U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

PUBLIC COPY

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

H4

[redacted]

JAN 13 2005

FILE: [redacted] Office: SAN ANTONIO, TEXAS Date:

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 Interim District Director, San Antonio, Texas, 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 Morocco who entered the United States on January 26, 1988, in possession of a valid F-1 student visa. The applicant departed the United States and reentered without a lawful admission or parole on November 27, 1988. On November 27, 1988, the applicant was served an Order to Show Cause for a hearing before an Immigration Judge. On February 27, 1989, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act). The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on July 10, 1991. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation was issued on January 21, 1992. The applicant filed a motion to reopen his deportation proceedings with the BIA that was denied on April 6, 1994. On or about March 19, 1992, the applicant's U.S. citizen spouse filed a Petition for Alien Relative (Form I-130) and at the same time he filed an application for adjustment of status. The record reflects that the applicant divorced his first spouse and married his current spouse, a U.S. citizen, on August 27, 1997. On January 16, 2003 a Warrant of Removal was issued and the applicant was removed from the United States on February 18, 2003. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant is the beneficiary of an approved petition for a K-3 nonimmigrant visa filed on Form I-129F as the spouse of a U.S. citizen. 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 travel to the United States and reside with his spouse and stepchildren.

The Interim District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Interim District Director's Decision* dated September 9, 2003.

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 has consented to the aliens' reapplying for admission.

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.

On appeal, counsel asserts that the Interim District Director failed to consider hardship to the applicant's stepchild and failed to properly balance the equities against the deportation in his case. Counsel submits a brief and affidavits from the applicant's spouse, stepchildren and other family members and friends.

In his brief counsel asserts that if the applicant is not permitted to travel to the United States his U.S. citizen spouse and stepchild would suffer extreme hardship. Counsel submits a letter from a doctor in which he states that the applicant's spouse is experiencing severe depression and elevated blood pressure. In addition counsel states that the applicant's stepchild is suffering from depression, which has completely changed the way they live their lives. The affidavits submitted attest to the applicant's character and the hardship his family would suffer if he were not permitted to enter the United States.

The letter regarding the applicant's spouse's depression states that the applicant's spouse ". . . is currently experiencing severe depression with somewhat elevated blood pressures that may be related. I feel that at this time these problems are intimately connected to the facts that her husband has been deported to Morocco and she has been separated from him for about the last eleven months. . . ." The physician who signed the letter did not indicate his qualifications to make psychological assessments, the duration of her condition or whether additional treatment was recommended or provided.

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.

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.

The applicant in the present matter married his U.S. citizen spouse on August 27, 1997, years after he was ordered deported by an Immigration Judge and years after the BIA had dismissed his appeal and denied his motion to reopen his deportation proceedings. The applicant's spouse should reasonably have been aware of the applicant's immigration violations and the possibility of his being removed at the time of their marriage. He now seeks relief based on that after-acquired equity.

The favorable factors in this case include the applicant's family ties to U.S. citizens, his spouse and stepchildren, the approval of a petition for alien relative, the absence of a criminal record and the potential of general hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States on November 19, 1988, his failure to appear for deportation proceedings, his failure to depart the United States after a final removal order was issued by an Immigration Judge, his failure to depart after the BIA dismissed his appeal 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 after his deportation order became final 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 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.