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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUL 18 2007

IN RE:



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 sustained and the application approved.

The applicant is a native and citizen of El Salvador who, on August 30, 1985, was apprehended by immigration officers after he had entered the United States without inspection. On August 31, 1985, the applicant was placed into proceedings. The applicant applied for asylum and voluntary departure before the immigration judge. On July 28, 1987, the immigration judge denied the applicant's application for asylum and granted the applicant voluntary departure until February 15, 1988. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On August 10, 1988, a warrant for the applicant's removal was issued. On July 26, 1990, the applicant married [REDACTED] a native and citizen of El Salvador. On September 27, 1991, [REDACTED] employer filed a Petition for Alien Worker (Form I-140) on her behalf which was approved on October 28, 1993. On August 31, 1995, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589) indicating that he had never applied for asylum before and that he had never been placed into proceedings. On August 24, 1998, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-140 as the spouse of the approved principal alien. On September 3, 2002, immigration officers apprehended the applicant. On November 4, 2002, the applicant filed an Application for Suspension of Deportation or Special Rule Cancellation of Removal (NACARA) (Form I-881). On December 4, 2002, the applicant was removed from the United States and returned to El Salvador where he has since resided. On December 23, 2005, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 return to the United States and reside with his U.S. citizen spouse and stepchildren.

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Director's Decision* dated May 16, 2006.

On appeal, counsel contends that the director failed to give specific fact-oriented reasons for the denial of the application and issued a template decision when the applicant is eligible for permission to reapply for admission. *See Counsel's Brief*, dated July 7, 2006. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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 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 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.

The Department of State has issued guidance which is useful in determining whether an applicant who was placed into removal proceedings prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), is inadmissible pursuant to section 212(a)(9)(A) of the Act:

New 212(a)(9)(A)(i) and (ii) roughly correspond to former 212(a)(6)(A) and (6)(B), relating to aliens previously excluded/deported. The main change from the previous law is that the periods of inadmissibility have been substantially lengthened:

Arriving aliens denied admission and removed (excluded), who were previously ineligible for one year, are now generally ineligible for either: five years, if the removal order was issued on/after April 1, 1997, or ten years, if the removal (exclusion) order was issued prior to 4/1/97; *aliens ordered removed after having been admitted or after having entered without inspection, who were previously ineligible for five years, are now generally ineligible for ten years . . .* (emphasis added)

INA Section (Class Code)

Applies to:

212(a)(9)(A)(ii) (92A or 92B or 92C) other aliens previously ordered removed

whether the order was issued before, on, or after 4/1/97

*Department of State Cable (R 040134Z APR 98), P.L. 104-208 Update No. 36: 212(a)(9)(A)-(C), 212(a)(6)(A) and (B), (April 4, 1998), Ref: 96-State-239978, 97-State-62429, 97-State-235245, 98-State-51296.*

The record of proceedings indicates that the applicant entered the United States without inspection and, when granted voluntary departure, failed to voluntarily depart the United States. The voluntary departure became a final order of removal with which the applicant failed to comply until December 4, 2002. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that [redacted] is a native and citizen of El Salvador who became a lawful permanent resident in 2002. The applicant and [redacted] do not have any children together. [redacted] has a 32-year old son, a 31-year old son, a 29-year old son and a 22-year old son from a previous relationship who are natives and citizens of El Salvador. While [redacted] indicates that

at least three of these children have emigrated to and reside in the United States, there is no evidence in the record to indicate that these children have any legal status in the United States. The applicant is in his 40's and [REDACTED] is in her 50's.

While the AAO notes counsel's assertion on appeal that the applicant's removal from the United States was unlawful because he is an ABC class member, the AAO has no authority to review the decision to remove the applicant. The only issue before the AAO is whether the applicant, who was physically removed from the United States in 2002 and is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, is eligible for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

On appeal, counsel asserts that the director incorrectly listed the applicant's inadmissibility for unlawful presence pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), as a negative factor because he had filed the Form I-212 to waive that ground of inadmissibility. The AAO finds that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant did not accrue unlawful presence because, since the date of enactment of unlawful provisions under the Act, April 1, 1997, had a bona fide application for asylum that remains pending to this date. *See* Section 212(a)(9)(B)(iii)(II) and *ABC Settlement*. Under the ABC settlement the applicant was eligible to file a second asylum application despite his prior removal order and the record reflects that he maintained work authorization pursuant to his application for asylum.

On appeal, counsel asserts that the applicant remains eligible to immigrate to the United States as a following-to-join spouse of an approved Form I-140 principal alien, [REDACTED]. Counsel asserts that [REDACTED] would suffer hardship should the applicant be denied permission to reapply for admission. He asserts that the applicant is a person of good moral character, as evidenced by the letters of reference submitted with the Form I-212. He asserts that the applicant has had no arrests and no problems with law enforcement and that, while in the United States, he was a hard-working man who provided for his family and never sought public assistance.

[REDACTED], in her affidavit, states that the applicant has always treated her children as his own and that they all live in the United States except for her eldest son. She states that they are a very close family and the children treat the applicant as their father. She states that since the applicant's removal, her family has been torn apart and she has lost her husband, best friend and the children have lost a father. She states that the applicant worked hard and provided for her and the children when he was in the United States. She states that she must now work full-time to support the family and she will suffer emotionally and financially if the applicant is not permitted to return to the United States. She states she will continue to struggle to earn sufficient money to support the family and that if she returned to El Salvador she would not find a job there that would meet their living expenses. She states she does not have a diploma and her skills are limited. She states that she would suffer emotionally because she has been separated from the man with whom she has shared her life for 15 years, but if she were to return to El Salvador to be with him she would be separated from her children, which is a decision no mother should have to make. She states that the family had to make many adjustments since the applicant's removal and she does not want to put her children through further changes.

[REDACTED] two middle children, in their statements, indicate that the applicant was a very caring father to them and was a good role model for them. They state that his absence has been difficult for the family, especially their mother who is sad and alone. Letters of recommendation from friends, neighbors and

co-workers indicate that the applicant is a hard-working man of good moral character who should be permitted to return to the United States.

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 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 that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The AAO finds that the director failed to consider the applicant's lawful permanent resident spouse, the potential general hardship to his wife, his bona fide asylum application under ABC, the absence of any criminal record, his payment of U.S. taxes and his status as a following-to-join spouse of an approved immigrant petition for alien worker.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States, his failure to comply with the grant of voluntary departure, and his failure to comply with his removal order.

While the applicant's entry into the United States without inspection, his failure to comply with an order of voluntary departure and his subsequent failure to depart the United States after being ordered removed 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.