets the requirements for this ground of inadmissibility to be waived.

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, 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 aliens' 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 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 declaration from the applicant's spouse. In her declaration, the applicant's spouse describes the way she and the applicant met and married. The applicant's spouse states that she had to undergo back surgery and that without the applicant she would be abandoned and helpless. She further states that she and her child would suffer financial hardship because if the applicant were forced to leave, she would have no money to support herself and her son. In addition, she states that her son has a speech defect that requires therapy for two hours a day and the applicant takes care of the child. Furthermore, the applicant's spouse states that she is not willing to relocate to Mexico with the applicant. She states that he does not have any close relatives in Mexico, and she would not be able to receive the same medical treatment in Mexico as she does in the United States. She further states that Mexico has a lot of crime and that her child would not be able to have the same education and other opportunities as he would in the United States.

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.

There are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See *Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

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 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.

The applicant in the present matter married his U.S. citizen spouse on February 25, 1998, years after his convictions and his deportations. The applicant's spouse should reasonably have been aware of the applicant's immigration violations, his criminal record, and the possibility of his being removed from the United States 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 ties in the United States, his U.S. citizen spouse and children, an approved Form I-130, the prospect of general hardship to his family, and the favorable letters of recommendation

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States in November 1981, his illegal reentries subsequent to each of his deportations, his convictions of crimes involving moral turpitude, 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 his deportations from the United States and his subsequent illegal reentry, 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.