



U.S. Citizenship
and Immigration
Services

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H4

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: MAR 11 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 a subsequent appeal was summarily dismissed by the Administrative Appeals Office (AAO). The AAO will reopen the matter. The previous decision of the director will be affirmed, the appeal will be dismissed and the application will be denied.

On July 19, 2006, the AAO summarily dismissed the applicant's appeal because he failed to identify either on the Form I-290B or through submission of a brief or additional evidence any erroneous conclusion of law or statement of fact made by the director. On the Form I-290B the applicant indicated he would file a brief or additional evidence with the AAO. At the time the AAO rendered its decision, the record did not contain a brief or additional evidence. Since the AAO's decision, documentation filed by the applicant on September 27, 2005, has come to light and sets forth the applicant's reasons for appeal. The AAO is therefore reopening the matter *sua sponte*.

The applicant is a native and citizen of El Salvador who, on August 31, 1988, was placed into immigration proceedings after he entered the United States without inspection. On January 12, 1989, the applicant filed a Request for Asylum in the United States (Form I-589) before the immigration court. On March 31, 1989, the immigration judge denied the applicant's applications for asylum and withholding of removal. The immigration judge granted the applicant voluntary departure until May 31, 1989. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On July 16, 1990, the BIA dismissed the applicant's appeal and granted him thirty days for voluntary departure. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On October 4, 1990, a warrant for the applicant's removal was issued. On September 11, 1998, the applicant filed a motion to reopen before the immigration judge in order to apply for relief pursuant to the Nicaraguan Adjustment and Central American Relief Act (NACARA) Pub. L. 105-100, 111 Stat. 2160, 2193. On April 12, 2000, the immigration judge denied the applicant's motion to reopen. The applicant appealed the immigration judge's denial of his motion to reopen to the BIA. On June 21, 2000, a second warrant for the applicant's removal was issued. On December 27, 2000, the BIA dismissed the applicant's appeal of the denial of his motion to reopen. On April 25, 2005, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien who has been ordered removed from the United States. 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 the lawful permanent resident mother of his children and his U.S. citizen children.

The director determined that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(A)(i) and 212(a)(9)(A) of the Act, 8 U.S.C. §§ 1182(a)(6)(A)(i) and 1182(a)(9)(A), as an alien present in the United States without inspection and an alien ordered removed from the United States. The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated August 8, 2005.

On appeal, the applicant contends that he has resided in the United States since 1988 and has grown accustomed to life in the United States. *See Applicant's Brief*, dated September 8, 2005. In support of his contentions, the applicant submits the referenced brief, financial documentation 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 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 Attorney General [now Secretary of Homeland Security] has consented to the alien's reapplying for admission.

The applicant failed to comply with an order of voluntary departure that became a final order of removal. The applicant has also failed to comply with the order of removal. The AAO finds that 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 the applicant and [REDACTED] have a 14-year old son, a 12-year old daughter and an eight-year old daughter who are all U.S. citizens by birth. [REDACTED] is a native and citizen of El Salvador who became a lawful permanent resident in 2004. The AAO notes that the record does not contain evidence that establishes that the applicant and [REDACTED] are married and the applicant describes [REDACTED] as "the mother of my children" and not his spouse. The applicant and [REDACTED] are in their 40's.

On appeal, the applicant asserts that he has resided in the United States since 1988 and has become accustomed to life in the United States. He asserts that he files his income taxes and is the only provider (financially and emotionally) for his home. He asserts that he has three U.S. citizen children and the mother of his children is a lawful permanent resident. He asserts that his children would suffer the most if he were removed from the United States because they will lose a father figure at home and the financial support that they currently receive. He asserts that he is a good person and has never violated the law in any way. However, the record reflects that, on May 21, 2006, the applicant was arrested and charged with driving under the influence. On September 11, 2006, the charge of driving under the influence was dismissed and the

applicant pled *nolo contendere* to and was convicted of reckless driving with no injury in violation of section 23103 of the California Vehicular Code (CVC). The applicant's sentence was suspended in favor of 36 months of probation and ten days in jail.

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 favorable factors in this matter are the applicant's three U.S. citizen children and the general hardship they would suffer if the applicant were removed from the United States.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; his failure to comply with an order of voluntary departure; his failure to comply with a removal order; his extended unlawful residence in the United States; his unauthorized employment; and his 2006 conviction for reckless driving.

The applicant in the instant case has multiple immigration violations and a criminal conviction. While the AAO notes the birth of the applicant's children, all three births occurred after the applicant was placed into proceedings and ordered removed. Accordingly, these factors are "after-acquired equities" and the AAO will accord them diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

The AAO notes that the director found the applicant to be inadmissible pursuant to section 212(a)(6)(A)(i) of the Act, a ground of inadmissibility for which there is no waiver available, and, therefore, ineligible to adjust his status in the United States.

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 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 and the application is denied.