

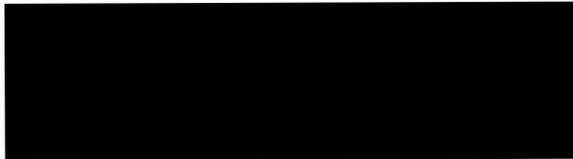
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Hu



FILE:



Office: CHICAGO, ILLINOIS
[consolidated therein]

Date:

APR 10 2008

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The decisions of the Chicago District Director and Field Office Director on the applicant's appeal will be withdrawn. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who initially entered the United States without inspection on June 7, 1991. On the same day, an Order to Show Cause and Notice of Hearing (OSC) was issued against the applicant. On June 24, 1991, an immigration judge ordered the applicant deported from the United States. On the same day, a Warrant of Deportation (Form I-205) was issued. On July 3, 1991, the applicant was deported from the United States. On September 3, 1994, the applicant reentered the United States without inspection. On June 23, 1997, the applicant married [REDACTED], a naturalized United States citizen, in Illinois. On September 4, 1997, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On October 4, 1997, the applicant's daughter, [REDACTED], was born. On September 4, 2003, the applicant and his wife adopted his wife's niece. On September 24, 2003, the applicant's Form I-130 was approved. On February 10, 2005, the applicant's Form I-485 was denied. On March 28, 2005, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On the same day, the applicant filed a motion to reopen the Acting District Director's denial of the Form I-485. On March 1, 2006, the Acting District Director denied the applicant's Form I-212 and the motion to reopen. On April 3, 2006, the applicant, through counsel, filed an appeal of the denial of his Form I-212. On May 2, 2006, the AAO received the applicant's appeal. On December 12, 2006, the District Director, Chicago, Illinois, considering the applicant's appeal as a motion to reopen, denied the applicant's appeal. On April 10, 2007, the Field Office Director, Chicago, Illinois, again treated the applicant's appeal as a motion to reopen, and again denied the applicant's appeal. The applicant is inadmissible to the United States under sections 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), 212(a)(6)(A) of the Act, 8 U.S.C. § 1182(a)(6)(A), and 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C). 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 United States citizen spouse and children.

The AAO finds that the District Director and Field Office Director in Chicago, Illinois, lacked jurisdiction to deny the applicant's appeal. The applicant's appeal was forwarded to the AAO on May 2, 2006; therefore, the AAO has jurisdiction to enter a decision on the applicant's appeal, and the District Director and Field Office Director's decisions on the applicant's appeal will be withdrawn.

On the denial of the applicant's Form I-212, the Acting District Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for being ordered removed under section 240 or any other provision of law, and he denied the applicant's Form I-212 accordingly. *Acting District Director's Decision*, dated March 1, 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 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 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.

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.- Any alien who-

- (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
- (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

Section 212(a)(6). Illegal entrants and immigration violators.-

(A) Aliens present without admission or parole.-

(i) In general.- An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the [Secretary], is inadmissible.

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, contends that the Acting District Director's decision denying the applicant's Form I-212 "shows clear error, is contrary to the evidence presented, and an abuse of discretion." *Form I-290B*, filed April 3, 2006. Counsel asserts that the Acting District Director incorrectly found that the applicant's reentry without inspection on September 3, 1994, was "a 'blatant disregard' for the law, since the return resulted in a myriad of other illegal consequences, such as living without permission and working without permission.... If this were the valid manner of addressing an I-212 under 8 C.F.R. 212.2, then no I-212 could ever be granted. Every such application starts from the fact that the applicant has returned without permission, to live here without permission, and will also most likely have worked without permission." *Appeal Brief attached to Form I-290B*, filed April 3, 2006.

The AAO notes that Form I-212 is filed when an alien is requesting permission to return to the United States after a deportation or removal from the United States; therefore, not all aliens have reentered the United States without permission nor are they residing and working in the United States without permission. The AAO notes that the applicant has been residing and working in the United States for many years without authorization and that is an unfavorable factor. Additionally, the applicant failed to abide by an immigration judge's order which is another unfavorable factor. The applicant's wife states that she "had to stop working to concentrate on [nursing] school, and [the applicant's] income is the only one coming into [their] household." *Affidavit of [REDACTED]*, dated March 28, 2005. However, the AAO notes that the applicant's wife was graduating from nursing school seven weeks from the date of her affidavit, and it has not been established that the applicant is the primary wage earner in the household. Additionally, based on the applicant and his wife's 2004 federal income taxes, the applicant's wife's income was \$26,157.00 while the applicant's income was \$31,242.82. The applicant states his "life in the United States revolves around [his] family and [his] work.... Since [he] married Maria in June of 1997 [his] life has completely changed for the better. [He] want[s] her and [their] children to succeed in life and that is everything that [he] work[s] for." *Affidavit of the applicant*, dated March 28, 2005.

The AAO notes that it has not been established that the applicant lacks transferable skills that would aid him in obtaining a job in El Salvador. Additionally, regarding the hardship the applicant's wife and children may face, the AAO notes that 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 June 24, 1991, an immigration judge ordered the applicant deported from the United States. On the same day, a Form I-205 was issued, and on July 3, 1991, the applicant was

deported from the United States. On September 3, 1994, 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 BIA denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board of Immigration Appeals (BIA) denial rested on discretionary grounds, and that the BIA 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 BIA 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 OSC 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 BIA’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, letters of recommendation, and the approval of a petition for alien relative. The AAO notes that the applicant’s marriage to his wife occurred after his order of 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 initial entry without inspection, his illegal reentry into the United States subsequent to his July 3, 1991 deportation, his 2001 arrest for DUI, and his periods of unauthorized presence and employment.

The applicant’s actions in this matter cannot be condoned. 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.