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U.S. Citizenship
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FILE:

Office: PHOENIX, ARIZONA

Date:

SEP 18 2007

IN RE:

Applicant:

APPLICATION:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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 application for permission to reapply for admission after removal was denied by the Acting District Director, Phoenix, Arizona, and 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 entered the United States on December 19, 1969, on a IR-1 immigrant visa. On January 9, 1984, an immigration judge ordered the applicant deported from the United States, based on a misrepresentation on the applicant's immigrant visa application. On the same day, the applicant was deported from the United States. Sometime before October 12, 1986, the date the applicant was arrested for shoplifting, the applicant reentered the United States without inspection. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He now 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 with his naturalized United States citizen wife and seven adult children.

The Acting District Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered removed under section 240 or any other provision of law and that the unfavorable factors in the applicant's case outweighed the favorable factors. The Acting District Director denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Acting District Director's Decision*, dated February 3, 2006.

Section 212(a)(9). Aliens previously removed.-

(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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant, through counsel, asserts that the decision by the Acting District Director was in error. *Brief in Support of Appeal*, dated March 8, 2006. Counsel contends that the applicant did not have an opportunity to rebut the 14 allegations discussed in the Acting District Director's decision, and a Notice of Intent to Deny (NOID) should have been issued to the applicant so that the applicant could respond. *Id.* The AAO notes that under 8 C.F.R. § 212.2(h), "[i]f the application is denied, the applicant must be notified of the reasons for the denial and of his or her right to appeal." There is no requirement that the District Director issue a NOID before denying a Form I-212. Counsel submitted additional evidence and another brief, dated April 17, 2007, which attempts to rebut the Acting District Director's allegations. Counsel contends that the "District Director did not provide [the applicant] with an opportunity to file Forms I-601 and I-212 with his application for adjustment of status." *Memorandum in Support of Appeal*, page 2, dated April 17, 2007. The AAO notes that the only application before the AAO is the Form I-212, filed on September 13, 1997, and since that application was never adjudicated, the AAO will not address the need for an Application for Waiver of Grounds of Excludability (Form I-601). Additionally, the applicant could have filed a Form I-601 concurrently with his Application to Register Permanent Residence or Adjust Status (Form I-485). The AAO notes that a Form I-485 was filed on January 3, 2002, but there is no indication that a Form I-601 was filed. Counsel claims that the applicant is a law abiding individual; however, the AAO notes that the applicant has a criminal record and a history of violating United States immigration laws, including fraudulently acquiring a United States birth certificate for his Mexican citizen daughter, obtaining an immigrant visa by failing to disclose his first marriage, failing to appear at an immigration hearing, self-deporting from the United States after his permanent residency status was terminated, reentering the United States without inspection, and being present in the United States without admission. Counsel states the applicant "remembers the immigration officer telling him that after five years [after his deportation], he could return to the United States. [The applicant] returned to the United States during those five years but did not live in the United States until late 1994." *Id.* at 3-4. The AAO notes that even if the applicant did not reside in the United States until 1994, he was aware that returning to the United States before January 9, 1989 would be in violation of the United States immigration laws, and he still reentered the United States sometime before 1989. Counsel states the applicant has "lived the majority of his life in the United States;" however, the AAO notes that the majority of the time that the applicant has resided in the United States, he has not had authorization and that is an unfavorable factor. *Id.* at 7. Counsel states the applicant has no family in Mexico and because of his health conditions, "he will die in Mexico due to the depression and lack of services available in Mexico." *Id.* The AAO notes that the applicant "underwent coronary atherectomy on 6/19/96." *Letter from [REDACTED] D.O.*, dated July 29, 1996. [REDACTED] states the applicant "needs to be monitored on a regular basis with office visits." *Id.* The AAO notes that the applicant failed to establish that he could not receive medical treatment for his health condition in Mexico. Counsel states the applicant's wife

and children will experience extreme hardship if the applicant is removed from the United States. *Memorandum in Support of Appeal*, pages 7-10, *supra*. 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 which 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.

The record of proceedings reveals that on January 9, 1984, an immigration judge ordered the applicant deported from the United States. On the same day, the applicant was deported from the United States. Sometime before October 12, 1986, the applicant reentered the United States without inspection. Based on the applicant's previous order of deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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.*

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an Order to Show Cause had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980), the Ninth Circuit Court of Appeals (Ninth Circuit) reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds). In *Wang*, the alien sought discretionary relief and a finding of extreme hardship through a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang*, that "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country."

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c) waiver of deportation discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

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 hardship to a spouse and for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's family ties to United States citizens, his wife and children, general hardship they may experience, and the approval of a petition for alien relative. The AAO notes that the applicant's marriage to his wife occurred after his deportation and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States subsequent to his January 9, 1984 deportation, fraudulently acquiring a United States birth certificate for his Mexican citizen daughter, failing to disclose his previous marriage on his visa application, his criminal record for shoplifting, and periods of unauthorized presence and employment.

The applicant's actions in this matter cannot be condoned. He has exhibited an extensive disregard for United States immigration laws. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

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.