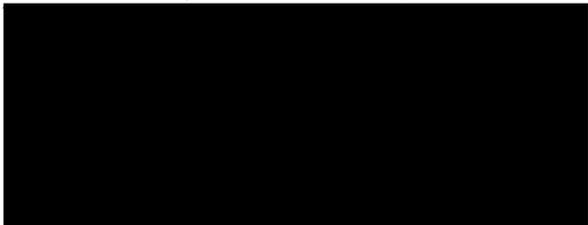


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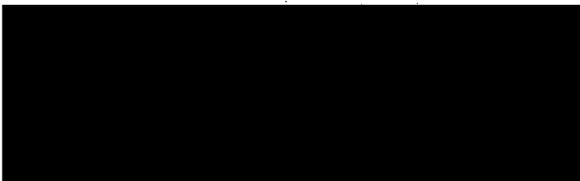
Applicant:



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 a citizen of the People's Republic of China who was admitted into the United States as a crewman on November 23, 1993. On November 26, 1993, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and an Order to Show Cause (OSC) for a hearing before an immigration judge was served on him. On January 6, 1994, the applicant was released on a \$4,000 bond. The applicant filed a Request for Asylum in the United States (Form I-589) with the immigration court. On August 24, 1995, an immigration judge denied his request for asylum and withholding of deportation. On the same date the immigration judge found the applicant deportable pursuant to section 241(a)(1)(B)(i)¹ of the Immigration and Nationality Act (the Act), for having failed to maintain the conditions of his status, and granted him voluntary departure until October 23, 1995, in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which, on March 28, 1996, affirmed the immigration judge's decision. The applicant was permitted to depart the United States voluntarily within 30 days of the date of the BIA's order. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart the United States within 30 days of the date of the BIA's order changed the voluntary departure order to an order of deportation. On November 22, 2002, the BIA denied the applicant's Motion to Reopen (MTR) his deportation proceedings and his request for a stay of deportation. On January 25, 2003, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear on March 3, 2003, at the San Diego, California, District Office in order to be removed from the United States. The applicant appeared as requested, was taken into custody and, consequently, was deported on July 16, 2003. 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 under 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 Director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated December 7, 2005. The Director previously denied a Form I-212 submitted on September 24, 2003. An appeal filed following that denial was rejected as untimely filed and a Motion to Reopen (MTR) was dismissed on June 13, 2005. The Form I-212 that is the basis of this proceeding was filed on September 15, 2005.

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for a period of one year or more or his eligibility for a waiver based on his marriage to a U.S. citizen, pursuant to section 212(a)(9)(B)(v) of the Act. This proceeding is limited to the issue of whether or not the applicant

¹ Now section 237(a)(1)(C)(i) of the Act.

meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived. This is the only issue that will be discussed.

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; (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/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief in which he compares the applicant, in the present case, with the applicant in *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). Counsel states that the applicant in *Matter of Lee* was admitted as a crewman and was deported after immigration officials apprehended him. He was refused landing privileges as a crewman on five subsequent occasions and finally deserted his vessel. Six years later a sixth-preference petition was approved on his behalf. At the request of the Service, he surrendered and was granted voluntary departure, and the applicant departed the United States. Counsel further asserts that the Director did not adequately explain why the applicant's unlawful presence and failure to voluntarily depart overrides the equities in his case, especially when compared to the applicant in *Matter of Lee*. Counsel states that the applicant's unlawful presence was only one year more than that of the applicant in *Matter of Lee*, he did not reenter after deportation as did the applicant in *Matter of Lee*, and he has a US citizen spouse and children unlike the applicant in *Matter of Lee*. In addition, counsel states that the Director failed to give the applicant credit for surrendering himself for deportation. In *Matter of Lee, supra*, the fact that the alien

surrendered was considered "hint of reformation of character." *Id.* at 278. Counsel states that an attorney advised the applicant's spouse that the applicant was eligible for adjustment of status and, therefore, she was unaware of the applicant's possibility of being deported at the time of their marriage. Finally, counsel states that the decision in *Matter of Lee* held that a record of immigration violations standing alone does not support a finding of a lack of good moral character, and that the 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.

The applicant in *Matter of Lee* was offered voluntary departure after he surrendered and timely departed the United States. The applicant, in the present case, failed to depart the United States in a timely manner after he was granted voluntary departure. The Director did not find that the applicant lacked good moral character but rather denied the Form I-212 after determining that the unfavorable factors outweighed the favorable ones. Each application must be viewed independently and all positive and negative factors must be considered.

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 family, 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 be a condonation of the alien's acts and could encourage others to enter without being admitted and work in the United States unlawfully. *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 April 8, 1997, approximately three and one half years after he was placed in deportation proceedings, and approximately one year after his voluntary departure order expired. Even if an attorney advised the applicant's spouse that the applicant was eligible for adjustment of status, that does not overcome the fact that the applicant now seeks relief based on an 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 children, an approved Form I-130, the prospect 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 depart the United States after he was granted voluntary departure and after his voluntary departure order became a final order of deportation, the breach of his immigration bond due to his failure to depart the United States, his unauthorized employment and his lengthy presence in the United States without authorization. The Commissioner stated in *Matter of Lee, supra*, that 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 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 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.