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U.S. Citizenship
and Immigration
Services

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FEB 03 2005

FILE:



Office: CALIFORNIA SERVICE CENTER, CA

Date:

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 on or about October 1, 1993, without a lawful admission or parole. An Order to Show Cause was served on the applicant on May 1, 1995, and he was released on a \$5,000 bond. On June 2, 1995, the applicant was ordered deported by an Immigration Judge pursuant to sections 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for entering without inspection and 241(a)(2)(A)(i) of the Act, for having been convicted of a crime involving moral turpitude. On June 3, 1995, the applicant was deported from the United States at Nogales, Arizona. The record reflects that the applicant reentered the United States on June 24, 1995, 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 applicant was apprehended, his prior deportation order was reinstated pursuant to section 241(a)(5) of the Act and he was removed to Mexico on September 25, 1997. On December 19, 1999, a Border Patrol Agent apprehended the applicant. On May 2, 2000, in the United States District Court for the District of Arizona the applicant was convicted for the offense of violating 8 U.S.C. § 1325, unlawfully entering the United States at a time or place other than that designated by an immigration officer, and he was removed to Mexico on May 18, 2000. The record reflects that the applicant married a U.S. citizen on December 30, 1995, and he is the beneficiary of an approved petition for alien relative. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 and children.

The Director determined that the applicant is not eligible for any exception or waiver under section 212(a)(9)(A)(iii) of the Act and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated June 17, 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 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 the applicant states that the adjudicating officer erred in denying his application in stating that he was convicted of a felony when in fact his 1993 charge and conviction was for a gross misdemeanor. In addition he states that his spouse and child would suffer hardship beyond any normal separation problems.

The applicant's statement is not persuasive since the record of proceedings reveals that on December 1, 1993, in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, the applicant was convicted of the offense of false imprisonment, a felony. Even if the charge were for a gross misdemeanor the applicant was convicted of a crime involving moral turpitude and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The record of proceedings further reveals that on June 3, 1991, in the Justice Court of Sparks Township, County of Washoe, State of Nevada, the applicant was convicted for possession of document to establish false status or identity.

On appeal, counsel submits statements from the applicant's spouse and stepdaughter, medical records, pictures and numerous letters of recommendation regarding the applicant character. In the affidavits the applicant's family members request that the applicant be given a second chance and be allowed to travel to the United States in order to reside with them as a family. The medical reports submitted show that in 1990 the applicant's spouse was diagnosed with a pituitary tumor that has been treated successfully with medication. In addition she suffers from psoriasis and is being treated for transient monocular blindness in the right eye and severe headaches. Furthermore, the applicant's spouse states that she and her children tried to relocate to Mexico with the applicant but her son has several medical conditions that cannot be treated in Mexico and her daughter can attend school only as an observer. Counsel states that the applicant's family would suffer severe hardship if the applicant were not permitted to travel to the United States due to the medical conditions suffered by his spouse and child.

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 (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 entered the United States without inspection on or about October 1, 1993, was deported on June 3, 1995, reentered illegally on June 24, 1995, and married his U.S. citizen spouse on December 30, 1995. 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, namely his U.S. citizen spouse and children, an approved petition for alien relative, the prospect of hardship to his family and the favorable recommendations attesting to his good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States on or about October 1, 1993, his illegal reentry subsequent to his June 3, 1995, removal, his attempt to enter the United States illegally in 1999, his second removal on September 25, 1997, his conviction of a crime involving moral turpitude, his conviction for possession of document to establish false status or identity, his conviction for unlawfully entering the United States, his removal on May 18, 2000, his employment without authorization during part of his unlawful presence 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 deportation 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 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.