



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: ANCHORAGE, ALASKA

Date: SEP 27 2006

IN RE:

Applicant:

[REDACTED]

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:

[REDACTED]

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 District Director, Anchorage, Alaska, 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 El Salvador who entered the United States without a lawful admission or parole on or about January 27, 1992. On January 14, 1993, the applicant was apprehended by the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On the same day, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on him. On July 30, 1993, the applicant filed a Request for Asylum in the United States (Form I-589) with the office of the immigration judge. On December 6, 1993, an immigration judge denied the applicant's request for asylum, found the applicant deportable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection, and granted him voluntary departure until February 6, 1994, in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on November 13, 1995, and he was permitted to depart from the United States voluntarily within 30 days from 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 on or prior to December 13, 1995, changed the voluntary departure order to an order of deportation. Consequently, the applicant was deported from the United States on April 5, 1996. The record reflects that the applicant attempted to reenter the United States in August or September of 1996. He was apprehended and returned to El Salvador. The record further reveals that the applicant reentered the United States in November 1996, 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 pursuant to 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 to reside with his U.S. citizen spouse and child.

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 May 2, 2002. The applicant filed a timely appeal, which the District Director treated as a Motion to Reopen. On August 27, 2004, the District Director affirmed the prior decision denying the Form I-212.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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 states that the District Director violated the regulations at 8 C.F.R § 103.3(a)(2) and failed to forward the appeal to the AAO. Counsel states that the District Director did not follow the regulations and, therefore, her August 27, 2004, decision should be withdrawn. In addition, counsel states that the District Director failed to consider the applicant's substantial equities and placed undue weight on the applicant's immigration violations. Counsel states that the applicant has a U.S. citizen spouse and child who rely on him financially and emotionally, a business that employs two people, and a disabled mother-in-law who relies on him and his spouse financially. According to counsel, these factors outweigh the applicant's illegal entry after deportation, which occurred almost eight years ago. Additionally, counsel states that the applicant's spouse has been diagnosed with major depressive disorder for which she receives medication. Counsel further states that the applicant's spouse does not speak Spanish, would be unable to find employment in El Salvador and both she and the applicant's child are eligible for free health care in the United States which they would lose in El Salvador. Counsel refers to the decision by the Ninth Circuit Court of Appeals in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) which held that a person who has been ordered deported and illegally reentered the country is not categorically barred from being granted retroactive permission to reapply for admission and adjustment of status in the exercise of discretion. Counsel states that the District Director's finding that the applicant's illegal reentry after deportation outweighs any favorable equities is effectively imposing a categorical bar under the guise of discretion. Counsel further states that the applicant has no criminal record and has been living and working in the United States legally since 2001, when he was granted Temporary Protected Status (TPS). Counsel states that if the applicant is not permitted to remain in the United States, his spouse and child would not be able to make ends meet, his spouse would default on substantial financial obligations to the federal government and private lenders, his mother-in-law would lose her house in Nebraska, and his two employees would lose their jobs. Counsel further states that if the applicant's spouse and child relocate with him to El Salvador they would lose their health care and the applicant's spouse may not be able to receive appropriate treatment for her psychiatric condition. Finally, counsel states that based on the above the August 27, 2004, decision should be withdrawn and the Form I-212 should be granted.

The AAO agrees with counsel regarding the District Director's August 27, 2004, decision. Because the District Director decided that she was not going to be taking favorable action on the appeal, she should have forwarded it to the AAO for adjudication, as noted in the regulations at 8 C.F.R § 103.3(a)(2)(iv). Therefore, the August 27, 2004, decision is withdrawn and it will not be taken into consideration. The applicant's appeals will be consolidated and treated as a single appeal to the District Director's decision dated May 2, 2002.

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 child, 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 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 February 14, 2001, approximately five years after he was deported from the United States and over four years after he reentered illegally. 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 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 child, an approved Form I-130, the prospect of general hardship to his family, the fact that he was approved for TPS and was issued EADs, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection, his failure to depart the United States after he was granted voluntary departure, his reentry after he was deported and periods of unauthorized presence and employment.

While the applicant's actions cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, 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 is sustained and the application approved.