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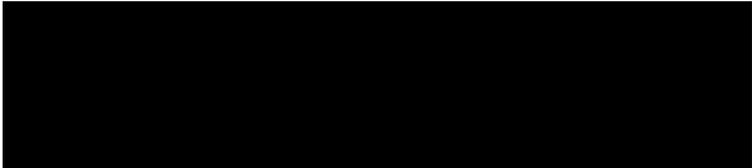
IN RE:



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 dismissed.

The applicant is a native and citizen of Mexico who, on October 9, 1997, applied for admission to the United States at the Calexico, California Port of Entry. The applicant presented a Form I-586 Border Crossing Card bearing the name "[REDACTED]" The applicant was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to obtain entry into the United States by presenting fraudulent documentation. On October 9, 1997, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). On April 14, 1999, the applicant married her spouse, [REDACTED] in Fresno, California. On February 8, 2001, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on October 11, 2001. On May 1, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On March 26, 2003, immigration officers apprehended the applicant at Citizenship and Immigration Services' (CIS) Fresno, California District Sub-office. The applicant testified that, in November 1997, she had reentered the United States without a lawful admission or parole and without permission to reapply for admission. On the same date a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), and the applicant was removed to Mexico on October 4, 2003. On October 2, 2003, the applicant filed the Form I-212.

The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), as an alien seeking admission within twenty years of a second removal after having been ordered removed under section 235(b)(1) of the Act. She 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 in the United States with her U.S. citizen spouse and children.

The director determined that the applicant was an alien who required permission to reapply for admission into the United States. The director determined that section 241(a)(5) of the Act applies in this matter and that no waiver is available for the applicant's inadmissibility under section 212(a)(9)(A)(iii) of the Act. The director then denied the Form I-212 accordingly. *See Director's Decision* dated October 20, 2004.

On appeal, counsel contends that section 241(a) of the Act does not bar the applicant from re-admission since she has the right to apply for a waiver under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9). Counsel contends that the applicant also has a waiver available to her under section 245(d)(2) of the Act, 8 U.S.C. § 1255(d)(2). *See Counsel's Brief*, dated February 8, 2005.

Section 241(a) of the Act states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

While the AAO notes counsel's assertion on appeal that the applicant's removal from the United States was unlawful because the Ninth Circuit Court of Appeals has found the reinstatement of removal orders without the right to appear before an immigration judge violates the Act, the AAO has no authority to review this decision. The only issue before the AAO is whether the applicant, who was physically removed from the United States in 1997 and 2003 and is, therefore, inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, is eligible for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

The record of proceedings reveals that at the time she filed the Form I-212, the applicant had been removed from the United States pursuant to the reinstatement of her prior removal order. There is nothing in the statute or regulations which indicates that the provision in section 241(a) of the Act barring an alien subject to reinstatement from applying for relief under the Act is permanent. A clear reading of the statutory language reveals that the bar applies when the order is reinstated. At that point, the alien cannot apply for relief under the Act and shall be removed. There is no indication in the present record that a subsequent order of reinstatement has been issued. The applicant is therefore no longer subject to the bar of relief. The director erred in finding that the applicant was ineligible to file for permission to reapply for admission through submission of a Form I-212..

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 Attorney General [now Secretary of Homeland Security] has consented to the alien's reapplying for admission.

The AAO finds that the applicant is clearly inadmissible under sections 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that [REDACTED] is a native of Mexico who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 2000. The applicant has a 13-year old daughter from a prior relationship who is a U.S. citizen by birth. The applicant and [REDACTED] have a nine-year old son, a seven-year old daughter, a five-year old son and a four-year old son who are U.S. citizens by birth. The applicant is in her 30's and [REDACTED] is in his 40's.

The AAO notes that, on appeal, counsel contends that the applicant is eligible for a waiver of her inadmissibility under section 212(a) of the Act, 8 U.S.C. § 1182(a), pursuant to section 245(d)(2) of the Act. However, section 245(d)(2) of the Act relates to aliens admitted for permanent residence on a conditional basis and not to a waiver of any ground of inadmissibility.

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

[REDACTED] in his statement, asserts that the life he has built with the applicant and their children would be shattered if the applicant is denied admission. He states that he and the applicant are dedicated to providing their children with a stable home, strong values and a good education. He states that the applicant is central to his and the children's lives and essential to their physical and emotional wellbeing. He states that he cannot express the pain and devastation he and the children would feel being separated from the applicant. He states that the applicant's absence from the United States would greatly jeopardize his job, which is the family's sole source of income, because he does not think he could successfully raise five children while attending to the house and also working a 9 to 12 hours a day. He states that the applicant manages the household and is the primary care-giver to the children. He states that if he has to move to Mexico he would have to apply for residency because he is a U.S. citizen and he would not be able to support his family there because there are no jobs for a person his age. He states that he now feels strange in Mexico and he would be unable to afford to send his children to school there. He states that to refuse the applicant admission would severely cripple both his own and his family's emotional and financial wellbeing and would be in direct opposition to the United States' commitment to family values.

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. *Supra*.

The 7th Circuit Court of Appeals 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-Munoz 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 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 favorable factors in this matter are the applicant's U.S. citizen spouse, the applicant's five U.S. citizen children, the absence of any criminal record, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's removal order; an illegal reentry into the United States after having been removed; her inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, between November 1997 and October 4, 2003, the date of her removal, and seeking readmission within ten years of her last departure from the United States; and her inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act, for attempting to obtain entry into the United States by presenting fraudulent documentation in 1997. The AAO notes that since the applicant is inadmissible pursuant to sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act she requires a waiver pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i). The record does not reflect that the applicant has filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) in order to seek a waiver pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage, the birth of her four youngest children and approval of her immigrant petition occurred after the applicant was removed from the United States. The AAO finds these factors to be "after-acquired equities" and that any favorable weight derived from the applicant's marriage, her four youngest children and approved immigrant visa petition must be accorded diminished weight. 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.

The AAO notes that the applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for entering the United States illegally after having been ordered removed.

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