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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:

[Redacted]

Office: NEWARK, NEW JERSEY

Date: FEB 20 2008

IN RE:

Applicant:

[Redacted]

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:

[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 application for permission to reapply for admission after removal was denied by the District Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ecuador who initially entered the United States without inspection on December 18, 1993. On May 8, 1995, the applicant filed a Request for Asylum in the United States (Form I-589). On June 13, 1995, the applicant's Form I-589 was denied and referred to an immigration judge. On June 19, 1995, an Order to Show Cause and Notice of Hearing (OSC) was issued against the applicant. On October 5, 1995, an immigration judge granted the applicant voluntary departure. The applicant failed to depart the United States as ordered. On May 7, 1996, a Warrant of Deportation (Form I-205) was issued for the applicant. On June 28, 1997, the applicant was deported from the United States. In March 2002, the applicant reentered the United States without inspection. On July 5, 2002, the applicant married [REDACTED] a United States citizen, in New Jersey. On September 3, 2002, the applicant's husband filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. 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). She 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 her United States citizen spouse.

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for being unlawfully present in the United States after previous immigration violations, and that the unfavorable factors in the applicant's case outweighed the favorable factors. The District Director 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 22, 2006. The AAO finds that the applicant is also inadmissible under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), and section 212(a)(6)(A) of the Act, 8 U.S.C. § 1182(a)(6)(A), for being ordered removed under section 240 or any other provision of law and for being present in the United States without being admitted or paroled, respectively.

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.

(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)(A). 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 states she does “not believe that the hardship caused to [her] husband, [her] parents (permanent residents in the United States) and [her] nieces and nephews was given proper consideration in the denial of [her] application.” *Form I-290B*, filed April 17, 2006. The AAO notes there is no evidence in the record that the applicant’s parents are lawful permanent residents. The applicant’s husband states the applicant “sends money to her parents in Ecuador so that they can afford to live a dignified life there” and her parents “rely on the money that she sends them and would suffer terribly if she were deported.” *Affidavit from* [REDACTED] dated November 20, 2005. The AAO notes that there was no documentation in the record establishing that the applicant provides any financial assistance to her parents. Additionally, the applicant’s brother resides in the United States and it has not been established that he could not help his parents with their finances. The applicant’s husband states that “[w]hile [they] were dating, [the applicant] told [him] that she had been deported from the United States and re-entered illegally. [He] was aware of this when [they] married and still hoped to apply for permanent residence for her so that [they] may spend the rest of [their] lives together in the United States.” *Id.* The AAO notes the applicant’s husband had knowledge of the applicant’s immigration violations before they married; therefore, his claim that he will suffer hardship if she is removed will be accorded less weight. The applicant’s husband states he does “not know what [he] would do without [the applicant]. Spending time with her is the best part of [his] day...[He] would also suffer economically if [the applicant] is deported. [He] work[s] as a bartender and live[s] off the tips [he] receive[s]. [He] would not be able to pay [his] rent and other bills without [the applicant’s] salary and do not know where [he] would be able to afford to live and how [he] would get by.” *Id.* The AAO notes that there is nothing in the record establishing that the applicant is the primary wage earner in the family or that the applicant’s husband would suffer economically without the applicant. Additionally, if the applicant is currently employed, she is working without authorization, which is an unfavorable factor. Regarding the hardship the applicant’s spouse 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, but it will be just one of the determining factors.

The record of proceedings reveals that on October 5, 1995, an immigration judge granted the applicant voluntary departure. The applicant failed to depart the United States as required, and a Form I-205 was issued for the applicant. On June 28, 1997, the applicant was deported from the United States. In March 2002, 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 (BIA) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the BIA'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 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 a United States citizen, her husband, general hardship he may experience, letters of recommendations, and no criminal record. The AAO notes that the applicant’s marriage to her husband occurred after her 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, allowing her friend to use her Employment Authorization Card and Social Security Card in order to work illegally, her illegal reentry into the United States subsequent to her June 28, 1997 deportation, and 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 she 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.