

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

H14

FILE:

Office: PHOENIX, AZ

Date: **MAY 11 2007**

IN RE:

PETITION: 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 PETITIONER:

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 District Director, Phoenix, Arizona 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 El Salvador who entered the United States without inspection on or about January 15, 1985. *Order to Show Cause*, dated March 11, 1985. On March 11, 1985, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and an Order to Show Cause (OSC) for a hearing before an immigration judge was issued. *Form I-213, Record of Deportable Alien; Order to Show Cause*, dated March 11, 1985. On March 13, 1985, an immigration judge found the applicant deportable, pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection and ordered him deported. *Decision of the Immigration Judge*, dated March 13, 1985. The applicant was deported on March 27, 1985. *Warrant of Deportation*, dated March 27, 1985. The record reflects that the applicant admitted that he re-entered the United States in 1986 without permission and continued this practice into 1998. *Form I-485 and Processing Worksheet*. The applicant last entered the United States without inspection in 1998. *Processing Worksheet*. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his naturalized U.S. citizen spouse. On February 20, 2004, he submitted an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. 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 remain in the United States and reside with his U.S. citizen spouse and their three U.S. citizen children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *District Director's Decision*, dated May 11, 2006.

On appeal, counsel states that the District Director erred in finding that the applicant does not merit a favorable exercise of discretion. *Form I-290B; Attorney's brief*.

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

(A) Certain alien 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The record of proceedings reveals that on December 15, 1986, the applicant was convicted of Assault, a class 1 misdemeanor, for which he received a sentence of 30 days in jail. *See Record of Conviction, Superior Court of Arizona, Maricopa County*, dated December 15, 1986. The record also indicates that the applicant was arrested for Trespassing on May 9, 1988, but that no complaint was filed with the court. *FBI Identification Record*, dated May 21, 2004.

The court held in *Garcia-Lopez 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 now naturalized U.S. citizen spouse on October 3, 1986, approximately one year and a half after he was placed in deportation proceedings. While the AAO notes that the applicant's spouse naturalized in 2002 and the record does not state her immigration status at the time she married the applicant, she nevertheless should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of his being removed. The applicant now seeks relief based on this after-acquired equity. Therefore, hardship to the applicant's spouse will be accorded appropriate weight.

The applicant has three U.S. citizen children ages 11, 15, and 16 whom he supports financially and emotionally. *See tax statements; letters from the applicant's U.S. citizen children*, dated March 24, 2006, March 26, 2006, and March 28, 2006. The applicant's U.S. citizen spouse has uncontrolled diabetes and hypercholesterolemia that necessitate regular doctor's appointments and laboratory work. *Statement from [REDACTED] M.D., [REDACTED] Surprise, Arizona*, dated March 31, 2006. Although the applicant's spouse works as a nanny for a private family (*See employment letter for the applicant's spouse*, dated March 27, 2006), the applicant's family's health insurance is provided through the applicant's employer. *Statement from [REDACTED], [REDACTED]*, dated March 10, 2006. *See also letter from [REDACTED] of Arizona*, dated March 9, 2005. If the applicant were to return to El Salvador, his family would no longer have the medical coverage that they need. *Statement from [REDACTED], [REDACTED]*, dated March 10, 2006.

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 that 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 children, 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.*

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 children; an approved Form I-130; the prospect of hardship to his family, including the effect of his removal on the ability of his wife to afford adequate medical treatment; numerous letters of support from many family members and friends attesting to the positive character of the applicant; letters of support from the applicant's employer; and the fact that more than 22 years have passed since the applicant was deported. The AAO also notes that more than 20 years have passed since the applicant's criminal conviction.

The AAO finds the unfavorable factors in this case to include the applicant's initial entry without inspection, his re-entries subsequent to his 1985 deportation, his periods of unauthorized presence and employment, and his 1986 criminal conviction.

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 will be approved.

ORDER: The appeal is sustained and the application is approved.