U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

H4

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER, CA Date: MAY 13 2004

IN RE: Applicant: [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, Director
Administrative Appeals Office

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or 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 a citizen of Guatemala who was present in the United States without a lawful admission or parole on June 10, 1992. The applicant applied for asylum on September 24, 1994, with the Immigration and Naturalization Service (now, Citizenship and Immigration Services, (CIS)). His application was denied on April 7, 1995. On March 5, 1996, the applicant was ordered deported in absentia by an Immigration Judge. The applicant failed to surrender for removal or depart from the United States. The applicant married a now naturalized U.S. citizen on August 2, 1995. On September 1, 1995, his spouse filed an I-130, Petition for Alien Relative and on November 13, 1996, the applicant filed an I-485, Application to Register Permanent Residence or to Adjust Status. On January 21, 1998, the applicant and his spouse appeared for an interview regarding the adjustment application. On the same day the applicant was detained by CIS and on January 23, 1998, the applicant was deported to Guatemala. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 travel to the United States to reside with his U.S. citizen spouse.

The director determined that the applicant reentered the United States after his deportation without a lawful admission or parole, without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 and therefore his deportation order was reinstated pursuant to section 241(a)(5) of the Act. The director denied the application accordingly. *See Director Decision* dated June 20, 2003.

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 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 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 has consented to the alien's reapplying for admission.

Section 241(a) detention, release, and removal or aliens ordered removed.-

> (5) reinstatement of removal orders against aliens illegally reentering.- if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after reentry.

On appeal counsel asserts that the director erred in his decision to deny the application due to the fact that the applicant did not provide documentation to show that he was residing outside the United States after his deportation. To support his assertion counsel submits a brief, copy of the applicant's passport, a power of attorney issued on January 6, 2003 in Guatemala, a letter from the applicant's employer and an affidavit from the applicant's spouse.

In the brief from counsel and in an affidavit from the applicant's spouse it is stated that when the applicant's spouse received a letter from CIS to provide documentary evidence that the applicant was residing outside the United States she forwarded the fingerprint chart to the applicant in Guatemala and got a power of attorney in order to be able to get a police clearance.

Copies of the applicant's passport reflect frequent travel in and out of Guatemala from February 1998 until February 2000. According to the letter submitted from the applicant's employer issued on November 10, 2002, the applicant was employed in Guatemala. In addition the applicant was in Guatemala on January 6, 2003, the day he signed the power of attorney for his spouse.

After a thorough review of the record of proceedings the AAO finds that the director erred in finding that the applicant reentered the United States after his deportation and that his deportation order was reinstated.

The applicant is still inadmissible under section 212(a)(9)(A)(ii) of the Act.

To recapitulate, the record reflects that the applicant first entered the United States without inspection on June 10, 1992, and on September 24, 1994, he applied for asylum. The applicant was interviewed for asylum status on April 7, 1995, and his application was referred to an Immigration Judge for a court hearing. On April 7, 1995, the applicant was ordered deported in absentia by an Immigration Judge. The applicant did not depart the United States and on January 23, 1998, he was deported to Guatemala.

A review of the 1996 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 for 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 reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

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 of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

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.*

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 be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The court 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-Nunoz 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.

Based on the evidence in the record, is appears that the applicant's spouse was aware that the applicant had been denied asylum status and the possibility of being removed at the time of their marriage on August 2, 1995.

The favorable factors in this matter are the applicant's family ties to U.S. citizens (spouse and child), the approval of a petition for alien relative and the prospect of general hardship to his family.

The unfavorable factors in this matter include the applicant's entry without inspection in 1992, his failure to appear for removal proceedings, his failure to depart the United States after a final removal order was issued by an immigration judge, his employment without authorization and his lengthy presence in the United States

without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra,* that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained while in removal proceedings can be given only minimal weight. 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 the applicant 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.