



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: MAR 12 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 dismissed.

The applicant is a native and citizen of Armenia who, on February 2, 1995, was admitted to the United States as an L-2 nonimmigrant. The applicant remained in the United States past his authorized stay, which expired on December 6, 1995. On December 31, 1997, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589). On February 10, 1998, the applicant was placed into immigration proceedings. On April 20, 1999, the immigration judge denied the applicant's applications for asylum and withholding of removal and denied the applicant's application for voluntary departure because he found that the applicant presented false testimony in order to obtain an immigration benefit. The immigration judge ordered the applicant removed. The applicant failed to surrender for removal or depart from the United States. The applicant appealed to the Board of Immigration Appeals (BIA). On April 5, 2002, the applicant married his spouse, [REDACTED]. On December 9, 2002, the BIA dismissed the applicant's appeal and ordered him removed. On April 18, 2003, the BIA reissued its decision in the applicant's case because the decision had been returned as non-deliverable. The applicant failed to surrender for removal or depart from the United States. On May 16, 2003, the applicant appealed to the Ninth Circuit Court of Appeals (9th Circuit). On March 12, 2004, the applicant's U.S. citizen daughter was born. On December 13, 2004, the 9th Circuit dismissed the applicant's appeal. The applicant failed to surrender for removal or depart from the United States and has since remained in the United States. On May 30, 2003, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on March 7, 2005. On April 19, 2005, the applicant filed a motion to reopen with the BIA. On May 19, 2005, the motion to reopen was dismissed. On August 9, 2005, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 and reside with his U.S. citizen spouse and child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the Form I-212 accordingly. *See Director's Decision* dated October 6, 2005.

On appeal, the applicant contends that his wife, child and grandmother would suffer extreme hardship should he not be allowed to remain in the United States. *See Applicant's Brief*, dated October 23, 2005. In support of his contentions, the applicant submitted the referenced brief, an affidavit from his spouse, medical documentation for his grandmother and copies of previously provided documentation. 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 . . .

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 record of proceedings indicates that the applicant remained in the United States past his authorized stay as an L-2 nonimmigrant visitor and failed to comply with an order of removal. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that [REDACTED] is a native of Armenia who became a lawful permanent resident in 1992 and a naturalized U.S. citizen in 1997. The applicant and [REDACTED] have a two-year old daughter who is a U.S. citizen by birth. The record reflects that both the applicant's mother and father are natives and citizens of Armenia who became lawful permanent residents in 2003. On appeal, the applicant asserts that, under *Matter of H-R-*, 5 I&N Dec. 769 (1954), [REDACTED] the applicant's child and his grandmother would suffer extreme hardship if the applicant were denied admission to the United States. The AAO notes that *Matter of H_R* has been superseded by *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), and *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978), cited below. The applicant asserts that they would suffer extreme hardship because of the family's established significant emotional and community ties to the United States and to their other relatives who reside in the United States. [REDACTED] in her affidavit, states that she is a college graduate who wants to go to law school. She states that she would be unable to pursue her education without the applicant's assistance. The record reflects that [REDACTED] was employed at least from June 2001 until January 2003 and there is no evidence in the record to suggest that she is unable to perform work duties or daily activities due to a physical or mental illness. On appeal, the applicant asserts that his grandmother, [REDACTED] is a U.S. citizen who would suffer extreme hardship because she is elderly and suffers from various medical conditions. The applicant states that he drives his grandmother to her various doctor's appointments and supplies her groceries and medicines. In support of his contentions, the applicant submitted a medical certificate from a doctor who indicates that [REDACTED] has been his patient from January 1997 until the date on which the medical certificate was executed, July 6, 2005. The medical certificate indicates that [REDACTED] is suffering from senility, chronic fatigue, nephrosys, insomnia, vertigo, bleeding hemorrhoids, anemia, osteoporosis, osteoarthritis and needs constant supervision and care. However, there is no evidence in the record that [REDACTED] has any legal status in the United States. Additionally, the record reflects that [REDACTED] has other family members in the United States, such as the applicant's parents, who may be able to provide her with financial, physical and emotional assistance in the absence of the applicant. Finally, there is no evidence in the record that [REDACTED] is dependent upon the applicant either financially or physically.

In *Matter of Tin, Id.*, 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, further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Supra* 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 9th 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 applicant contends that the director erred in finding that the applicant had resided unlawfully in the United States for an extended period of time and asserts that he has resided in the United States lawfully since December 6, 1995. The applicant asserts that to retroactively find him unlawfully present more than ten years after his entry is unfair. The applicant asserts that the director played with the truth by finding his lengthy presence in the United States after his removal order as a negative factor. The applicant asserts that pursuant to section 212(a)(9)(B)(iii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii)(II), asylum seekers are permitted to remain in the United States until final adjudication of their application and any pending appeals. The AAO finds the applicant's assertions unpersuasive. The applicant remained in the United States unlawfully after December 6, 1995 and failed to file the Form I-589 until December 31, 1997. The record does not contain any

evidence that the applicant applied for or was granted a stay of removal while his appeals were pending. Moreover, the applicant exhausted his appeals to the 9th Circuit on December 13, 2004, the date on which the 9th Circuit dismissed the applicant's appeal. The applicant cannot attempt to extend what he perceives to be his lawful presence in the United States by filing a motion to reopen. Furthermore, section 212(a)(9)(B)(iii)(II) of the Act provides an exception to accumulation of unlawful presence only when the applicant has filed a bona fide application for asylum and the applicant has not been employed without authorization during the pendency of the asylum application. As discussed above, the immigration judge determined that the applicant had provided false testimony in regard to obtaining an immigration benefit, specifically his asylum application. As such, the applicant's asylum application was not bona fide. Furthermore, the record reflects that the applicant has been employed in the United States as an auto mechanic since April 1997. The record reflects that the applicant was initially issued an employment authorization card from October 12, 1999 until October 11, 2000, and was only issued one extension of his employment authorization from June 12, 2001 until June 11, 2002. As such, the applicant has also been employed without employment authorization prior to, during and after the pendency of his asylum application.

The applicant asserts that the director erroneously applied *Carnalla-Munoz v.INS, Supra*, as a false precedent to deny the application inappropriately, rhetorically asking why the 9th Circuit would not allow equities to be gained during the pendency of an appeal to the 9th Circuit. The AAO finds the applicant's assertion unpersuasive because the cited case is 9th Circuit case law and the general principal of "after-acquired equities" has been established throughout various Circuit Courts. Finally, the applicant asserts that the director incorrectly relied on *Matter of Lee, Supra*, in denying his application for permission to reapply for admission because it involved an applicant who lacked good moral character and made excessive attempts to reenter the United States illegally after having been previously excluded. The AAO also finds the applicant's final assertion unpersuasive. While *Matter of Lee* does not reflect the applicant's exact situation, the director correctly cites this precedent, because it offers incite into the weighing of discretionary factors. Moreover, the AAO finds that, since the immigration judge found the applicant to have provided false testimony in order to obtain an immigration benefit, the applicant does lack good moral character, despite an otherwise clear criminal background.

The favorable factors in this matter are the applicant's U.S. citizen spouse, U.S. citizen child, lawful permanent resident parents and the approved Form I-130.

The AAO finds that the unfavorable factors in this case include the applicant's extended unauthorized residence and employment in the United States, false testimony in order to obtain immigration benefits, and non-compliance with an order of removal.

The applicant in the instant case has multiple immigration violations and has provided false testimony in order to obtain immigration benefits. The applicant's actions in this matter cannot be condoned. Moreover, the AAO finds that the applicant's marriage, the birth of his U.S. citizen child, the adjustment of status of his parents to lawful permanent resident status and the approval of the Form I-130 benefiting him occurred after the applicant was placed into immigration proceedings. Accordingly, these favorable factors are "after-acquired equities" and the AAO accords them 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 may also be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to obtain immigration benefits under the Act by fraud or willful misrepresentation and may need to file an Application for Waiver of Grounds of Inadmissibility (Form I-601).

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