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**U.S. Citizenship
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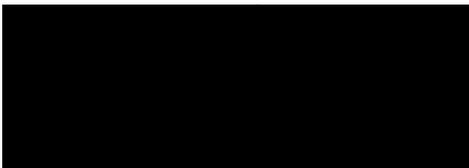
Applicant:



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 was denied by the Officer in Charge, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Poland who entered the United States as a non-immigrant visitor for pleasure on May 14, 1988, with an authorized period of stay until November 14, 1988. The applicant remained in the United States beyond his authorized period of stay and on June 4, 1992, he applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)). On July 27, 1992, the applicant appeared late for his asylum interview, thus, his interview was rescheduled for September 3, 1992. The applicant failed to appear for his rescheduled interview and an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued on September 11, 1992. On December 30, 1992, the applicant failed to appear for a deportation hearing and was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on March 16, 2003. On October 18, 1997, the applicant married a subsequently naturalized U.S. citizen who filed a Petition for Alien Relative (Form I-130) on his behalf. The applicant appeared at a CIS office on June 25, 2002, for a scheduled interview regarding his application for adjustment of status. Based on the Form I-205 the applicant was removed from the United States on August 28, 2002. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 and reside with his U.S. citizen spouse and children.

The Officer in Charge 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 Officer in Charge Decision* dated October 29, 2003.

The AAO notes that the Officer in Charge erroneously states on the Notice of Denial (Form I-292): ". . . Application for Waiver of Grounds of Excludability (I-601) be denied for the following reasons: SEE ATTACHMENTS". The application in the present matter is for permission to reapply for admission, not a waiver of inadmissibility. The AAO finds this typographical error to be harmless since it does not affect the outcome of the decision. In the attachment and his decision the Officer in Charge adjudicated the Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act.

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 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 asserts that the Officer in Charge abused his discretion and failed to consider all the evidence presented. Counsel states that the Officer in Charge failed to consider the psychological evaluation regarding the applicant's spouse, the fact that the applicant filed income tax returns from 1990 to 2002, the impact the denial of the application will have on the lives of the applicant's two children and the financial hardship his spouse will suffer if she is forced to raise their two children without the applicant's assistance. Furthermore counsel states that the service incorrectly characterized the applicant's application for political asylum as fraudulent. According to counsel the applicant applied for political asylum but never appeared for an interview nor did he testify under oath as to the veracity of the application. According to counsel there is nothing in the record to establish that the applicant knowingly committed fraud. In addition counsel states that there is nothing in the record to establish that the appellant was give notice of his hearing before the Immigration Judge. Counsel further states that the applicant never resided in Virginia and he was under the impression that he was signing an application for employment authorization when he applied for asylum. The applicant and his spouse submit affidavits in which they state that she suffers financial hardship as a result of the separation and that the applicant never lived in Virginia.

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 psychological evaluation submitted was conducted on September 20, 2002, and counsel has not submitted any follow up report to indicate if she has sought any medical treatment for her condition.

Counsel statements that the applicant was unaware of his hearing before an Immigration Judge and that when he applied for asylum he was under the impression he was applying for employment authorization are unpersuasive. This office agrees with counsel that the Officer in Charge erroneously states that the applicant resided in Virginia. The record of proceedings reveals that although the applicant applied for asylum with the Arlington Asylum Office he provided an address in Maryland. The applicant signed his asylum application

and an application for employment authorization, he appeared at his initial asylum interview and he received some of the documents related to his case at the address he had provided in Maryland. It was the applicant's responsibility to notify the service of his change of address, which he did not do.

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 or Removal:

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 [REDACTED] 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.*

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 October 18, 1997, years after he overstayed his authorized period of stay and years after he was ordered deported by an Immigration Judge. The applicant's spouse should reasonably have been aware of the applicant's immigration violations and the possibility of him being removed at the time of their marriage. 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, child and stepchild, the approval of a petition for alien relative, the absence of a criminal record and the fact that he filed tax returns.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of his authorized period of stay in 1988, his failure to appear for deportation proceedings, his failure to depart the United States after a final removal order was issued by an Immigration Judge, his employment without authorization 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 a deportation order was issued 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 he 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.