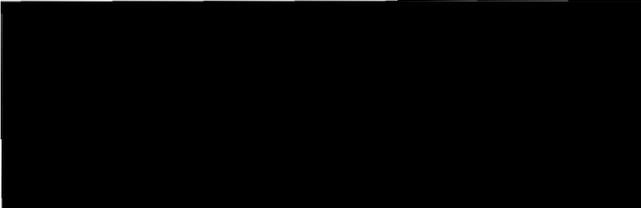




U.S. Citizenship
and Immigration
Services

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Office: NEBRASKA SERVICE CENTER

Date: MAR 10 2008

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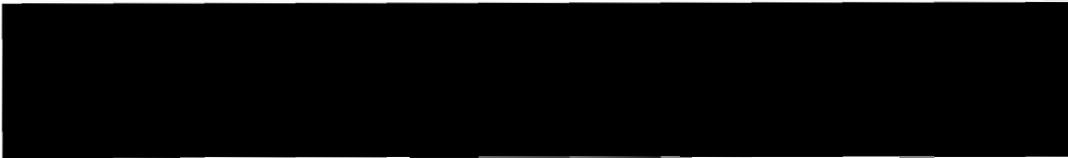
Applicant:



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 Acting Director, Nebraska Service Center, 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 of Italy and citizen of Argentina entered the United States on November 17, 1989, on a B-2 nonimmigrant visa, with authorization to remain in the United States until December 20, 1990. On May 28, 1992, the applicant filed a Request for Asylum in the United States (Form I-589). The applicant's Form I-589 was denied and referred to an immigration judge. On November 24, 1992, an Order to Show Cause and Notice of Hearing (OSC) was issued against the applicant. On January 27, 1993, an immigration judge administratively closed the applicant's asylum case. An immigration judge reopened the applicant's case, and on April 14, 1993, the applicant was granted voluntary departure. The applicant failed to depart the United States as required. On May 16, 1994, the applicant divorced his first wife. On January 4, 1995, a Warrant of Deportation (Form I-205) was issued for the applicant. On September 19, 1997, the applicant married [REDACTED], a United States citizen, in Illinois. On October 3, 1999, the applicant's second wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On October 19, 1999, the applicant's Form I-130 was approved. On January 26, 2000, the applicant, through counsel, filed a motion to reopen the immigration judge's decision. On July 10, 2000, an immigration judge denied the motion to reopen. The applicant filed an appeal with the Board of Immigration Appeals (BIA), and on April 5, 2001, the BIA affirmed the immigration judge's decision. On June 13, 2003, the applicant, through counsel, filed a Stay of Deportation. On June 17, 2003, another Form I-205 was issued for the applicant, and on July 8, 2003, the Stay of Deportation was denied. On January 29, 2004, the applicant voluntarily departed the United States. The applicant is inadmissible to the United States under section 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 wife and stepson.

The Acting Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered removed under section 240 or any other provision of law, and that the unfavorable factors in the applicant's case outweighed the favorable factors. The Acting Director denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Acting Director's Decision*, dated May 18, 2005.

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.

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, contends that "[t]he I-212 waiver was improperly adjudicated as none of the positive factors were considered in balancing the merits for relief." *Form I-290B*, filed June 16, 2005. Counsel asserts that the Acting Director "misapplied the equities against the negative factors in this case. The Service only recognized that [the applicant] had a wife and step-child, but failed to weigh their severe financial and emotional collapse since his departure." *Appeal Brief*, filed June 16, 2005. The AAO notes that the applicant's wife is a licensed dentist and is the primary wage earner in the family; however, when the applicant resided in the United States, he worked in construction and was the primary caretaker of his stepson. The AAO notes that the applicant's wife was diagnosed with major depressive disorder and adjustment disorder with anxiety, which is affecting her personal and work life. *See Psychological Evaluation by [REDACTED]* dated May 23, 2004. Additionally, the applicant's stepson is having behavioral problems in school. The applicant's wife states "[t]he emotional stress that [they] have been through doesn't let [them] function normally. [They] aren't a normal family. [They] are a broken family. The loneliness and the sadness [of the applicant's] departure is devastating [them] all of [them] everyday of [their] lives...[She] can't function as a mother, a dentist, nor as a woman." *Letter from [REDACTED]* undated. [REDACTED] states that "[s]ince the deportation of [the applicant], [the applicant's stepson's] behavior has escalated. Prior to this incident, [the applicant's stepson's] behavior was that of a typical 11 years [sic] old. He was an attentive, good humored, and easily going youngster. [The applicant] supported [his stepson] at his track meets and football games, and was always available to the teachers at The Chicago Academy. Now, [the applicant's stepson] has a Behavior Management Plan because he is in constant trouble. During [her] time with [the applicant's stepson], he cries during session and appears to be anxious. He has stated that his mother is always sad and cries, and that he no longer feels 'safe at home,' without his father." *Letter from [REDACTED] MSW, School Social Worker*, dated May 24, 2004; *see also letter from [REDACTED]*

_____, *Ph.D., Illinois Certified School Psychologist*, dated May 20, 2004 (“I would like to express my concern with regard to the emotional, behavioral, and academic well-being of our student, _____ is considered to be a bright, motivated student who has been successful in the academic setting. However, there have been marked changes in the areas of motivation, behavioral, and overall affect since the removal of his father from the home environment.”). The applicant’s son states that after the applicant left “[he does not] want to go to school but before [he] loved school or [he does not] do [his] homework right because [he] can’t help but wonder in [the applicant] and if [the applicant] is okay or not and [his] grades dropped [a lot] but before [he] knew [the applicant] wanted the best for [him] but now [he] feel[s] like [the applicant] isn’t there anymore and there is no point of living in this cruel world. [He] needed [the applicant] to be besides [him] and protect [him].” *Letter from _____*, undated. The AAO notes that the applicant has raised his wife’s son as his own son, since the applicant’s stepson’s biological father passed away when he was only a few months old. Regarding the hardship suffered by the applicant’s wife and stepson, 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 son, but it will be just one of the determining factors.

The record of proceedings reveals that on April 14, 1993, an immigration judge granted the applicant voluntary departure. The applicant failed to depart the United States until January 29, 2004. 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 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 United States citizens, his wife and stepson, hardship they are experiencing, and the approval of a petition for alien relative. 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 failure to abide by an order of deportation, 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.