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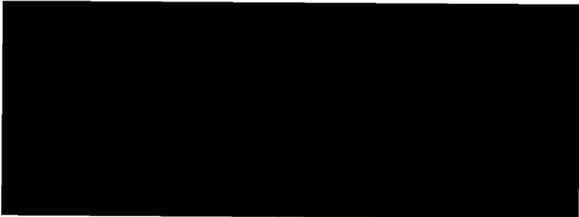
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JAN 18 2007**

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:



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 Acting Director, Vermont 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 Colombia who entered the United States without a lawful admission or parole on a date that is unclear from the record. On January 17, 1995, 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)). On March 30, 1995, the applicant was interviewed for asylum status. His application was referred to the immigration court and on June 12, 1996, an Order to Show Cause (OSC) for a hearing before an immigration judge was served on him. On October 15, 1997, an immigration judge denied the applicant's request for asylum and withholding of deportation. The immigration judge 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 January 13, 1998, in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which, on August 6, 2002, affirmed without opinion the immigration judge's decision. The applicant filed a Motion to Reopen or Reconsider (MTR), which was denied by the BIA on November 12, 2002. A second MTR was denied on March 26, 2003. The applicant filed a petition for review of the order by the BIA and a motion for a stay of removal with the United States Court of Appeals for the First Circuit. On October 9, 2003, the applicant was granted temporary stay pending the court's decision on his petition for review. On April 22, 2004, the First Circuit Court of Appeals affirmed the BIA's denial. The record of proceeding reflects that the applicant departed the United States on June 29, 2004 and, as such, self deported. 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 travel to the United States and reside with his U.S. citizen spouse and child.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Acting Director's Decision* dated January 3, 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 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 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 she alleges that the Acting Director erred in her interpretation of the applicant's immigration violations. Counsel states that of the 11 reasons cited by the Acting Director in her denial, all pertain to the applicant's alleged violation of immigration laws and that the decision is completely devoid of any mention of hardship to the applicant's spouse. Counsel further states that the Acting Director should have acknowledged that the applicant sought to obtain legal status by filing applications for relief which he was entitled to file, and that the BIA and CIS decisions should not be labeled as unfavorable factors. In addition, counsel states that although the applicant was unlawfully present in the United States, he was pursuing legitimate paths to legal status. Additionally, counsel states that the applicant filed a timely Form I-589, and timely appeal and MTR's which, although ultimately denied, should not weigh negatively against the applicant because he was entitled to remain in the United States while they were pending. Furthermore, counsel asserts that the fact that the applicant lost his legal battle does not mean that he was disregarding the immigration laws by remaining in the United States. Counsel further states that the Acting Director failed to give proper weight to the extreme hardship the applicant's spouse would suffer if he were not permitted to enter the United States. Counsel submits an affidavit by the applicant's spouse in which she states that she relies on the applicant for care and support. In addition, counsel submits medical records for the applicant's spouse that reflect that she attempted to commit suicide and that during her attempt she sustained major injuries to her arm that forced her to be out of work for a long period of time. Counsel further states that the applicant's child would suffer hardship if he were denied entry into the United States. Counsel states that the child has been devastated since the applicant's departure and that the applicant provided financial support prior to his departure but is unable to do so while residing in Colombia. Furthermore, counsel states that the applicant himself would suffer extreme hardship if he were not permitted to enter the United States. The applicant is unable to secure a steady job, is concerned about his wife's condition and is frustrated by his inability to provide financial support to his spouse and child.

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 August 12, 2001, over five years after he was placed in deportation 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 accorded appropriate weight.

The AAO finds that the denial of the applicant's asylum application, the subsequent dismissal of his appeal and the denial of a petition for review of the appeal, are not unfavorable factors. The applicant had the right to file an asylum application, and although it was subsequently denied, he was entitled to exhaust all means available to him by law in an effort to legalize his status in the United States. His appeal, MTR's and petition for review with the First Circuit Court of Appeals conferred on him a status that allowed him to remain in the United States while they were pending. The AAO notes that the applicant departed the United States shortly after the First Circuit Court of Appeals confirmed the BIA's decision.

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, and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection and periods of unauthorized presence and employment.

While the applicant's actions 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 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.