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

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 29 2008

RELATES)

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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guyana who, on March 31, 1988, was apprehended by immigration officers and placed into immigration proceedings. The applicant testified that he had entered the United States on the same day without inspection. Upon apprehension the applicant provided a false name, date of birth and country of birth to immigration officials. On August 3, 1988, the immigration judge ordered the applicant removed *in absentia* under the name [redacted]." On September 13, 1988, a warrant for the applicant's removal was issued. The applicant failed to depart the United States. On March 19, 1993, the applicant's mother, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on March 30, 1993. On June 8, 2001, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) based on the approved Form I-130. The applicant failed to indicate that he had ever been arrested by immigration authorities, placed into removal proceedings or ordered removed from the United States. On December 14, 2001, the applicant appeared at Citizenship and Immigration Services' (CIS) Newark, New Jersey District Office. The applicant was notified that a match on his fingerprints had revealed a prior removal order and that the District Office did not have jurisdiction over the Form I-485. On the same day, the Form I-485 was terminated. On June 29, 2004, immigration officers detained the applicant as a result of a fugitive operation. On July 15, 2004, the applicant filed a motion to reopen and motion for stay of removal before the immigration judge. On July 15, 2004, the immigration judge granted the applicant's motion to stay removal. On August 12, 2004, the immigration judge denied the motion to reopen. On August 24, 2004, the applicant was removed from the United States and returned to Guyana. On December 16, 2004, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). 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 his U.S. citizen mother, three U.S. citizen brothers and one lawful permanent resident brother.

The acting director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Acting Director's Decision* dated January 4, 2007.

On appeal, counsel contends that the applicant's case warrants a favorable exercise of discretion. *See Form I-290B and Attachment,* dated February 2, 2007. In support of his contentions, counsel submits the referenced Form I-290B and the attachment, newspaper reports on Guyana and copies of documentation previously provided. The entire record was considered 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 Secretary has consented to the alien's reapplying for admission.

In analyzing whether an applicant who was placed into removal proceedings prior to the date on which the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), was enacted is inadmissible pursuant to section 212(a)(9)(A) of the Act, the Department of State has issued the following guidance:

> New 212(a)(9)(A)(i) and (ii) roughly correspond to former 212(a)(6)(A) and (6)(B), relating to aliens previously excluded/deported. The main change from the previous law is that the periods of inadmissibility have been substantially lengthened:
>
> Arriving aliens denied admission and removed (excluded), who were previously ineligible for one year, are now generally ineligible for either: five years, if the removal order was issued on/after April 1, 1997, or ten years, if the removal (exclusion) order was issued prior to 4/1/97; *aliens ordered removed after having been admitted or after having entered without inspection, who were previously ineligible for five years, are now generally ineligible for ten years* . . . [emphasis added]
>
> | INA Section (Class Code) | Applies to: |
> | --- | --- |
> | . . . . | |
> | 212(a)(9)(A)(ii) (92A or 92B or 92C) other aliens previously ordered removed | whether the order was issued before, on, or after 4/1/97 |
>
> *Department of State Cable (R 040134Z APR 98), P.L. 104-208 Update No. 36: 212(a)(9)(A)-(C), 212(a)(6)(A) and (B), (April 4, 1998), Ref: 96-State-239978, 97-State-62429, 97-State-235245, 98-State-51296.*

The record of proceedings indicates that the applicant entered the United States without inspection and was ordered removed *in absentia* prior to April 1, 1997. The applicant failed to comply with the order of removal

until August 24, 2004. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that is a native of Guyana who became a lawful permanent resident in 1993 and a naturalized U.S. citizen in 2001. The record does not indicate that the applicant is married and has any children. [redacted] has four adult sons, besides the applicant, who reside in the United States. Three of Ms. [redacted]'s adult sons are natives of Guyana who became lawful permanent residents in 1986, 2001 and 2002, respectively, and naturalized U.S. citizens in 1992, 2007 and 2008, respectively. The last of [redacted] adult sons is a native and citizen of Guyana who became a lawful permanent resident in 2004. The applicant is in his 40's and [redacted] is in her 60's.

The AAO now turns to a consideration of the positive and negative factors in the present case.

On appeal, counsel asserts that the applicant did not appear at his immigration hearing because he did not receive notice of the hearing and was the victim of ineffective assistance of counsel. Counsel's assertions are unpersuasive. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Counsel contends that the applicant has met these requirements.

The AAO notes that the applicant reported his former counsel's actions to the Office of the Chief Disciplinary Counsel of the State Bar of Texas in 2004. The State Bar found that the conduct of counsel had occurred more than four years previously and was no longer under their jurisdiction. There is no indication that counsel was contacted regarding the grievance.[1] The record does not contain any other evidence that the attorney whose integrity or competence is being impugned has been informed of the allegations and has been given an opportunity to respond. Therefore, the record does not establish that the applicant has met the requirements for establishing a claim to ineffective assistance of counsel. The AAO also observes that the immigration judge made a determination in denying the applicant's motion to reopen that the applicant has failed to meet the requirements of *Lozada*.

On appeal, counsel contends that the applicant's prior counsel provided a fictitious address and the applicant's signature was forged on court documents. The applicant, in affidavits and letters, states that he does not know who hired or paid for his prior counsel. He states that he has never had any contact with his prior counsel. He states that his prior counsel did not inform him that he had an immigration hearing scheduled for August 2, 1988. The AAO finds that the record includes an exemplar of the applicant's signature as '[redacted]' on his Fingerprint Card (Form FD-249) and the Order to Show Cause (Form I-221S). These signatures closely match those on the Notification of Requirement for Change of Address, dated April 22, 1988, in which the applicant lists the address he now claims prior counsel provided and an April 4, 1988, letter permitting prior

[1] The grievance form submitted to the Texas bar by the applicant indicates that a copy of the grievance may be forwarded to the attorney named in the grievance. The record does not, however, contain evidence to establish this notification took place and the attorney was given an opportunity to respond to the allegations.

counsel to withdraw as his representative. Accordingly, counsel's claims regarding prior counsel's role in submitting the fictitious address and the forging of the applicant's signature are not persuasive. Moreover, the AAO notes that the immigration judge made a determination in denying the applicant's motion to reopen that the applicant provided the court with the fictitious address and that prior counsel had informed him of his immigration hearing. The immigration judge found, and the AAO concurs, that the applicant was on notice of the date of his hearing and the consequences of failure to attend the immigration hearing or to provide the court with his correct address.

On appeal, counsel contends that the applicant did not learn of the removal order until 2004 after immigration officers detained him. As discussed above, the AAO finds that the applicant was aware of the consequences of his failure to attend his scheduled immigration hearing. Moreover, On December 14, 2001, the applicant was informed that he had an outstanding removal order when his Form I-485 was terminated.

On appeal, counsel asserts that the applicant has good moral character, no criminal record and that he paid taxes while working in the United States. He asserts that the applicant did not return to Guyana because it is a country in which his life was not safe and because his family resides in the United States. Counsel asserts that the applicant is facing problems since he was removed to Guyana. He asserts that the applicant's mother needs the applicant in the United States to care for her. He asserts that the applicant's stay in the United States was innocent.

The applicant, in a letter, states that he is currently living alone in Guyana with no close family or friends with whom to socialize. He states that he feels isolated, rejected and lonely. He states that he misses his family and is very depressed. He states that living conditions in Guyana are bad and the crime rate and corruption are hard to deal with. He states that he does not feel safe in his house at night. He states that the security system in his community is corrupt and the police are not doing their job. He states that he is a law-abiding individual.

[redacted]n, in an affidavit, states that the applicant used to live with and care for her in her old age. She states that she is facing hardship because the applicant is not in the United States. She states that applicant used to cook and run errands for her. She states that she does not drive and depends on him to move around. She states that she is helpless and that her husband passed away 14 years ago. She states that her other children do not care for her and she is totally dependent on the applicant for her survival.

The applicant's brothers, in letters, state that the applicant is by himself with no moral and family support. They state that he is an important part of their and their family's lives. They state that it has been emotionally devastating to see the family separated.

January 2007 newspaper clippings presented on appeal indicate that there have been home invasions and burglaries in various communities in Guyana. The record, however, does not indicate whether the applicant resides in or near these communities or that he would be subject to similar risks anywhere in Guyana. The clippings do not establish that there is corruption or widespread negligence in the police or security forces and they do not address the living conditions in Guyana.

Financial documentation in the record does not establish that the applicant filed taxes in the United States. The financial documentation does indicate that from 2002 to 2004 social security, medicare, state and federal

taxes were withheld from the applicant's wages. Financial documentation in the record also establishes that [redacted]'s eldest son, [redacted] claims her as a dependent and that she resides with him.

The record reveals that, in applying for adjustment of status, the applicant failed to indicate that he had been arrested, placed into immigration proceedings and ordered removed. Whether the applicant has been arrested, placed into immigration proceedings or previously removed is material in regard to the applicant's adjustment of status because it renders him ineligible to apply for adjustment of status. As such, the AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), based on his 2001 attempt to obtain immigration benefits in the United States by fraud. To seek a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), the applicant would file an Application for Waiver of Ground of Inadmissibility (Form I-601).

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.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen mother, his three U.S. citizen brothers, his lawful permanent resident brother, the general hardship the applicant's family will suffer if the applicant is denied admission, and an approved immigrant visa petition. The AAO notes that the adjustment of status and naturalization of the applicant's mother and three of his brothers, as well as the filing of the immigrant visa petition benefiting him occurred after the applicant was placed into immigration proceedings and ordered removed. These factors are "after-acquired equities" and the AAO will accord them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States; his misrepresentation of his identity upon apprehension by immigration officers; his failure to provide a valid address to the court; his failure to attend his immigration hearing; his failure to comply with an order of removal; his extended unlawful presence and employment in the United States; his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act for fraud; his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, between April 1, 1997, the date of enactment of unlawful presence provisions under the Act, and August 24, 2004, the date on which he departed the United States, and seeking readmission within ten years of his last departure.

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors. Accordingly, the appeal will be dismissed.

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.

ORDER: The appeal is dismissed.