



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **APR 11 2006**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 Guatemala who was present in the United States without lawful admission or parole on June 26, 1993. On the same date, an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued and the applicant was released. On September 7, 1993, the applicant failed to appear for the hearing and the Immigration Judge ordered him deported in absentia. On January 8, 2002, the applicant filed the Form I-212. The applicant failed to surrender for removal or depart from the United States and is therefore 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). The applicant 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 U.S. citizen spouse and daughter.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the Form I-212 accordingly. *See Director's Decision* dated January 28, 2005.

On appeal, counsel contends that the Director erred in finding that the unfavorable factors in the applicant's case outweighed the favorable factors. *See Applicant's Motion to Reopen*, dated February 21, 2005.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

....

(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 . . . [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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The record of proceedings indicates that the applicant entered the United States without inspection and, when subsequently placed into deportation proceedings, failed to appear at his immigration hearing. The applicant was ordered deported from the United States and failed to comply with the order. Subsequently a warrant for deportation of the applicant was issued. The applicant failed to appear for deportation or to depart the United States. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and, therefore, must receive permission to reapply for admission.

On January 24, 1998, the applicant married his U.S. citizen spouse. On April 18, 1998, the applicant's U.S. citizen daughter was born. The applicant also has a U.S. citizen stepson for whom he provides financial and emotional support. On May 24, 2001, the applicant filed an I-485 Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved I-130 Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse.

Counsel argues that the applicant merits a favorable exercise of discretion because he has a U.S. citizen daughter and stepson attending school, there is an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse on his behalf, he is a person of good moral character, except for the deportation order he never violated any law and the applicant would face hardship if he were returned to Guatemala. Counsel submits copies of the applicant's marriage certificate, the spouse's naturalization certificate, birth certificate's for the applicant's U.S. citizen daughter and step-son, school records for the applicant's U.S. citizen daughter and step-son, letters of recommendation for the applicant from members of the community, copies of medical insurance provided by the applicant for his U.S. citizen spouse, daughter and stepson, and an employment letter for the applicant.

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-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 that the above-cited precedent 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.

The favorable factors in this matter are the applicant's marriage to a U.S. citizen, birth of a U.S. citizen daughter, his financial support of a U.S. citizen stepson, the absence of a criminal record, and an approved immigrant petition for an alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States, failure to appear for an immigration hearing, non-compliance with a 1993 order of deportation and accumulated unlawful presence in the United States.

The applicant in the instant case has multiple immigration violations. Moreover, the AAO finds that the birth of the applicant's daughter, the applicant's marriage and support of a U.S. citizen stepson occurred after a deportation order was issued against the applicant in 1993. The AAO finds that these factors are "after-acquired equities" and that any favorable weight derived from the applicant's marriage, daughter or stepson is accorded diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and 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 that 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.