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U.S. Citizenship
and Immigration
Services

H4



FILE:



Office: PHOENIX, ARIZONA
(relates)

Date: **NOV 07 2005**

IN RE:

Applicant:



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:



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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, Phoenix, Arizona 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 Mexico who entered the United States without a lawful admission or parole on or about February 10, 1982. On April 20, 1983, in the Superior Court of Maricopa County, State of Arizona, the applicant was convicted of the crime of sexual abuse, a class 5-felony, in violation of ARS 13-1404, 1401, 701, 702 and 801. The court ordered suspending imposition of sentence and placed the applicant on probation for a period of three years. Consequently, on July 21, 1983, the applicant was deported from the United States pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for entering the United States without inspection. The record reflects that the applicant reentered the United States on or about February 24, 1984, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of Act, 8 U.S.C. § 1326. On April 20, 1984, an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued. On August 14, 1984, an Immigration Judge ordered the applicant deported from the United States and the applicant was removed to Mexico. The applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. On February 26, 2003, the applicant appeared at a Citizenship and Immigration Services (CIS) office for a scheduled interview regarding his application for adjustment of status and it was determined that the applicant reentered the United States in 1984, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of Act. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of 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 remain in the United States and reside with his U.S. citizen spouse and children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See District Director's Decision* dated August 2, 2004.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

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(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 alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (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 states that the District Director erred in denying the Form I-212 because he failed to consider the fact that the applicant's spouse has been diagnosed with Type 2 Diabetes, which cannot be treated in Mexico. Counsel states that he will be submitting a brief and/or evidence to the AAO within 30 days from the date of the appeal. On August 16, 2005, the AAO forwarded a fax to counsel informing him that this office had not received a brief or evidence related to this matter and unless counsel responded within five business days the appeal may be summarily dismissed. Counsel has not responded to the AAO's fax of August 15, 2005. The appeal was filed on September 9, 2004, and to this date more than one year later, no documentation has been received and therefore the AAO will adjudicate the appeal based on the documentation within the record of proceeding.

Medical documentation provided shows that the applicant's spouse suffers from Type 2 Diabetes. However, there is no independent corroboration that shows that her medical condition cannot be treated in any other country except the United States. It is noted that there are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." The applicant's spouse has the option of remaining in the United States maintaining access to her medical treatment. There is no indication in the record that the applicant's presence is necessary to assist with her condition.

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 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 entered the United States without inspection on or about February 10, 1982, was deported twice, reentered illegally in 1984 and married his now naturalized U.S. citizen spouse on July 24, 1989, approximately five years after his second deportation. The applicant's spouse should reasonably have been aware of the applicant's immigration violations, his criminal conviction and the possibility of his being removed from the United States at the time of their marriage. He now seeks relief based on that after-acquired equity.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse and children, an approved Form I-130, the prospect of general hardship to his family, the favorable recommendations from family and friends and the fact that he owns real estate and a business in the United States.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States on or about February 10, 1982, his illegal reentries subsequent to his July 21, 1983 and August 14, 1984 deportations, his conviction of a crime involving moral turpitude, his employment without authorization 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 from the United States and his subsequent illegal reentry, 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 applicant 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.

The AAO notes that the applicant has a Service file under number ~~A91-033-894~~ that should be consolidated with Service file ~~A24-346-447~~.

ORDER: The appeal dismissed.