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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H4

[REDACTED]

FILE:

Office: CHICAGO, IL

Date:

SEP 20 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 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 Poland who, on June 11, 1990, was placed into proceedings after he had entered the United States without inspection. On July 30, 1990, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589) before the immigration court. On September 19, 1990, the immigration judge denied the applicant's applications for asylum and withholding and granted him voluntary departure until October 19, 1990. The applicant appealed to the Board of Immigration Appeals (BIA). On May 20, 1991, the BIA dismissed the applicant's appeal and granted him 30 days of voluntary departure. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On January 6, 1992, a warrant for the applicant's removal was issued. On May 11, 1993, the applicant was removed from the United States and returned to Poland. The applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to October 23, 1993, the date on which he was arrested for public indecency in Chicago, Illinois. On October 15, 1997, the applicant married his spouse, [REDACTED], in Chicago, Illinois. On November 14, 1997, [REDACTED] a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on March 19, 1998. On April 15, 1998, the applicant filed the Form I-212. On June 1, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130.

The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien seeking admission after having been 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 and his U.S. citizen and lawful permanent resident children.

The district director determined that there was no basis for the applicant's Form I-212 because he is inadmissible as an alien previously removed and as an alien who reentered the United States illegally after having been removed. The district director determined that the Form I-212 should be filed abroad prior to entering the United States and then denied the Form I-212 accordingly. *See District Director's Decision* dated July 6, 2005.

On appeal, counsel contends that section 241(a) of the Act does not bar the applicant from re-admission since he has the right to apply for a waiver under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) for *nunc pro tunc* grant of permission to reapply for admission to cure his illegal 1993 reentry. Counsel contends that the Form I-212 does not need to be filed from abroad prior to reentry. Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated August 5, 2005. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 241(a) of the Act states in pertinent part:

- (5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is

reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time he filed the Form I-212 or that the district director reinstated the prior removal order after he denied the Form I-212. Accordingly, the applicant, although he was previously removed from the United States and reentered illegally is not prevented from benefiting from the Form I-212. The AAO also finds that the district director erred in finding that the applicant is required to remain outside the United States prior to filing the Form I-212. The regulation at 8 C.F.R. § 212.2(e) provides that an applicant for adjustment of status may file an application for permission to reapply for admission with the district director having jurisdiction over the place where the applicant resides in the United States.

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 Attorney General [now Secretary of Homeland Security] has consented to the alien's reapplying for admission.

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 [REDACTED] is a native of Poland who became a lawful permanent resident in 1991 and a naturalized U.S. citizen in 1997. The applicant and [REDACTED] have a twelve-year old daughter and a seven-year old daughter who are both U.S. citizens by birth. The applicant has a 23-year old son from a prior

marriage who is a native of Poland who became a lawful permanent resident in 2000 and a naturalized U.S. citizen in 2007. The applicant has a 22-year old son from a prior marriage who is a native and citizen of Poland who became a lawful permanent resident in 2000. The applicant is in his 40's and [REDACTED] is in her 30's.

On appeal, counsel asserts that the applicant has a U.S. citizen spouse and four children who are wholly dependent upon him. She asserts that the applicant is an entrepreneur who has paid taxes during the years he has resided in the United States. She asserts that separating the applicant from his family would cause them hardship because they have no means of sustaining themselves. She asserts that the applicant's family could not relocate to Poland because of language and cultural barriers in Poland and the accessibility to health care and educational opportunities that are available to them in the United States.

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 favorable factors in this matter are the applicant's U.S. citizen spouse, U.S. citizen children, lawful permanent resident child, his payment of U.S. taxes and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; his failure to comply with an order of voluntary departure; his failure to comply with an order of removal until May 11, 1993; his illegal reentry into the United States after having been removed; and his extended unlawful presence and employment in the United States.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage, birth of his U.S. citizen children, his adult children's adjustment of status to that of lawful permanent resident and naturalization, his payment of U.S. taxes and the approval of the immigrant visa petition benefiting him occurred after the applicant was placed into proceedings and removed from the United States. The AAO finds these favorable factors to be "after-acquired equities" and therefore 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.

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 failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The decision to dismiss the appeal is affirmed.