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U.S. Citizenship
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Services

H4

FILE:

Office: VERMONT SERVICE CENTER

Date: **JUN 06 2008**

IN RE:

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 Acting Director, Vermont 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 sustained.

The applicant is a native and citizen of Jordan who, on October 11, 1988, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, which expired on November 11, 1988. On April 23, 1991, the applicant filed a Request for Asylum in the United States (Form I-589). On October 17, 1997, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On November 3, 2000, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture. The immigration judge granted the applicant voluntary departure until January 3, 2001. The applicant appealed to the Board of Immigration Appeals (BIA). On April 30, 2001, the applicant's employer filed an Application for Labor Certification (Form ETA-750) on behalf of the applicant. On November 12, 2002, 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 grant of voluntary departure to a final order of removal. On December 13, 2002, a warrant for the applicant's removal was issued. On February 6, 2003, the applicant filed a motion to reopen and motion for stay of removal with the BIA. On March 3, 2003, the BIA denied the applicant's motion for stay of removal. On May 28, 2003, the applicant was removed from the United States and returned to Jordan, where he has since resided. On July 2, 2003, the BIA denied the applicant's motion to reopen. On February 16, 2004, the applicant married his spouse, [REDACTED]. On April 29, 2004, [REDACTED] filed a Petition for Alien Fiancée (Form I-129F) on behalf of the applicant, which was denied on December 22, 2005. On April 11, 2005, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on September 21, 2005. On September 21, 2005, [REDACTED] filed a second Form I-129F on behalf of the applicant, which was approved on January 9, 2006. On June 24, 2006, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) and 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.

The acting director determined that the unfavorable factors outweighed the favorable factors in the applicant's case and denied the Form I-212 accordingly. *See Acting Director's Decision* dated January 11, 2007.

On appeal, counsel contends that the acting director's decision contains factual errors and fails to acknowledge certain positive factors in the applicant's case. *See Counsel's Letter with Additional Evidence*, dated April 16, 2007. In support of her contentions, counsel submits the referenced letter, letters from the applicant and his spouse and copies of documentation previously provided. The entire record was reviewed 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 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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

Counsel contends that the acting director incorrectly stated that the applicant was found inadmissible as an arriving alien. While the AAO notes the language to which counsel refers, it is clear from the acting director's decision that she found the applicant to have been admitted to the United States as a B-2 visitor and to have overstayed his authorized period of stay, as indicated by counsel. In that the record reflects that the applicant was removed from the United States under a final order of removal after he had been legally admitted to the United States as a nonimmigrant visitor, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

The record reflects that [REDACTED] is a native of Yugoslavia who became a conditional permanent resident in 1987, a lawful permanent resident in 1990 and a naturalized citizen in 2002. The record does not indicate that applicant and [REDACTED] have any children together. While [REDACTED] states that she has a son from a prior relationship who is a U.S. citizen, there is no documentary evidence in the record to this effect. The applicant and [REDACTED] are in their 40's.

Counsel, on appeal, asserts that the acting director incorrectly found that the applicant had overstayed his nonimmigrant status by 15 years because he had filed a Form I-539, Application to Extend/Change Nonimmigrant Status, (Form I-539) and faithfully renewed his employment authorization for twelve years. The applicant, in his letter, states that he applied for an extension of his nonimmigrant status before it expired. While the record does not establish that the applicant ever filed a Form I-539, it does prove that during the period of 1991 until 2002, he was permitted to remain in the United States and work pursuant to employment authorization while his asylum application was pending in immigration proceedings and on appeal. The AAO notes, however, that the applicant's statement before the immigration judge does establish that the applicant engaged in unauthorized employment for a period of two to three years prior to filing the Form I-589.

Counsel, on appeal, contends that the acting director failed to acknowledge that, even though the applicant overstayed his voluntary departure order, he attempted to do everything within his power to lawfully challenge his deportation, including the filing of a motion to stay removal. Counsel also contends that the acting director fails to acknowledge that the applicant filed a motion to reopen his case and ignores his intent to lawfully continue his case through that motion to reopen. The AAO notes that the applicant's motion to stay removal and motion to reopen were denied approximately two months before he was physically removed from the United States.

Counsel, on appeal, contends that mismatching years of birth on driver's licenses and the fact that the applicant held driver's licenses in two States does not indicate that the applicant had a malevolent intent. The AAO finds that the acting director erred in finding that the applicant's two driver's licenses were negative factors to be considered in exercising discretion as they do not indicate a lack of good moral character or that he had engaged in fraud.

Counsel, on appeal, contends that the applicant is being penalized for losing his asylum case, even though his case was not found to be frivolous, and that the immigration judge thought well of the applicant despite denying his asylum claim. Counsel contends that the acting director erred in holding the applicant's removal against him because he did not make any attempt to evade immigration authorities and always appeared for any immigration appointments that he had, including the one in which he was detained for removal to Jordan. Counsel asserts that the acting director failed to consider the dozens of letters of support in the applicant's case from his co-workers and employers.

The applicant, in his letter, states that he loves the United States and the democratic system, which they do not have in Jordan. He states that when he resided in the United States he had to work to support himself and to pay for school. He states that he paid taxes while he lived in the United States. He states that he does not have a criminal record, is married to a U.S. citizen, has a son, has an approved immigrant visa petition, had a pending labor certification at the time he was removed from the United States, worked legally in the United States until he was removed, had a good work record and an excellent reputation. He states that it has been more than four years since he was removed from the United States and has lived far away from his family and the wife that he loves.

[REDACTED], in her letters, states that she and her son have gone through a great deal living in the United States without the applicant and have no other support or help. She states that the applicant is a great person who did nothing to deserve his punishment. She states that her son misses the applicant very much as he sees the applicant as a father figure and had grown close to him prior to his removal from the United States. She states that she still works in the same hotel at which the applicant worked and people still talk about him and miss him. She states that the applicant is an extremely kind and generous person, who is always there whenever help is needed. She wants the applicant to return to the United States so that they can pursue their hopes and dreams together.

Recommendation letters from the applicant's employers and co-workers state that they miss the applicant, who is a model employee. They state that the applicant is a kind and fair person who is extremely committed and treats his associates with respect. They state that he is the best employee, colleague and friend. They state that he is courteous, sincere, loyal, responsible, punctual, eager, dependable, reliable, honest, and a man of integrity and great work ethic.

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 AAO finds the favorable factors in the present case to include the applicant's U.S. citizen spouse; the general hardship she has experienced and would continue to experience; the absence of any criminal record; his payment of U.S. taxes; and the immigrant visa petition approved on his behalf. The AAO notes, however, that the applicant's marriage and the approval of the immigrant visa petition benefiting him occurred after he was placed into proceedings. Accordingly, these factors are "after-acquired equities" and the AAO will accord them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of his nonimmigrant status, his failure to comply with an order of voluntary departure and his failure to comply with the order of removal once all avenues of appeal had failed.

The applicant's overstay of his nonimmigrant status, his unauthorized employment prior to the filing of his asylum application, his failure to comply with an order of voluntary departure and his failure to comply with the order of removal once all avenues of appeal had failed cannot be condoned. However, the AAO finds that given all of 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.

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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.