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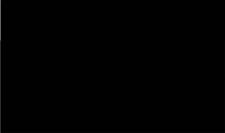
U.S. Citizenship and Immigration Services

HL4

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FILE:



Office: LOS ANGELES, CALIFORNIA
[consolidated therein]

Date: FEB 05 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)(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 application for permission to reapply for admission after removal was denied by the District Director, Los Angeles, California, and 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 Mexico who initially entered the United States without inspection in May 1990. On February 7, 1994, an immigration judge granted the applicant voluntary departure. On March 9, 1994, the applicant filed an appeal of the immigration judge's decision with the Board of Immigration Appeals (BIA). On August 26, 1994, the BIA dismissed the applicant's appeal and ordered him to voluntarily depart the United States within 30 days. The applicant failed to depart the United States and on November 26, 1994, a Warrant of Deportation (Form I-205) was issued against the applicant. In January 1995, the applicant departed the United States and reentered the United States without inspection sometime in 1995. 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). 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 District Director determined that there were an insufficient amount of positive factors in the applicant's case and denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *District Director's Decision*, dated March 10, 2006.

Section 212(a)(9). Aliens previously removed, states in pertinent part:

(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 [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 “[s]ufficient positive factors offset adverse factors in the case at bar...Determination of hardship was made without consideration of adverse country conditions.” *Form I-290B*, filed April 3, 2006. Counsel states that the applicant voluntarily departed the United States in January 1995 after his BIA appeal was dismissed. *Brief in Support of Appeal*, page 9, filed April 27, 2006. The applicant states “[w]hen he was deported, [he] complied with the order and left the United States.” *Statement from the applicant*, dated April 19, 2006. The applicant’s wife states “[w]hen [the applicant] unfortunately had an order of deportation, he did not want to disrupt [their] family unit and abandon [her son] because he knew what kind of life would await a boy raised by a single mom, having experienced it first hand himself. However, [the applicant] also wanted to comply with the law. With a heavy heart and many tears, he departed the United States. That period of time that [the applicant] was separated from [them] was the darkest in [her] life.” *Letter from [REDACTED] dated April 18, 2006.*

The AAO notes that the applicant submitted numerous documents regarding his employment in the United States. [REDACTED] states the applicant “has been with [their] company for close to a year now and has proven to be very dependable...[They] feel that [the applicant] is very important to [their] company...If [they] were to lose [the applicant] it would cost [them] a good deal of time and money looking for a replacement for his position. It would be hard to replace an employee such as [the applicant].” *Letter from Bugmasters Termite Control*, dated March 29, 2006. The AAO notes that based on the submitted Wage and Tax Statements (Form W-2) and U.S Individual Income Tax Returns (Form 1040A), it appears that the applicant is the primary wage earner in the family. However, some of the time that the applicant has been employed in the United States, he has worked without authorization and that is an unfavorable factor.

The applicant states that he “cannot imagine a life without [his] children and [his] wife. [He] cannot imagine their life in Mexico where they would not have any opportunity for a future and [he] would not have any opportunity for work that could support all their living expenses and education of [his] children. This would be even harder due to the fact that [his] mom has been living in a little village far from the city and where the conditions of life and employment are even harder.” *Statement from the applicant, supra*. The applicant’s wife states they “shudder at the thought of being separated or in alternative moving all to Mexico because in this country [they] have so many opportunities for self-improvement for [them] and also for [their] children. If [the applicant] had to go back to Mexico, [she and her] children...would be very affected economically and emotionally because they could not live over there due to the language, the food, the schools and so many different things that would affect [her] children...Here [they] have steady jobs...[They] bought [their] house which [they] have been paying on time and if [the applicant] had to leave, what would happen with [them]?” *Letter from [REDACTED] 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 February 7, 1994, an immigration judge granted the applicant voluntary departure. On August 26, 1994, the BIA affirmed the immigration judge's decision and ordered the applicant to depart the United States within 30 days. Based on the applicant's statements, he departed the United States in January 1995, and in the same year, he 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's 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 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 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 spouse and children, general hardship they may experience, no criminal record, community involvement, and letters of recommendations from friends, his employers, and other members of the community. 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 failure to abide by an order of voluntary departure, his illegal entry into the United States subsequent to his voluntary departure order, and periods of unauthorized presence and employment.

While the applicant’s actions cannot be condoned, the AAO finds that given all 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.

ORDER: The appeal is sustained and the application approved.