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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: DEC 20 2008

IN RE:

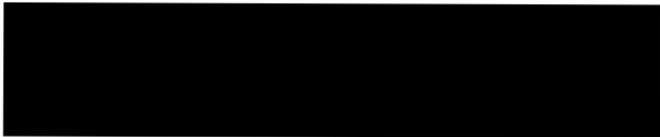
Applicant:



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, 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 sustained and the application approved.

The applicant is a native and citizen of the Philippines who entered the United States without a lawful admission or parole on or about May 30, 1993. On December 27, 1993, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). The applicant failed to appear for an asylum interview and on May 19, 2000, his application was referred to the immigration court and a Notice to Appear (NTA) for a hearing before an immigration judge was issued. On October 11, 2000, an immigration judge found the applicant removable pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i), for having been present in the United States without being admitted or paroled, and granted him voluntary departure until February 8, 2001, in lieu of removal. On February 1, 2001, the applicant filed a Motion to Reopen (MTR) his removal proceedings, which was denied by the immigration judge on April 3, 2001. The applicant failed to surrender for removal or depart from the United States on or before February 8, 2001. The applicant's failure to depart the United States on or before February 8, 2001, changed the voluntary departure order to an order of removal. An Application for Stay of Deportation or Removal (Form I-246) was denied on April 10, 2001, and on the same date a Warrant of Removal/Deportation (Form I-205) was issued. On April 23, 2001, another Form I-246 was denied. On May 9, 2001, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear at the San Diego District Office in order to be removed from the United States. The applicant failed to surrender for removal or depart from the United States. An appeal filed with the Board of Immigration Appeals (BIA) was dismissed on September 19, 2001. A Motion to Reconsider the BIA's decision was denied on January 7, 2002. On April 1, 2003, the applicant appeared at a CIS office and was taken into custody. On May 14, 2003, another Form I-246 was denied. Consequently on May 23, 2003, the applicant **was removed from the United States**. An immigration judge denied an MTR and an application for stay of removal on June 10, 2003. 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 pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He now 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 child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Director's Decision* dated January 20, 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 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 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 he states that the applicant did not cause financial hardship to another person because of his breach of an immigration bond because he was the obligator of the bond. Counsel submits a copy of an Immigration Bond (Form I-352) that reflects that the applicant himself was the obligator of the immigration bond. In addition, counsel states that the applicant did not abandon his former spouse and child in the Philippines as stated by the Director and submits copies of documentation showing a pattern of support and contact between the applicant and his ex-wife and child. Counsel does not dispute the fact that the applicant and his spouse married a month after he was placed in removal proceedings but he states that their relationship predated his removal proceedings as they had a child together in 1997. Additionally, counsel submits medical documentation showing that the applicant's child suffers from Kawasaki disease, an inflammatory disease of the blood vessels. A letter from the child's doctor states that the applicant's child requires life long follow-ups for his Kawasaki disease, with blood pressure check and electrocardiograms every 3-5 years. In addition, the doctor states that the child's separation from the applicant contributes to stress that may be harmful to his coronary arteries, and that the child has borderline high blood pressure. Counsel further states that because of the applicant's removal, his spouse has struggled to support herself and their child, she has been forced to give up full-time employment and is now supported by unemployment insurance, part-time work and her savings. Furthermore, counsel states that the applicant has been in the Philippines for three years and he and his family have suffered and continue to suffer because of their separation. Finally, counsel states that the record clearly shows that the applicant's child suffers because of the absence of the applicant and such absence causes stress that affects the child's medical condition. Counsel alleges that the favorable factors in this case outweigh the unfavorable ones and requests that the appeal be sustained and the Form I-212 be granted.

The AAO agrees with counsel that the applicant did not cause financial hardship to an individual because of his breach of an immigration bond. The Form I-352 clearly shows that the applicant was the obligator of the immigration bond. In addition, based on the documentation in the record of proceeding, the AAO does not

agree with the Director in finding that the applicant abandoned his first wife and child and left them unsupported in the Philippines. The Director based his conclusion on a letter dated October 14, 1996, provided by an attorney representing the applicant's first wife. On appeal, counsel submitted documentation showing that the applicant corresponded numerous times with his first spouse after he entered the United States.

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 June 22, 2000, a month after he was placed in removal proceedings. 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 be given appropriate 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 child, an approved Form I-130, the absence of a criminal record and the potential of hardship to his family. The AAO notes that the applicant's child would face economic, educational and medical hardship if he relocates to the Philippines, or in the alternative, if he remains in the United States without the applicant.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry, his failure to attend an asylum interview, his failure to depart the United States after he was granted voluntary departure and his periods of unauthorized employment and presence in the United States.

While the applicant's actions are very serious matters that cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable ones, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal of the denial of the Form I-212 is sustained and the application approved.