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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:



Office: LIMA, PERU

OCT 02 2009

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:



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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Officer in Charge (OIC), Lima, Peru, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Brazil who entered the United States as a tourist in 1986 and remained until he was removed on December 12, 2004. He is, therefore, inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been ordered removed and seeking admission to the United States within ten years of that removal. The applicant is the husband and stepfather of U.S. citizens and seeks permission to reapply for admission into the United States pursuant to section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

In his decision, the OIC found the applicant to be inadmissible pursuant to section 212(a)(9)(B)(v) and that he had failed to establish extreme hardship to a qualifying relative. However, the OIC erred in denying the applicant's Form I-212, Application for Permission to Reapply for Admission After Deportation or Removal, on the basis of extreme hardship. The applicant in filing the Form I-212 seeks an exception to his inadmissibility under section 212(a)(9)(A)(iii) of the Act, not 212(a)(9)(B)(v) of the Act as determined by the OIC. Accordingly, the AAO withdraws the OIC's decision in this matter and will consider the matter on a *de novo* basis.¹

Section 212(a)(9)(A) 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

¹ The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

case of a second or subsequent removal or at any time in the case on 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.

In support of the Form I-212, the record includes, but is not limited to, counsel's brief; statements from the applicant's spouse and her children; photographs of the applicant, his spouse and their children; Numerous statements from physicians treating the applicant's spouse for Prinzmetal's angina and Shingles; a psychological evaluation of the applicant's spouse by Licensed Medical Social Worker [REDACTED] an educational/developmental evaluation of the applicant's son by [REDACTED] court records regarding the applicant's previous divorces and custody of his U.S. citizen son; birth certificates for the applicant's spouse and her children; a marriage certificate for the applicant and his spouse; employment statements for the applicant; employment verification for the applicant's spouse; and country conditions information on Brazil.

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 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-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 AAO finds these cited 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.

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

On appeal, the applicant requests that his case be reconsidered and states that he wishes to join and take care of his spouse and children in the United States. In addition, he states that he regrets his prior behavior that affected his family. Furthermore, he states that he is of good moral character and that, aside from his unlawful presence, he lived an otherwise lawful life in the United States.

The positive factors in this case include the applicant's U.S. citizen spouse and stepchildren, the extreme hardship that would be experienced by his spouse if he were to be excluded from the United States; his commitment to his stepchildren as reflected in their statements; his involvement in and support of community activities; his physical and emotional support of his spouse and stepchildren, and his paternal relationship with his United States citizen son. The AAO notes that the applicant's marriage occurred after the applicant was placed into proceedings in 1991. Accordingly, the AAO finds the applicant's marriage and stepchildren to be "after-acquired equities" and will accord them diminished weight in exercising the Secretary's discretion in this matter.

The negative factors include the applicant's failures to depart the United States in compliance with Orders of Voluntary Departure, and his long-term unlawful presence and periods of unauthorized employment in the United States. On appeal, counsel for the applicant asserts there were mitigating circumstances to the applicant's failure to depart, namely his custody of his United States citizen son and his duty to provide for his son.

The AAO finds that the applicant's actions in this matter cannot be condoned. Nonetheless, given all of the circumstances of the present case, the negative factors are outweighed by the favorable factors and thus warrant a favorable exercise of discretion. Accordingly, the appeal will be sustained.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.