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U.S. Department of Homeland Security
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U.S. Citizenship
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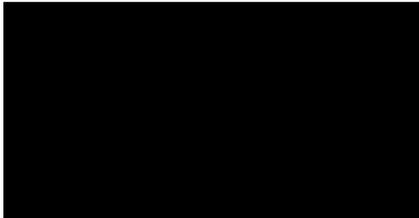
Applicant:



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, Chief
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 Thailand who on September 15, 1994, was admitted into the United States in possession of a non-immigrant visa with an authorized period of stay until October 13, 1994. On August 23, 1995, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on August 25, 1995, he was served with an Order to Show Cause (OSC) for a hearing before an immigration judge. On May 28, 1997, the applicant failed to appear for a deportation hearing and he 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) for having remained in the United States longer than permitted. On March 25, 2002, the applicant filed a Motion to Reopen (MTR) his deportation proceedings, which was denied by an immigration judge on April 26, 2002. An appeal filed with the Board of Immigration Appeals (BIA) was dismissed on February 24, 2003, and a Motion to Reconsider was denied on July 3, 2003. Subsequently, on July 29, 2003, the applicant was deported to Thailand. 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 pursuant to 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 travel to the United States and reside with his U.S. citizen spouse and children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See District Director's decision* dated April 27, 2005.

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 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 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 in which he states that the Director abused his discretion and did not consider all pertinent factors and did not properly balance the favorable versus the unfavorable factors. In addition, counsel states that the Director did not mention the psychological report submitted with the Form I-212. The psychological report states that the applicant's spouse suffers from Posttraumatic Stress Disorder and his children are demonstrating symptoms of intense separation anxiety. Counsel further states that the applicant was the sole breadwinner for his family and since his removal his family has become homeless, his children lack the guidance and support from their father and his spouse suffers from a heart condition, depression and anxiety and cannot function without the applicant's emotional stability and strength. Additionally, counsel states that the applicant has not shown a continued disregard for the laws of the United States, as stated by the Director, but the applicant simply was not aware of his deportation order. According to counsel, the OSC was not properly served on the applicant and all correspondence regarding the applicant's deportation proceedings were forwarded to an address that did not belong to him. Finally, counsel states that the applicant has no criminal record, is a good father and husband, and requests that the Form I-212 be granted.

The AAO notes that aside from the 2003 psychological report, which was based on a single visit and gave no indication of the need for further treatment, and a short, vague letter dated May 8, 2002, regarding his spouse's medical problems, there is nothing in the file to substantiate any of the claims of hardship.

A thorough review of the record of proceedings reveals that the applicant was personally served with an OSC on August 25, 1995, but additional correspondence regarding the date of his deportation proceedings and the immigration judge's order were not forwarded to the applicant's address and were never received by the applicant. The AAO notes that the OSC was forwarded to the address provided to the Service on the day the applicant was apprehended and a bond was posted on his behalf. The record of proceedings reflects that the applicant moved at least once after he was released on bond. When the applicant was served with the OSC he was informed that he was required to provide written notice to the immigration judge's office within five days of any change of address. It was his responsibility to make sure that his true and correct address was provided to the office of the immigration judge. The applicant failed to appear for a deportation hearing because he failed to inform the Service of his change of address as required by section 265(a) of the Act.

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 will consider the hardship to the applicant's spouse and children, but it will be just one of the determining factors.

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 (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 August 8, 1997, approximately two years after he was placed in deportation proceedings and three months after a final order of deportation was issued. The applicant's spouse should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of his being deported. He now seeks relief based on that after-acquired equity. Therefore, hardship to her spouse will not be accorded great weight.

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 potential of general hardship to his family, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after his initial lawful admission, his failure to appear for deportation proceeding, his failure to depart the United States after a deportation order was issued, his periods of unauthorized presence and his unauthorized employment. 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 a final order of deportation 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 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.