

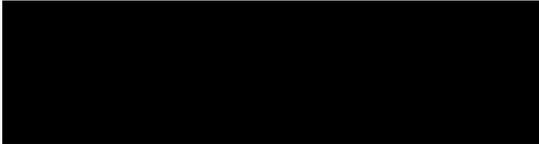
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship
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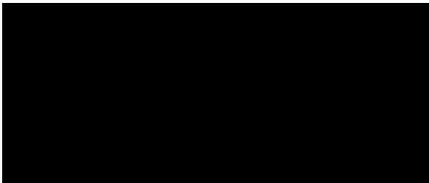
H4

FILE:  Office: VERMONT SERVICE CENTER Date: JAN 13 2006

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 into the United States after Deportation or Removal (Form I-212) was denied by the Acting Director, Vermont 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 Portugal who was admitted into the United States as a non-immigrant visitor for pleasure on April 26, 1989, with an authorized period of stay until October 25, 1989. On September 8, 1994, an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued. On April 25, 1995, an Immigration Judge found the applicant deportable, pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) and granted him voluntary departure until July 24, 1995, in lieu of deportation. On January 23, 1997, the applicant filed a motion to reopen his deportation proceedings, which was denied by an Immigration Judge on April 16, 1997. On March 6, 2002 an appeal of the Immigration Judge's decision to deny his motion to reopen his deportation proceedings, and a motion to remand the decision, were denied by the Board of Immigration Appeals (BIA). The applicant failed to surrender for removal or depart from the United States and is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant is the beneficiary of an Application for Alien Relative (Form I-130) filed by his U.S. spouse. 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 remain in the United States and reside with his U.S. citizen spouse and children.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Acting Director's Decision* dated August 25, 2004.

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 she states that the applicant has provided documentation to show that the negative factors in his case are outweighed by the positive factors and requests that the AAO sustain the appeal and approve the Form I-212. In addition, counsel states that the applicant is supporting his U.S. citizen spouse and children financially and emotionally, he has always worked hard, has never received public assistance, has filed tax returns, and has never been convicted of a crime.

The record of proceedings contains an affidavit from the applicant's spouse, a copy of the applicant's child's birth certificate, numerous letters of recommendation from individuals regarding the applicant's good moral character and pictures from the applicant's wedding ceremony, and other functions. In her affidavit, the applicant's spouse states that she would be devastated if the applicant were forced to leave the United States. In addition, the applicant's spouse states that if the family is forced to leave the United States her children would be uprooted and would not have access to educational opportunities or the United States medical system. Furthermore, she states that her entire family resides in the United States, she cannot imagine her life without her parents and siblings, and she is very concerned about the emotional turmoil her family would go through if the applicant were not allowed to remain in the United States.

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." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See *Shooshtary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

If the applicant's spouse and her children were to relocate to Portugal to reside with the applicant, it would be expected that some economic, linguistic, and cultural difficulties would arise. No evidence exists that the applicant's spouse and her children would not be able to adjust to life in Portugal if they were to relocate with the applicant.

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 July 30, 2000, approximately six years after he was placed in deportation proceedings and approximately five years after his voluntary departure order had expired. The applicant's spouse should reasonably have been aware of the applicant's immigration violation and the possibility of his being removed at the time of their marriage. He now seeks relief based on that after-acquired equity.

The AAO finds that the favorable factors in this case are the applicant's family ties to U.S. citizens, his spouse and children, an approved petition for alien relative, the absence of any criminal record and the letters of recommendation.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after his initial lawful admission, his failure to depart the United States after he was granted voluntary departure and after his voluntary departure order became a final order of deportation, his periods of unauthorized employment and his lengthy presence 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 a U.S. citizen, gained after he was placed in deportation proceedings and after his voluntary departure order had expired, 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.