



U.S. Citizenship
and Immigration
Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: NOV 05 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 China who, on April 13, 1993, was placed into immigration proceedings under the name "██████████" and A-number "██████████". The applicant expressed a fear of returning to China. While applicant was informed that if he was unable to return to his home country he could apply for relief before the immigration judge, he filed an Application for Asylum or Withholding of Removal (Form I-589) with the immigration judge, the applicant, on June 3, 1993, filed a Form I-589 with the local office under the name "██████████" and was assigned A-number "██████████". On January 13, 1994, the immigration judge ordered the applicant removed *in absentia* under the A-number "██████████". On February 12, 1994, a warrant for the applicant's removal was issued. On November 25, 1996, the applicant's Form I-589 was referred to the immigration judge and the applicant was placed into proceedings under the name "██████████" and A-number "██████████". On November 24, 1997, the applicant married his spouse, ██████████. On December 9, 1997, Ms. ██████████ filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on January 13, 1998. On January 13, 1998, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485), based on the approved Form I-130. On October 20, 1999, the immigration judge terminated the applicant's proceedings under the name "██████████" and A-number "██████████" so that he could pursue adjustment of status. On April 25, 2003, the applicant's Form I-485 was denied. On May 2, 2003, immigration officers apprehended the applicant after a fingerprint check revealed the prior removal order under the name "██████████" and A-number "██████████". On May 27, 2003, the 1994 warrant was executed and the applicant was removed from the United States and returned to China, where he has since resided. On November 17, 2003, 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) 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 reside in the United States with his U.S. citizen spouse and son.

The director determined that the unfavorable factors outweighed the favorable factors in the applicant's case and denied the Form I-212 accordingly. *See Director's Decision* dated July 7, 2006.

On appeal, counsel contends that pertinent factors exist that should have compelled the director to grant the applicant's application for permission to reapply for admission. *See Counsel's Brief*, dated August 8, 2006. In support of his contentions, counsel submits the referenced brief, affidavits, and medical documentation. The entire record was reviewed in rendering a decision in this case.

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 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 reflects that the applicant was removed from the United States under a final order of removal. 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 Ms. [REDACTED] is a native of China who became a lawful permanent resident in 1992 and a naturalized citizen in 1997. The applicant and Ms. [REDACTED] have an eight-year old son who is a U.S. citizen by birth. The applicant and Ms. [REDACTED] are in their 30's.

Counsel, on appeal, asserts that Ms. [REDACTED] suffers from emotional problems as a result of the applicant's removal that have manifested in physical symptoms and affect her ability to care for her son. Counsel asserts that two tumors have been located in Ms. [REDACTED] breast and that, even though they have been determined to be benign, her doctor has recommended their removal through surgery. Counsel asserts that Ms. [REDACTED] fears that the tumors may become cancerous. Counsel asserts that Ms. [REDACTED]'s psychiatrist has diagnosed her with major depression, recurrent, moderate, and has prescribed her five psychotropic medications. Counsel asserts that the diminished value that is accorded "after-acquired equities" is offset by the fact that Ms. [REDACTED] physical and emotional diagnoses affect her ability to care for her son and the fact that she did not know her husband had been previously ordered removed because he was ordered removed *in absentia*. Counsel asserts that, although the applicant entered the United States illegally he has never violated the law in or outside the United States.

Ms. [REDACTED] in her statement, indicates that her husband's removal left her in extreme conditions and her life has taken a severe and drastic turn for the worse. She states that not only does she miss her husband but her son is fatherless. She states that the applicant was the main financial support for the family and now it is hard

for her to work and care for her son. She states that the applicant is a great father and her son suffers emotionally because he has been separated from his father for so long. She states that she suffers from neurasthenia which makes it difficult to sleep and she is often ill. She states that she feels weak and her condition grows worse with time. She states that she has been treated by a psychiatrist for three years for her emotional problems and outbursts, and that she feels withdrawn and depressed. She states that she suffers physical pain. She states that she has back pain, asthma, hay fever and arthritis. She states that it is difficult dealing with all of these problems while caring for a son and working. She states that she has no one to talk to about her problems or to ask for help. She states that she is aware that the tumors in her breast must be removed but worries that if something happens to her, her son would be placed in foster care. She states that she cannot sleep at night and awakes in a cold sweat.

A letter, prepared by [REDACTED] a board certified psychiatrist, states that Ms. [REDACTED] started treatment in 2003 for depression and emotional instability. It states that her condition was precipitated by the applicant's apprehension by immigration authorities and became worse after he had been removed from the United States. It explains that Ms. [REDACTED] feels hopeless about a family reunion, that she cared for her son while working in a restaurant and developed insomnia. The doctor states that he had to prescribe five psychotropic medications in order to permit Ms. [REDACTED] five hours of sleep per night. The letter indicates that, at the time she was last seen, Ms. [REDACTED] was withdrawn and depressed, expressing passive suicidal thoughts and had not slept for one week. The doctor provided supportive psychotherapy and adjusted her medications: risperdal, effexor, ambient, wellbutrin and ativan. The letter indicates that the doctor discussed hospitalization with Ms. [REDACTED] and diagnosed her with major depression, recurrent, moderate.

A letter, prepared by [REDACTED] a doctor with CP Advanced Imaging, states that a bilateral breast ultrasound revealed that Ms. [REDACTED] had two lesions in her right breast, one of which had increased in size in the past two years. The letter states that further evaluation with a mammogram and ultrasound guided biopsy is recommended but that the lesions demonstrate sonographic characteristics suggestive of a benign process, such as fibroadenoma.

A letter, prepared by [REDACTED], a doctor in Brooklyn, New York, indicates that Ms. [REDACTED] is under his care for asthma, hay fever, arthritis and back pain. The letter states that Ms. [REDACTED] is on active treatment and it is important for her to be seen regularly to control her asthma.

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 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 these precedent legal decisions to 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 the favorable factors in the present case to include the applicant's U.S. citizen spouse; U.S. citizen son; the general hardship to his family members; the psychological hardship to his spouse resulting from her major depression combined with her other medical conditions; the absence of any criminal record and his approved immigrant petition for alien relative. The AAO notes, however, that the applicant's marriage, the birth of his son and the approval of the immigrant visa petition benefiting him occurred after he was placed into proceedings. Accordingly, these factors are "after-acquired equities" and the AAO will accord them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States, providing a false name to immigration officers at the time of his original apprehension, his failure to attend an immigration hearing, his failure to comply with an order of removal until 2003 and his extended unlawful presence and employment in the United States.

The applicant's original illegal entry into the United States, the misrepresentation of his name to immigration officers at the time of his original apprehension, his failure to attend an immigration hearing, his failure to comply with an order of removal until 2003 and his extended unlawful presence and employment in the United States cannot be condoned. However, 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application approved.