U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Citizenship
and Immigration
Services

H4

[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: SEP 14 2009
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, 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, whose then lawful permanent resident spouse, on March 10, 1995, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On October 24, 1995, the Form I-130 was approved. On January 31, 1998, the applicant appeared at John F. Kennedy International Airport. The applicant presented a Guyanese passport and a lawful permanent resident card bearing the name "[redacted]" The applicant was placed into secondary inspections. The applicant admitted that he was not the true owner of the document and did not have valid documentation to enter the United States. The applicant failed to provide his true identity to immigration officers. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and for being an immigrant without a valid documentation. On February 1, 1998, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1) under the name [redacted]"

On March 16, 1998, the applicant was issued a U.S. nonimmigrant visa under his true identity. The applicant failed to reveal that he had been previously removed from the United States and had also attempted to enter the United States by fraud in 1998. Accordingly, the applicant committed fraud and failed to obtain appropriate waivers and permission to reapply for admission prior to issuance of the visa. On March 22, 1998, the applicant was admitted to the United States as a nonimmigrant by utilizing the fraudulently obtained visa.

On August 24, 1999, the applicant filed an Application to Register Permanent Residence or Adjust the Status (Form I-485), based on the approved Form I-130. On March 2, 2001, the Form I-485 was denied. On April 14, 2003, the applicant filed a Form I-212, indicating that he continued to reside in the United States. On November 4, 2003, the district director denied the applicant's Form I-212. The applicant filed an appeal with this office. On October 21, 2004, the AAO dismissed the applicant's appeal. On October 24, 2008, the applicant filed a new Form I-212, indicating that he continued to reside in the United States. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). 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 now naturalized U.S. citizen spouse and three U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision,* dated January 14, 2009.

On appeal, counsel contends that the district director failed to take into consideration all the positive and negative factors in the applicant's case. *See Counsel's Brief,* dated February 2, 2009. In support of his contentions, counsel submits the referenced brief and a birth certificate for the applicant's new child. 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that the applicant's spouse, [redacted], is a native of Guyana who became a lawful permanent resident in 1993 and a naturalized U.S. citizen in 2000. The applicant and [redacted] have an eight-year-old daughter, a five-year-old daughter and a newborn son who are all U.S. citizens by birth. The applicant and [redacted] are in their 30s.

On appeal, counsel states that the positive factors in the applicant's case were not given full consideration. Counsel states that those positive factors are that the applicant's U.S. citizen spouse filed a petition on his behalf, which has been approved; his two U.S. citizen children are very young to have their father removed from the household; the family is living together as a unit; the applicant has no criminal record; the applicant is employed in the United States and has paid income tax with his spouse; the applicant and his spouse own two homes in the United States; and the applicant's spouse is currently in business as a child care specialist and is a registered nurse. Counsel states that the applicant and his spouse now have a third U.S. citizen child.

The applicant, in a letter accompanying the Form I-212, states that he and his spouse own two homes in the United States. The applicant states that his spouse operates a New York State licensed day care from one of those homes. The applicant states that he has never been arrested in the United States or anywhere else. The applicant states that his removal from the United States would cause emotional hardship to his spouse and daughters.

The applicant's spouse, in a letter accompanying the Form I-212, states that she and the applicant own two houses in the United States. She states that she currently owns and operates a New York State licensed day care from one of those homes. She states it would be an extreme hardship on her business, herself and her U.S. citizen children if the applicant were forced to leave the United States.

A letter from [redacted], PremiumBag, states that the applicant is currently his employee and has been with the company since August of 2005.

A letter from [redacted] Mercy Medical Center, states that the applicant's spouse is currently employed at Mercy Medical Center as a full-time registered nurse. He states that the applicant's spouse has been employed since February 27, 2007 and works seventy-five hours biweekly with an annual gross salary of $61,542.

The record contains two good conduct certificates from the police department of the city of New York, dated October 10, 2007 and February 24, 2003, indicating that the applicant has no criminal record.

The record reflects that the applicant has been employed in the United States since September 1998. The record reflects that the applicant was issued employment authorization from March 17, 2004 until March 16, 2005 and April 6, 2009 until April 5, 2010.[1] The record reflects that the applicant has filed joint taxes with his spouse from 1999 through 2002 and in 2006. The record also reflects that the applicant and his spouse have two houses in the United States.

The AAO notes that the applicant is inadmissible for attempting to enter the United States by fraud in 1998, for obtaining a visa or by fraud in 1998 and for entering the United States on a fraudulently obtained visa in 1998, and is therefore inadmissible under section 212(a)(6)(C)(i) of the Act. An applicant may file a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), by filing an Application for Waiver of Grounds 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

[1] The AAO notes that the employment authorization issued in 2009 does not appear to be based on a pending application for adjustment of status or any other valid application, since the applicant's Form I-485 was denied on March 2, 2001. The record does not reflect that the applicant has filed a subsequent application upon which he could claim to apply for employment authorization.

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 naturalized U.S. citizen spouse, his three U.S. citizen children, general hardship to the applicant and his family if he were denied admission to the United States, the absence of a criminal background, filing of joint taxes and the approved immigrant visa petition filed on his behalf. The AAO notes that the birth of the applicant's children occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to enter the United States by fraud in January 1998; his failure to provide his true identity at the time of his removal; his attainment of a U.S. nonimmigrant visa by fraud in March 1998; his entry into the United States utilizing a fraudulently obtained visa in March 1998; his inadmissibility under section 212(a)(6)(C)(i) of the Act; his unauthorized employment in the United States, except for periods of authorized employment; and his unlawful presence in the United States from March 2, 2001, until present.

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.

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.