

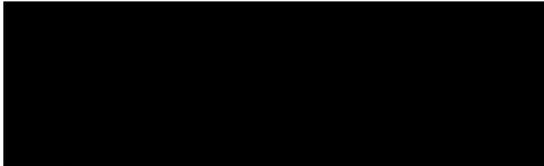
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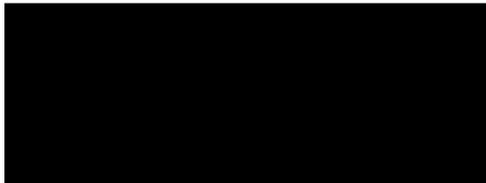


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 17 2007**

IN RE: [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:



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 Director, California Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica who, on April 20, 1989, was admitted to the United States as a conditional resident through his marriage to [REDACTED], a U.S. citizen. On May 1, 1991, the applicant's conditions were removed and he became a lawful permanent resident. On August 13, 1991, the applicant pled guilty to carrying a concealed weapon, a loaded firearm, in violation of section 2923.12 of the Ohio Revised Statutes (ORS). The applicant was sentenced to 6 months in jail and one year of probation. On January 14, 1992, the applicant was placed into proceedings. On April 6, 1992, the immigration judge ordered the applicant removed from the United States. The applicant appealed to the Board of Immigration Appeals (BIA). On July 6, 1994, the BIA dismissed the applicant's appeal. On August 19, 1994, a warrant for the applicant's removal was issued. On September 15, 1994, the applicant was placed under an order of supervision. On August 14, 1997, the applicant was ordered to report for removal on August 28, 1997. The applicant failed to appear for removal. On July 6, 2003, police officers apprehended the applicant after a routine traffic stop. On July 23, 2003, the applicant was removed from the United States and returned to Jamaica, where he has since resided. On May 12, 2005, Ms. [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on November 28, 2005. On June 20, 2005, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside the United States with his U.S. citizen spouse and daughter.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated August 22, 2005.

On appeal, counsel contends the director did not have jurisdiction over the applicant's Form I-212. Counsel also contends that the director abused his discretion in denying the applicant's Form I-212. *See Counsel's Brief*, received November 7, 2005. In support of his assertions, counsel submits the referenced brief, letters from the applicant and his spouse and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years 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.
- (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 who 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 on a 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that Ms. [REDACTED] is a U.S. citizen by birth. The applicant and Ms. [REDACTED] have a 19-year old daughter who is a U.S. citizen by birth. The applicant is in his 50's and Ms. [REDACTED] is in her 40's.

Counsel asserts on appeal that the director did not have jurisdiction over the Form I-212 and the Form I-212 should be remanded to the Cleveland District Office for adjudication. However, pursuant to 8 C.F.R. § 212.2(d), the applicant, who also requires a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), for having been unlawfully present in the United States for more than one year and seeking admission within ten years of his last departure, was required to file the Form I-212 with the Application for Waiver of Grounds of Inadmissibility (Form I-601) at the U.S. Consulate with jurisdiction over his place of residence for forwarding to the overseas Citizenship and Immigration Services (CIS) office with jurisdiction over the area in which the consulate is located. The AAO notes that the U.S. Consulate in Jamaica in returning the applicant's Forms I-130, I-212 and I-601, misinformed the applicant regarding the submission of the Form I-601 and Form I-212, which led to the applicant's filing of the Form I-212 with the Cleveland District Office and its subsequent adjudication by the California Service Center.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO has jurisdiction over all Form I-212 decisions, whether issued by the California Service Center, the Cleveland District Office or a CIS office abroad. Accordingly, the AAO will consider the applicant's Form I-212 and issue a decision in this matter.

The AAO now turns to a consideration of positive and adverse factors in the present case.

On appeal, counsel asserts that there is hardship to two U.S. citizens if the applicant's application is denied. Counsel asserts that Ms. [REDACTED] is now effectively a single parent supporting her daughter and two households as she has moved to Florida to secure better representation for the applicant. Counsel asserts that Ms. [REDACTED] income is not sufficient to meet her obligations and support her daughter's higher education. Counsel asserts that the applicant's failure to appear for removal was driven by his moral choice to honor his obligations to his family. Counsel asserts that the applicant has not been convicted of any crimes since 1992 and he has expressed repentance and remorse for his actions.

Counsel, on appeal, asserts that the director mischaracterized the applicant's immigration violations as

separate and discrete acts rather than correctly identifying them as the consequences of only one immigration violation, his decision to fail to report for removal. The AAO finds counsel's assertion that the applicant's extended unlawful presence and employment in the United States are merely consequences of the removal order and not discrete and separate immigration violations to be unpersuasive. Counsel asserts that the applicant was permitted to reside and work in the United States under the order of supervision and because he is a lawful permanent resident. However, the applicant's lawful permanent resident status was terminated when he was ordered removed from the United States and the order of supervision was terminated when the applicant was ordered to appear for removal on August 28, 1997. The applicant was unlawfully present and unlawfully employed in the United States from August 28, 1997 until July 23, 2003, the date on which he was finally removed from the United States.

Ms. [REDACTED], in her letter, states that for fifteen years she struggled to keep her husband in the United States so that he could raise their daughter, support their family and live a rewarding life. She states that the applicant supported her through her battles with illness and provided her with a way to get a college degree and send their daughter to private school. She states that her daughter had never been separated from her father until he was removed from the United States. She states that the applicant's rights were abused when he was not informed of the immigration ramifications of his guilty plea to his weapons charge. She admits that the applicant violated the law by failing to report for removal but explains that they were trying to stay together as a family. She states that she had to move to Florida to seek an experienced legal professional who knows the immigration process and could relate to her husband's case. Ms. [REDACTED] states that her husband is not a threat to any one and is not a threat to the United States. She states that her daughter has not seen her father since he was removed because she cannot afford to send her to Jamaica with only one income. She states that her daughter is interested in attending college but she does not see that as a possibility without the support of two parents.

The applicant, in his letter, states that he is deeply sorry and has come to realize the harm that he has inflicted upon his wife and daughter due to the lack of judgment he showed when he did not comply with the removal order. He states that he very much regrets this decision. He states that he was gripped by the fear of losing his family. He states that, at the time, his daughter was turning three years old and his wife was scared to go to Jamaica with him. He states that his action has caused nothing but financial and emotional distress for his wife and daughter.

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. *Supra*.

*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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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-Munoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> 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 (5<sup>th</sup> 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 AAO finds these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's U.S. citizen spouse, U.S. citizen daughter and his approved immigrant visa petition. The AAO notes that the approval of the applicant's immigrant visa petition occurred after the applicant was ordered removed, and is an "after-acquired equity." Any favorable weight derived from it must, therefore, be accorded diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's conviction for a firearms violation after having been admitted to the United States as a lawful permanent resident; his failure to comply with an order of removal; and his extended unlawful presence and employment in the United States.

The applicant in the instant case has multiple immigration violations and a criminal conviction. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he 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.