

U.S. Citizenship
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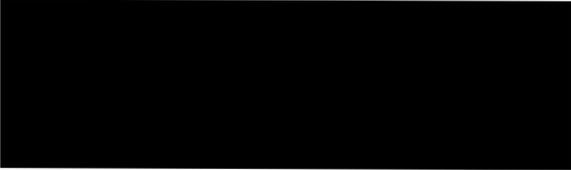
Applicant:



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, Chief
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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Haiti who entered the United States without a lawful admission or parole in 1992. On April 14, 1997, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On June 12, 1997, the applicant was interviewed for asylum status. His application was referred to the immigration court and a Notice to Appear (NTA) for a hearing before an immigration judge was served on him on June 26, 1997. On November 13, 1997, the applicant failed to appear for a removal hearing and he was subsequently ordered removed in absentia by an immigration judge, pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i) for having been present in the United States without being admitted or paroled. On December 6, 2001, an immigration judge denied a Motion to Reopen (MTR) the removal order. A Warrant of Deportation (Form I-205) was issued on May 30, 2002. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on August 5, 2004. The applicant is inadmissible under 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.

In a decision dated June 24, 2004, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. A Motion to Reopen or Reconsider (MTR) was denied by the Acting Director on December 2, 2004. A new MTR filed on December 28, 2004, was granted and the Form I-212 was denied because the arguments presented with the MTR did not overcome the initial grounds of denial. *See Director's Decision* dated February 16, 2005.

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

(A) Certain alien 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, 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 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.

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 in others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (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 submits a brief in which he states that the decision is contrary to law and an abuse of discretion. Counsel asserts that the applicant merits a favorable exercise of discretion based on the favorable factors and that the Director was incorrect in finding that the applicant had a "callous attitude toward violating immigration laws." Counsel states that the applicant entered the United States with a visa and applied for asylum status while his native country, Haiti, was in turmoil. In addition, counsel states that the applicant was not aware of the removal order because he had changed address and notified the court. Additionally, counsel states that the applicant appeared at a CIS office after he received a notice for his removal and informed CIS that he was filing an appeal of the removal order. Furthermore, counsel restates that the applicant failed to appear in court for his removal hearing because he was not aware of the scheduled hearing of November 13, 1997. Counsel further states that the applicant qualifies for a stay of deportation, kept the Service aware of his change of address, and although he worked without permission, he did that only to support his U.S. citizen spouse and child. Finally, counsel states that the Form I-212 should be granted because the applicant is a person of good moral character, did not ignore an order of the Court because he was unaware of the removal order, has been in the United States for over twelve years, has a U.S. citizen spouse and two U.S. citizen children, has no criminal record, and has family who depend on him financially and emotionally.

Counsel's assertions are not persuasive. The record of proceedings reflects that the applicant entered the United States without inspection. On all his applications, the applicant he stated that he entered the United States without inspection. In addition, the record of proceedings clearly reflects that a notice of a removal hearing for November 13, 1997, was served both personally on the applicant, and sent to his Washington, D.C. address. Therefore, counsel's assertion that the applicant was unaware of his removal hearing is not credible.

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 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 married his U.S. citizen spouse on January 4, 1999, over six and one half years after he was placed in removal proceedings, and over two years after he was ordered removed from the United States. The applicant's spouse should reasonably have been aware, at the time of their marriage, of the possibility of his being removed. 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 to U.S. citizens, his spouse and children, an approved Form I-130 and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his failure to depart the United States after a final removal order was issued, 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 he was placed in removal proceedings and after a final order of removal was issued, 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.

ORDER: The appeal is dismissed.