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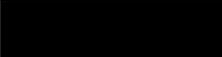


U.S. Citizenship  
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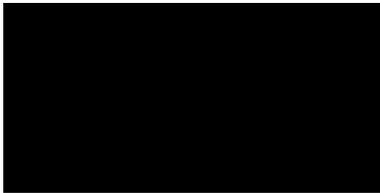
H4

FILE:  Office: CALIFORNIA SERVICE CENTER Date: DEC 16 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 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 a citizen of Guatemala who entered the United States without a lawful admission or parole in 1982. The applicant applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) and on May 2, 1996, he was interviewed for asylum status. His application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued on May 16, 1996. On December 11, 1996, an Immigration Judge found the applicant deportable and granted him voluntary departure until September 11, 1997, 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 September 11, 1997, changed the voluntary departure order to an order of deportation. On September 9, 1998, the applicant filed a Motion to Reopen (MTR) under the Nicaraguan Adjustment and Central American Relief Act (NACARA), which was denied on July 21, 2000. On September 25, 2000, a Warrant of Deportation (Form I-205) was issued. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. He is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Director's Decision* dated November 8, 2004.

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.

On appeal, counsel states that the Director improperly denied the Form I-212 by failing to consider relevant circumstances set out in case law, and improperly held that the applicant's illegal employment and unlawful presence in the United States rendered him ineligible for Form I-212 relief. Counsel, asserts that the Director did not properly weigh positive factors including the applicant's marriage to a U.S. citizen and his lack of a criminal record. In addition, counsel states that in his decision, the Director inaccurately states that the applicant's Form I-130 was filed on August 9, 2001, and was not covered under section 245(i) of the Act. According to counsel, the Service received the Form I-130 on April 30, 2001, and therefore, the applicant is eligible for adjustment of status under 245(i) of the Act. Counsel further states that permission to reapply for admission has been granted in circumstances where the immigration violations of the applicant have been far more egregious. Counsel refers to *Matter of Carbajal*, 17 I&N Dec. 272 (BIA 1978) in which the applicant had entered the United States illegally on four occasions without inspection or parole. Furthermore, counsel states that the applicant's steady employment merits a favorable determination. Additionally, counsel states that the applicant's spouse would suffer extreme hardship if the waiver application were not granted. Finally, counsel states that the Director failed to consider the recent Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004).

The AAO agrees with counsel in part. The record of proceedings indicates that a Form I-130 was filed on behalf of the applicant on April 30, 2001, and not August 9, 2001, as stated in the Director's decision. Therefore, the applicant may be eligible for benefits under section 245(i) of the Act. The fact remains that the applicant failed to depart from the United States after he was granted voluntary departure. These proceedings are limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived.

In *Matter of Carbajal*, the Board of Immigration Appeals (BIA) determined that the individual's immigration violations did not constitute a lack of good moral character. In the present case, the Director did not find that the applicant lacked good moral character. The Director denied the Form I-212 after determining that the unfavorable factors outweigh the favorable ones.

In *Perez-Gonzalez*, the court found that the Service denied the Form I-212 erroneously on the ground that permission to reapply is only available to aliens who are outside the United States, applying at a port of entry, or paroled into the United States. The Service's decision also indicated that the alien's prior deportation order was reinstated pursuant to section 241(a)(5) of the Act. The court ruled that the alien, who returned to the United States following a deportation and had his deportation order reinstated, could still adjust status if his Form I-212 were granted. The court stated in *Perez-Gonzalez*: "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 ruling only allows for the filing for permission to reapply for admission. It does not diminish the weight that can be accorded various immigration violations when considering a discretionary grant of an I-212.

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 (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 married his U.S. citizen spouse on March 24, 2001, approximately three and one half years after his voluntary departure order had expired. 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.

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.

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 AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States in 1982, 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 was placed in deportation proceedings and after his voluntary departure order had expired, 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.