



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: **JUN 02 2008**

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 Director, California Service Center 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 Mexico who, on April 26, 1995, filed an Application for Asylum and Withholding of Deportation (Form I-589). The Form I-589 indicates that the applicant entered the United States without inspection on June 25, 1994. On September 19, 1995, the applicant's Form I-589 was referred to the immigration judge after he failed to appear for an interview, and the applicant was placed into immigration proceedings. On January 24, 1996, the immigration judge ordered the applicant removed *in absentia*. On February 1, 1996, a warrant for the applicant's removal was issued. The applicant failed to comply with the order of removal. On June 16, 2006, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). 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 four U.S. citizen children.

The director determined that the applicant had failed to file an Application to Register Permanent Resident or Adjust Status (Form I-485) and that he had failed to comply with the order of removal. The director determined that the applicant was not eligible for the benefit sought and denied the Form I-212 accordingly. *See Director's Decision* dated February 20, 2007.

On appeal, the applicant contends that he has not yet filed a Form I-485 because he wanted to pursue permission to reapply for permission first. *See Attachment Form I-290B*, dated March 14, 2007. In support of his contentions, the applicant submits only the referenced attachment. The entire record was considered in rendering a decision in this case.

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 Secretary has consented to the alien's reapplying for admission.

The applicant, on appeal, indicates that he has not yet filed a Form I-485 because he did not want to subject himself to a possible removal if he is denied permission to reapply for admission. The AAO finds the director erred in failing to adjudicate the Form I-212 because the applicant had failed to file a Form I-485. While 8 C.F.R. § 212.2(e) does indicate that an applicant for adjustment of status may file the Form I-212 in conjunction with the Form I-485, the regulations do not require an alien present in the United States to file a Form I-485 in order to seek permission to reapply for admission to the United States. 8 C.F.R. § 212.2(g) provides that such an applicant may file the Form I-212 with the district director having jurisdiction over the place where the applicant's removal proceedings were held. In the applicant's case, the applicant was ordered removed in Los Angeles, California and the applicant submitted the Form I-212 to the Los Angeles District Office pursuant to the instructions accompanying the form.

The record reflects that the applicant has a 14-year old son, an eleven-year old daughter, a nine-year old son and a four-year old son who are all U.S. citizens by birth. The applicant is in his 30's.

The AAO now turns to a consideration of the positive and adverse factors in the present case.

On appeal, the applicant states that he is the only economic support for his household, which includes four U.S. citizen children. He states that, if he were to be removed from the United States, he would not want to take the children and expose them to the dangers in Mexico. He states that separation of his family would cause him and his family hardship. He states that his children deserve to live in the United States with him and that only in the United States will they be able to obtain a good education, freedom and an opportunity to become good citizens. He states that he has never been convicted of a crime and has never relied on any assistance. He states that as a resident of the United States he promises to remain a person in good standing and support the constitution and form of government 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.

As established by the record, the favorable factors in this matter are the applicant's four U.S. citizen children, the general hardship the applicant's children will suffer if the applicant is denied admission, and an otherwise clean background. The AAO notes that the birth of the applicant's three youngest children occurred after the applicant was placed into immigration proceedings. Therefore the applicant's three youngest children are "after-acquired equities" and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; his failure to appear at an asylum interview; his failure to appear at an immigration hearing; his failure to comply with a removal order; and his unlawful presence and employment in the United States.

The applicant in the instant case has multiple immigration violations. The AAO notes that the record fails to establish that the applicant is the beneficiary of any immigrant or nonimmigrant visa petition that would offer him a means of acquiring lawful residence in the United States. The totality of the evidence demonstrates 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 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.