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

U.S. Citizenship and Immigration Services

H4

[redacted]

DATE: MAR 30 2012 OFFICE: CHICAGO FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

fs/

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Chicago, Illinois. A subsequent appeal was remanded by the Administrative Appeals Office (AAO) for entry of a new decision and the Field Office Director subsequently denied the application and certified the decision to the AAO for review. The application for permission to reapply for admission will be denied.

The applicant is a native and citizen of Nigeria who entered the United States on January 10, 1986 with an F1 visa. The applicant worked without authorization while he was a student and was placed in deportation proceedings for failure to comply with the conditions of his nonimmigrant status. The applicant was deported from the United States on May 1, 1988 and subsequently entered the United States without admission or parole in January 1994. The applicant is inadmissible pursuant to 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).

The Field Office Director concluded that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after his removal, and that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for ten years after his last departure. *See Decision of the Field Office Director*, dated October 16, 2007. On appeal, the AAO determined that the applicant is not subject to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), because his removal and reentry without admission or parole took place before April 1, 1997, and remanded the matter to the Field Office Director for a decision on the merits. *See Decision of the AAO*, dated March 15, 2010. The Field Office Director determined that the applicant's application should not be considered because it was submitted after his unlawful reentry into the United States. The Field Office Director further determined that, based upon the merits of the case, the applicant's application does not warrant favorable discretion and denied the applicant's application accordingly. *See Decision of the Field Office Director*, dated July 26, 2011.

Counsel for the applicant states that the applicant merits a discretionary I-212 waiver grant because his U.S. citizen spouse and children live in the United States and the applicant's health and safety would be in danger if he returned to Nigeria.

In support of the waiver application and appeal, the applicant submitted family photographs, medical documentation from the applicant's physician, background information concerning Nigeria, e-mail correspondence between the applicant and his children, letters from the applicant's spouse and children, letters of support, letters concerning the employment of the applicant and his spouse, certificates of achievement for the applicant's children, financial information, and identity documents. The entire record was reviewed and considered in rendering a decision on the appeal.

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 of an 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 was granted voluntary departure by an immigration judge on August 25, 1987. The applicant was granted until January 31, 1988 to voluntary depart from the United States, but failed to depart within that time frame. The applicant remained in the United States until he was removed on May 1, 1988. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. It is noted that the Field Officer Director's decision of July 26, 2011 stated that the applicant's application for permission to reapply to the United States could not be considered because it was not filed prior to the date of the applicant's reentry to the United States. However, the regulations, under 8 C.F.R. § 212.2(e), allow for the applicant to file a Form I-212, as an adjustment of status applicant who is inadmissible pursuant to 212(a)(9)(A) of the Act.

The Field Office Director relies on *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), to support a finding that the regulation at 8 C.F.R. § 212.2(e) does not apply to section 212(a)(9) of

the Act and that allowing a retroactive grant of permission to reapply for admission under that provision would be contrary to the plain language of the Act. The decision in *Matter of Torres-Garcia*, addresses eligibility for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act rather that under section 212(a)(9)(A)(iii), and states that 8 C.F.R. § 212.2 "cannot reasonably be construed as implementing the provision for consent to reapply for admission at section 212(a)(9)(C)(ii)." The AAO finds that the Field Office Director erred in relying on this decision to conclude that the regulation at 8 C.F.R. § 212.2(e), which is still in effect, does not allow retroactive permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

The record further reflects that the applicant has an approved Form I-130 based upon his marriage to his U.S. citizen spouse. The applicant submitted identity documents to demonstrate that he and his wife have two U.S. citizen children. The applicant submitted letters of support and evidence that he suffers from glaucoma.

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 Seventh 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 a discretionary determination. 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 legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

Counsel asserts that the applicant merits a favorable exercise of discretion due to factors including his U.S. citizen spouse and two U.S. citizen children, his gainful employment and volunteer work in the United States, evidence of the payment of taxes, medical hardship to the applicant and country conditions in Nigeria.

The record indicates that the applicant married his U.S. citizen spouse on August 30, 1997 and they have two children in common. The evidence reflects that the applicant and his spouse were married in Louisiana, but the applicant no longer resides with his spouse or children. The applicant's spouse and children reside in Louisiana and the applicant resides in Chicago. The record contains e-mail messages between the applicant and his children and the record reflects that the applicant has visited his children in Louisiana and that his children have visited him in Chicago. The record contains statement from the applicant's daughters regarding the potential effects of separation from their father. It is noted that the applicant's spouse is employed and there is no assertion that she would be unable to financially support herself without the applicant. Further, the applicant's spouse and children are equities acquired after a removal order was entered against the applicant, so the weight of these equities and any hardship they would suffer should be given less weight. *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991). It is also noted that although the applicant is in contact with his wife and daughters, it appears that he resided with his family for only a short period of time.

The applicant submitted letters from his physician stating that he suffers from glaucoma and takes medication on a daily basis. Counsel for the applicant submitted country conditions documentation concerning Nigeria and contends that the applicant's health safety would be in jeopardy in Nigeria. It is noted that the U.S. Department of State travel warning for Nigeria recommends that U.S. citizens avoid all but essential travel to certain states of Nigeria. The record does not address where in Nigeria the applicant intends to reside and the possibility of relocation to other areas. Further, there is no indication that the applicant would be unable to obtain medication for his physical condition while in Nigeria.

The unfavorable factors for this applicant are the applicant's immigration violations, including the applicant's repeated employment without authorization, failure to depart pursuant to a grant of voluntary departure, an order of removal from the United States, removal from the United States,

and subsequent reentry into the United States without admission or parole. Further, the applicant misrepresented his marital status to an immigration official.

The applicant was admitted to the United States with an F1 visa on January 10, 1986, but failed to comply with the conditions of his student status and worked without authorization in February of 1986. The applicant claims that he was forced to work because his father was unable to pay his tuition fees and that his electricity was disconnected. It is noted that the record does not contain supporting evidence for the applicant's assertions. Further, on April 11, 2005, the applicant's employment authorization was accordingly revoked upon denial of his Form I-485 application. Once again, the applicant sought employment without authorization. Counsel for the applicant asserts that the applicant was forced to work to support his family and afford his medical treatment. However, as noted above, there is no indication that the applicant's family would be unable to support themselves without him.

The applicant committed another immigration violation in his failure to depart from the United States pursuant to a grant of voluntary departure on August 25, 1987. As a result of his failure to depart, the applicant was removed from the United States on May 1, 1988. The applicant subsequently entered the United States without admission or parole in January 1994.

In addition, the applicant made a false statement to an immigration officer on February 14, 1986, falsely claiming that he was married to a U.S. citizen named [redacted] The applicant signed an affidavit indicating that he married [redacted] in [redacted] in May of 1985. The record also contains an affidavit from [redacted] stating that she lives in [redacted] and dated the applicant, but that she has never been married. The applicant recanted his false statements on August 14, 1987

The immigration violations committed by the applicant are serious in nature and cannot be condoned. In addition, the applicant has not demonstrated sufficient evidence of reformation or rehabilitation. As such, the AAO finds that the applicant has not established that the favorable factors in his application outweigh 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 application will be denied.

ORDER: The application is denied.