



U.S. Citizenship
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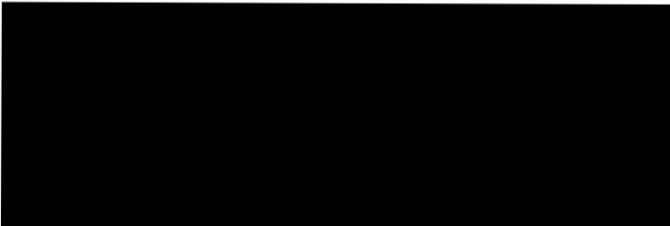
Applicant:



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 Acting District Director, Phoenix, Arizona 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 without a lawful admission or parole on or about November 7, 1980. On April 30, 1981, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant. The record of proceeding reflects that a Notice of Action – Voluntary Departure (Form I-210) was issued and the applicant was granted until May 14, 1981, to depart the United States voluntarily. The record does not reflect that the applicant departed the United States on or before May 14, 1981. The record reflects that on June 29, 1981, the applicant was convicted of possession of marijuana. On December 8, 1993, CIS encountered the applicant after he was arrested and convicted for the offense of threat with intent to terrorize. On December 9, 1993, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on him. On December 13, 1993, an immigration judge ordered the applicant deported pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. Consequently, on the same date, the applicant was deported from the United States. The applicant reentered the United States shortly after his deportation without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of 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 remain in the United States and reside with his U.S. citizen spouse and stepchild.

The Acting District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. See Acting District *Director's Decision* dated January 27, 2006.

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 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 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 in 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 deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief in which she states that the Form I-212 was incorrectly denied because the Director did not weigh the equities in the applicant's favor. According to counsel, the applicant has many equities which outweigh any negative factors. Counsel states that the applicant has resided in the United States for 25 years, his criminal history is scant since he has one conviction in 1981 and one in 1993, and the 1993 conviction was dismissed on December 14, 1998. **In addition, counsel states that the applicant's deportation order was issued 13 years ago.** Additionally, counsel states that although the applicant has violations of law, the applicant exhibits excellent moral character, and has been a responsible and loving husband and father. Furthermore, counsel states that the applicant's spouse is a U.S. citizen who does not speak Spanish fluently and, therefore, it would be impossible and impractical for her to live or work in Mexico with the applicant. Counsel states that because of the applicant's age, it would be exceedingly difficult for him to find employment in Mexico. Counsel further states that the applicant has insignificant immigration violations and that his criminal convictions are minor, have been dismissed, and may be waived by a Form I-601, which the applicant has filed. Moreover, counsel states that if the applicant were removed to Mexico, it would constitute an extreme hardship to his spouse and son. Finally, counsel states that the applicant's appeal should be sustained because the favorable factors clearly outweigh the negative factors.

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 U.S. citizen spouse and stepchild, but it will be just one of the determining factors. There are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." In addition, the record of proceeding does not reflect that the applicant's conviction for possession of marijuana was ever dismissed.

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 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 March 11, 1995, approximately two years after he was deported and after he illegally reentered the United States. 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 removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his 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 step-child, an approved Form I-130 and the prospect of general hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his illegal reentry subsequent to his deportation, his criminal record, his periods of employment without authorization and his extended periods 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 an U.S. citizen, gained after he illegally reentered 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 eligibility 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.