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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 06 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Uruguay who initially entered the United States on February 1, 2002, on a B-2 nonimmigrant visa, with authorization to remain in the United States until July 30, 2002. He departed and reentered the United States on July 27, 2002, with authorization to remain until January 26, 2003. On January 22, 2003, he was arrested in California for driving under the influence of alcohol and he was convicted on February 14, 2003. In December 2003, the applicant departed the United States. On January 27, 2004, the applicant reentered the United States on a B-2 nonimmigrant visa, with authorization to remain in the United States until July 26, 2004. On November 27, 2004, the applicant departed the United States. On January 13, 2005, the applicant attempted to reenter the United States on a B-2 nonimmigrant visa; however, Customs and Border Protection found the applicant inadmissible to the United States. On the same day, the applicant was expeditiously removed from the United States. On March 14, 2006, the applicant married [REDACTED], a naturalized United States citizen, in Uruguay. On March 31, 2006, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On October 13, 2006, the applicant's wife filed a Petition for Alien Fiancé(e) (Form I-129F) on behalf of the applicant. On February 28, 2007, the applicant's Form I-129F was approved. On April 26, 2006, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). The applicant is inadmissible to the United States under section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). 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 wife.

The Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for being ordered removed under section 235(b)(1), that the unfavorable factors in the applicant's case outweighed the favorable factors, and she denied the applicant's Form I-212 accordingly. *Director's Decision*, dated March 26, 2007.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(i) Arriving Aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 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 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.

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 the Director "erred [sic] in not granting the I-212 filed by [the applicant]. Attached is a statement by [the applicant] stating that in 2004 he came to the U.S. in January of 2004 and left in November of 2004 but was never employed in the U.S." *Form I-290B*, filed April 24, 2007; see also *letter from the applicant*, undated (The applicant states he "was never employed in the United States."). However, the AAO notes that during the applicant's sworn statement taken on January 13, 2005, he stated that during his 11 months of unauthorized presence in the United States, he "lived with [his] girlfriend and worked as a handyman." *Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act*, dated January 13, 2005. In response to the officer's question regarding if the applicant had ever worked in the United States, the applicant stated he "never [worked] with a company but [he] did gardening work or handy man work," and he earned "maybe \$400.00 a month." *Id.* The AAO notes that the applicant's employment was without authorization and that is an unfavorable factor. Additionally, the AAO notes that any time that the applicant was present in the United States without authorization is an unfavorable factor. The applicant's wife states that the applicant has "provided [her] with great emotional support for various personal issues in [her] life. [Her] daughter and [her] grandson, [redacted] live with [her]. [Her] grandson is mentally retarded and needs constant care.... It is a [sic] highly stressful for both [herself] and [her] daughter to care for [her] grandchild and the thought of being separated from [her] husband for several more years has caused [her] to battle with fits of depression." *Statement from [redacted]*, undated. 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 wife, but it will be just one of the determining factors.

The record of proceedings reveals that on January 13, 2005, the applicant was expeditiously removed from the United States. Based on the applicant's previous expedited removal, the applicant is clearly inadmissible under section 212(a)(9)(A)(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 (Board) 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 Board 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 Board 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 (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 Board’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 his United States citizen wife, general hardship she may experience, and the approval of a visa petition filed by his wife on his behalf. The AAO notes that the applicant’s marriage to his wife occurred after his order of expedited removal 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 two times that the applicant failed to depart the United States before his authorization to remain in the United States expired, his periods of unauthorized employment, his attempt to reenter the United States to resume his unauthorized employment, and his 2003 misdemeanor conviction for DUI.

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.