



U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CHICAGO, IL

Date:

SEP 07 2007

IN RE:

[REDACTED]

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:

[REDACTED]

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 District Director, Chicago, Illinois denied the application and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the order dismissing the appeal will be affirmed and the application will be denied.

The applicant is a citizen of Canada who, on November 10, 1994, filed an Application for Asylum or Withholding of Removal (Form I-589), indicating that he was born in Honduras and feared return to that country. On January 27, 1995, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into proceedings. On January 4, 1996, the immigration judge ordered the applicant removed *in absentia*. On February 27, 1996, a warrant for the applicant's removal was issued. On September 2, 1999, the applicant married his spouse [REDACTED] in Skokie, Illinois. On January 8, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), in conjunction with a Petition for Alien Relative (Form I-130) filed by [REDACTED]. On December 10, 2001, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On November 22, 2002, the Form I-130 was approved. The applicant is, therefore, inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien ordered removed. 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.

The district director determined that the applicant was inadmissible pursuant to section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), a ground of inadmissibility for which there is no waiver. The district director determined that no purpose would be served in adjudicating the Form I-212 and denied the Form I-212 accordingly. *See District Director's Decision* dated February 10, 2003.

On September 17, 2004, the AAO summarily dismissed the applicants appeal because the applicant had failed to file additional evidence that would identify any errors in the district director's decision. *Decision of AAO*, dated September 17, 2004.

On motion, counsel contends that a brief and additional evidence in support of the appeal was filed with the AAO on April 13, 2004. Counsel contends that the district director erred in finding the applicant inadmissible pursuant to section 212(a)(6)(B) of the Act and that the applicant should be granted permission to reapply for admission. *See Counsel's Motion to Reopen and Brief in Support of Appeal*, submitted October 20, 2004 and April 18, 2004. In support of his contentions, counsel submits the referenced briefs, proof of the filing the brief and additional documentation and copies of the documentation provided on appeal. 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 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 Secretary has consented to the alien's reapplying for admission.

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

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] do not have any children together. The applicant and [REDACTED] are in their 30's.

Counsel, in the brief supporting the appeal (Appeal Brief), asserts that the district director erred in finding the applicant inadmissible pursuant to section 212(a)(6)(B) of the Act because the applicant was placed into proceedings prior to April 1, 1997, the date on which this section of the Act was enacted. The AAO finds that the June 17, 1997, Memorandum, "Additional Guidance on Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)," by [REDACTED] Acting Executive Associate Commissioner (Memo) referred to by counsel, made clear that an alien placed into removal proceedings prior to April 1, 1997, would not be considered inadmissible under section 212(a)(6)(B) of the Act for failure to attend the removal hearing. The AAO therefore finds that the district director erred in finding the applicant inadmissible pursuant to section 212(a)(6)(B) of the Act.

Counsel asserts that the applicant's failure to attend his removal hearing and the subsequent removal order are ameliorated by the applicant's reliance upon his prior counsel's advice. Counsel asserts, and the applicant states in his affidavits, that the applicant's prior counsel informed him that he did not need to attend the immigration hearing if he wished to withdraw the asylum application because the immigration judge would terminate proceedings and not order him removed. Counsel and the applicant assert that the applicant was unaware that he had been ordered removed until he retained his current counsel. Counsel and the applicant assert that the applicant has not had any contact with his prior counsel since he departed the United States in 1996. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any

violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record does not contain evidence to establish that the applicant's prior counsel has been given an opportunity to respond to the applicant's allegations or whether the applicant has filed a complaint with the appropriate disciplinary authorities. Moreover, the record reflects that the Order to Show Cause and Notice of Hearing (Form I-221) notified the applicant in both English and Spanish that failure to attend a hearing before an immigration judge would result in an order of removal. Furthermore, the record reflects that documentation informing the applicant of his removal order was mailed to the address at which the applicant resided until March 1996. See *Warrant of Removal (Form I-205)* and *Biographical Information Sheet (Form G-325)*.

Counsel contends that the applicant did not intend to abscond and was legally admitted to the United States each time he entered thereafter. However, while the applicant's removal order and all prior immigration documentation identify the applicant as a native and citizen of Honduras, the record demonstrates that, in January 1996, the applicant obtained a Costa Rican passport and thereafter obtained U.S. visas and entry into the United States as a Costa Rican citizen born in Costa Rica. In September 2000, after he became a Canadian citizen, the applicant obtained a Canadian passport indicating that his place of birth was Costa Rica. The record, however, does not establish that the applicant misrepresented his citizenship on obtaining a visa or entry into the United States because it is unclear as to whether the applicant's correct place of birth is Honduras or Costa Rica. Nevertheless, the AAO notes that these facts do not reflect the actions of an individual legitimately seeking to gain entry or status in the United States.

The record does, however, provide sufficient evidence to demonstrate that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) as an alien who has entered the United States by misrepresenting a material fact or by fraud. On October 5, 2000, when the applicant entered the United States as a nonimmigrant visitor, he was, instead, an intending immigrant.

With regard to immigrant intent on the part of nonimmigrant, the Department of State developed the 30/60-day rule which applies when, "an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by ...taking up permanent residence." *Id.* at § 40.63 N4.7-1(3). Under this rule, "when violative conduct occurs more than 60 days after entry into the United States, the State Department does not consider such conduct to constitute a basis for an INA 212(a)(6)(C)(i) ineligibility." *Id.* Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive.

The applicant entered the United States on October 5, 2000, as a nonimmigrant. While the Form I-130 and Form I-485 were not officially filed until January 8, 2001, the Form G-325 accompanying the Form I-485 was signed and dated by the applicant on November 15, 2000, 41 days following his nonimmigrant admission. In that the completion of the Form G-325 indicates an immigrant intent on the part of the applicant within 60 days of his nonimmigrant admission, the AAO finds the evidence of record to establish that the applicant was an intending immigrant when he entered the United States on October 5, 2000. The AAO also notes that the applicant indicates on the Form G-325 that he began residing in Champaign, Illinois in March 2000, seven months prior to his October nonimmigrant admission. Therefore, the record establishes that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

Counsel asserts that the applicant and [REDACTED] have been married for over 3½ years and share an extremely close relationship. He asserts that a separation resulting from the applicant's inability to adjust his status

would be emotionally and psychologically devastating to them both. He asserts that a move to Canada would result in [REDACTED]'s inability to finish her doctoral program as scheduled in 2004, which would result in adverse professional consequences. He asserts that [REDACTED]'s absence from the University of Illinois would greatly affect her academic department because she has significant teaching, editing, and administrative responsibilities that would be extremely difficult to transfer to another graduate student. He asserts that relocation to Canada would be intolerably painful for [REDACTED]s and the applicant because they both have an unusually close relationship to [REDACTED] father, who is in his 70's and resides alone in Illinois. He asserts that the applicant and [REDACTED] need to be geographically close to [REDACTED]'s father to be able to support him as his need for support grows with age. He asserts that the applicant is extremely involved in the community where he volunteers as a tutor and a D.A.R.E. program counselor. He asserts that the applicant is taking courses towards a bachelor's degree and relocation to Canada would interrupt these studies. He asserts that the applicant and [REDACTED] have purchased their first house in Champaign, Illinois and it holds a great deal of sentimental value for them.

[REDACTED] in her affidavit, states that she wants to be close to her father who resides alone in Chicago, Illinois and to whom she is very close. She states that a move to Canada would be a tremendous hardship to her because she would have to abandon her doctoral program, which would interrupt several years of effort and result in long-term adverse professional consequences. She states that the University of Illinois would be greatly affected if they lost her significant teaching, editing and administrative skills which would be difficult to transfer to another graduate student. She states it would be intolerably painful to be separated from her father because of their unusually close relationship. She states that her father has a business, which ties him to the Chicago, Illinois area and that she is very concerned that if she relocated she would not be close enough to him to provide him with support in the future. She states that she and the applicant still own their very first house which holds a great deal of sentimental value that would be lost if she relocated to Canada.

The applicant, in his affidavit, states that he has become involved in the life of his community and participates in several community activities. He states that he participates in D.A.R.E. counseling, teaching and free-lance tutoring. He states his bachelor studies would be interrupted. He states that he has a very close relationship with [REDACTED] father and would suffer the loss of this relationship. He states that he and [REDACTED] still own their very first house which holds a great deal of sentimental value that would be lost if he relocated to Canada.

Letters of recommendation from the City of Champaign and employers indicate that the applicant has been actively involved in the community, volunteers with D.A.R.E. and that his language skills provide the community with an opportunity to learn about the Spanish language and Latin Culture.

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. *Supra*.

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 favorable factors in this matter are the applicant's U.S. citizen spouse, the absence of any criminal record, his involvement in his community, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's failure to comply with a removal order; the inconsistent documentation regarding his previous nationality and citizenship which indicates either that the applicant in 1994 filed a fraudulent asylum claim, or in 1996 sought to conceal his true identity and nationality; and his nonimmigrant admission to the United States while an intending immigrant. The AAO notes that since the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act he requires a waiver pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). The record reflects that the applicant has not filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) in order to seek a waiver pursuant to section 212(i) of the Act.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage, his involvement in his community and approval of his immigrant petition occurred after the applicant was placed into proceedings and ordered removed and are "after-acquired equities." Any favorable weight derived from them must, therefore, be accorded diminished weight. In that 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 applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted.

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. The applicant has not met that burden. Accordingly, the AAO's decision to dismiss the appeal will be affirmed.

ORDER: The decision to dismiss the appeal is affirmed.