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U.S. Citizenship
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FILE:



Office: SAN FRANCISCO (FRESNO), CALIFORNIA Date: NOV 06 2006

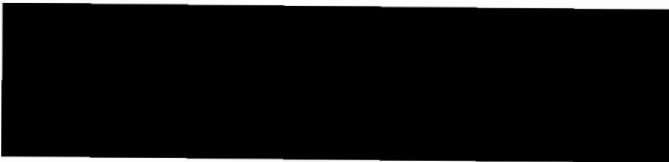
IN RE:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who entered the United States without a lawful admission or parole on or about August 10, 1990. On January 18, 1994, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On March 14, 1994, the applicant was interviewed for asylum status. On July 1, 1994, his application was denied and on July 15, 1994, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on him. On January 11, 1995, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported *in absentia* by an immigration judge, pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. On January 11, 1995, a Warrant of Removal/Deportation (Form I-205) was issued and on January 13, 1995, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear at the San Francisco, California District Office in order to be removed from the United States. The applicant failed to surrender for deportation or depart from the United States. Consequently, on November 21, 1996, the applicant was deported. The record reflects that the applicant reentered the United States on or about November 24, 1996, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). 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 stepchildren.

The District Director determined that since the applicant's Application to Register Permanent Residence or Adjust Status (Form I-485) was denied on December 17, 2001, and a Petition for Alien Relative (Form I-130) filed on his behalf was revoked on March 23, 2004, the applicant cannot derive a benefit from a Form I-212. The District Director then denied the Form I-212 accordingly. *See District Director's Decision* dated April 6, 2004.

Although the applicant does not have an application or a petition pending with CIS he is eligible to file a Form I-212 pursuant to the regulation at 8 C.F.R. § 212.2(g)(1) which states in pertinent part:

(g) Other applicants.

(1) Any applicant for permission to reapply for admission under circumstances other than those described in paragraphs (b) through (f) of this section must file Form I-212. This form is filed with either:

(i) the district director having jurisdiction over the place where the deportation or removal proceedings were held; . . .

The San Francisco District Office has jurisdiction over where the deportation proceedings were held.

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, 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 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.

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; (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 deterring 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 she states that the applicant was working as a confidential informant for the Fresno, California, INS sub-office and he was deported in error. According to counsel the deportation arose directly out of the undercover operation the special agent was trying to operate and had nothing to do with the bona fides of the applicant's own application for permanent residence in the United States. Counsel states that the applicant was working with immigration officials and was involved in obtaining evidence against immigration consultants/notarios who were filing false and/or frivolous asylum applications on behalf of Mexican nationals. In addition, counsel states that the applicant posed as a Mexican national seeking a work permit and this was a sham scenario in that the applicant had already filed for adjustment of status through his marriage to a U.S. citizen. According to counsel, the applicant received a notice for an asylum interview and he was told by the special agent not to worry about it because it was a result of the operation. Additionally, counsel alleges that since the applicant did not appear for his asylum interview, the asylum office issued an OSC to the immigration court. The special agent advised the applicant that this was in error and he did not need to appear at court. According to counsel, the court was not advised by the Service that the OSC was issued in error and ordered the applicant deported *in absentia*. Counsel further states that the applicant had a Form I-485 and a Form I-130 pending with CIS and when he appeared

at the Fresno sub-office he was taken into custody and deported based on the *in absentia* order. Counsel states that the applicant and his spouse demanded to talk to the special agent who had recruited him but he was not in the office on that day. Counsel further states that the applicant returned to the United States within 24 hours using his valid nonimmigrant visa and re-filed for adjustment of status. Counsel further asserts that she never received a revocation for the Form I-130 or a denial of the Form I-485. Counsel requests that the Forms I-130 and I-485 be reinstated and the denial of the Form I-212 be vacated in order that the applicant be granted adjustment of status.

In a chronology of the applicant's immigration history, the applicant states that he filed an asylum application on March 8, 1994, and he was recruited by a special agent in late July 1994 or early August 1994. The applicant further discloses the dates of his meetings with the special agent and the dates of his contacts with the Fresno Sub-office. Finally, the applicant states that when he appeared for an adjustment interview, the special agent took him into custody and he was deported to Mexico on the same day. On his Form I-485, the applicant states that he reentered the United States November 24, 1996, without an admission or parole.

The AAO notes that the record of proceeding reflects that the applicant's Form I-589 was filed on January 18, 1994, and not March 8, 1994, as stated by the applicant. In addition, the record reflects that the applicant appeared for an asylum interview on March 14, 1994. An OSC was forwarded to the applicant by certified mail and he received it on July 18, 1994. Additionally, the record reflects that the OSC charged the applicant with entering the United States without inspection and not for failure to appear for an asylum interview. The record further reflects that the applicant reentered the United States on November 24, 1996, without a lawful admission or parole and not by using a nonimmigrant visa 24 hours after his deportation, as stated by counsel. Finally, the applicant stated that he was detained and deported by the special agent after he appeared for an adjustment of status interview and this contradicts counsel's statement that the special agent was not in the office when the applicant was taken into custody and deported.

The AAO notes that working with the Service as a confidential informant does not automatically confer immigration benefits to an individual. The AAO does not have jurisdiction over the immigration judge's ruling. The fact remains that the applicant was ordered deported from the United States and was removed on November 21, 1996. Therefore, he is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, and must receive permission to reapply for admission. In addition, this office does not have jurisdiction over the revocation of the Form I-130 or the denial of the Form I-485. The proceeding in the present case is limited to the application for permission to reapply for admission into the United States after deportation or removal under section 212(a)(9)(A)(iii) of the Act. This is the only issue that will be discussed.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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 married his U.S. citizen spouse on August 10, 1994, shortly after he was placed in deportation proceedings. The applicant's spouse should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

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 step-children, his assistance in an investigation, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States, his failure to appear for deportation proceedings, his illegal reentry immediately after his deportation, his periods of unauthorized employment 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 deportation proceedings 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 eligibility 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.