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FEB 03 2005

FILE:



Office: BANGKOK, THAILAND

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 District Director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Australia who was admitted to the United States as a non-immigrant visitor for pleasure on or about July 15, 1994, with an authorized period of stay to January 15, 1995. The applicant overstayed his authorized period of stay and on October 30, 1997, a Notice to Appear was issued. On November 18, 1997, an Immigration Judge denied the applicant's request for voluntary departure and ordered the applicant removed from the United States pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(1)(B) for having remained in the United States longer than permitted and on November 25, 1997, he was removed to Australia. The applicant married a U.S. citizen on May 2, 1999, in Australia and he is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) 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 travel to the United States to reside with his U.S. citizen spouse and child.

The District 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) accordingly. *See District Director Decision* dated June 4, 2004.

In addition, in her decision the District Director stated that a Consular Officer determined that the applicant is inadmissible under sections 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude and 212(a)(9)(B) of the Act, for having been unlawfully present in the United States.

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

(A) Certain alien 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 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 brief, letters of recommendation from relatives and friends regarding the applicant's character and pictures of the applicant with his spouse and other family members. In his brief counsel states that the District Director erred in denying the Form I-212 because she erroneously considered the applicant's conviction in the United States, and further states that the applicant is not inadmissible under section 212(a)(9)(B) of the Act. In addition counsel states that the District Director failed to consider that the applicant demonstrated rehabilitation and failed to consider the hardship his spouse and child would suffer if he were not permitted to travel and reside in the United States.

Counsel states that the applicant is not inadmissible under section 212(a)(9)(B) of the Act because he was unlawfully present in the United States for a period of seven months and his inadmissibility under this section of the Act expired on November 25, 2000, three years after the date he was removed from the United States. Furthermore counsel asserts that in her decision the District Director erroneously states that the applicant is inadmissible due to his conviction of a crime involving moral turpitude because he should be eligible for the petty offense exception found in section 212(a)(2)(A)(ii)(II) of the Act. He states that the applicant's conviction was designated as a class 1 misdemeanor that is punishable under Arizona Revised Statutes to a maximum period of imprisonment of six months.

Counsel's assertion that the District Director erroneously considered the applicant's conviction is unconvincing. The record of proceedings reveals that on October 2, 1997, the applicant was convicted for the offense of larceny, a crime involving moral turpitude. Although the applicant may be eligible for the petty offense exception found in section 212(a)(2)(A)(ii)(II) of the Act, in adjudicating a Form I-212 the District Director must weigh all favorable and unfavorable factors in the case and take into consideration the applicant's complete criminal history. 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 examine the applicant's other potential grounds of inadmissibility under sections 212(a)(2)(A)(ii)(II) and 212(a)(9)(B) of the Act.

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 the applicant's family 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.

The applicant in the present matter entered the United States in July 1994, fell out of lawful status, was denied voluntary departure and was removed from the United States on November 25, 1997. He married his U.S. citizen spouse on May 2, 1999, in Australia, after his removal from the United States. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties to U.S. citizens (his spouse and child), the approval of a petition for alien relative on his behalf and the prospective hardship to his family.

The unfavorable factors in this matter include the applicant's overstay after his initial lawful admission, his criminal history, his illegal stay and employment in the United States and his lengthy presence in the United States without authorization. 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 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.