

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

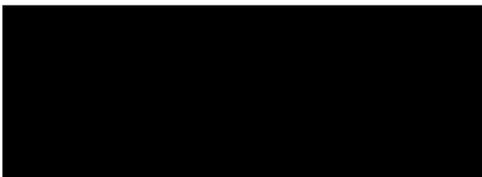
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



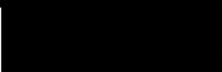
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H4



FILE:



Office: VERMONT SERVICE CENTER

Date: APR 03 2007

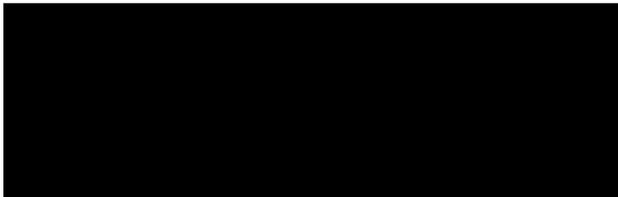
IN RE:

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, 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 Acting 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 Mexico who entered the United States without a lawful admission or parole in July 1993. The record reflects that on August 7, 1997, in the Juvenile and Domestic Relations Court of Harrisonburg, Virginia, the applicant was convicted of the offense of assault and battery of a family member, and was sentenced to one year of imprisonment. On January 22, 1998, the applicant was removed from the United States pursuant to section 237(a)(2)(A)(iii) of the Act, for having been convicted of an aggravated felony at any time after admission. The record reflects that the applicant reentered the United States in March 1998 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 the beneficiary of a Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He now 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.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Acting Director's Decision* dated January 23, 2006.

On appeal, counsel submits a brief, a statement from the applicant's spouse, a previously submitted psychological report, copies of the applicant's school transcripts, letters of recommendation, pictures of the applicant with his spouse and other family members, and copies of the applicant's spouse's medical reports. In his brief, counsel states that the applicant's deportation was a direct result of allegations made by his then girlfriend, now wife, who has now recanted her version of the events that led to the applicant's arrest and conviction. The applicant's spouse declares that her statements that led to the applicant's arrest were false. Counsel further states that the applicant is a hard working and valued employee at the company where he works; that the applicant and his spouse have been attempting *in vitro* fertilization, a treatment that would be cost prohibitive if the couple relocates to Mexico; that the applicant's conviction is not a crime involving moral turpitude, and he is not statutorily inadmissible, as stated by the Acting Director, and even if his conviction is found to be a crime of moral turpitude he would be eligible to file a waiver; that it would not be possible for the applicant's spouse to accompany him to Mexico because she has been diagnosed with post-traumatic stress disorder and depression, and treatment of her disorders would not be readily available in Mexico; that the applicant is completely assimilated into the American culture, has no relatives in Mexico and everyone the couple knows reside in the United States; and that the applicant's only conviction was based on the fabricated testimony of his spouse. Finally, counsel asserts that the applicant's deportation from the United States would cause exceptional and unusual harm to his spouse, would be a detriment to his community and, if his spouse were to accompany him to Mexico, they would lose all the social supports they rely on in the United States.

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss if the applicant's conviction is a crime of moral turpitude. The fact remains that the applicant was deported from the United States and, therefore, is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act. This proceeding is limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived.

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 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 deterring aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

The AAO notes that the psychological evaluation was based on two interviews with the applicant and his spouse in April 2001, nearly five years prior to the submission of the appeal, and there is no indication of an ongoing relationship with the psychologist or of any other treatment for emotional or psychological problems.. The statements contained in the report are speculative as to the future effects that separation or relocation of the family may cause. The AAO therefore gives the evaluation little weight.

Further, 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." There is no current information to establish that her mental stability would be jeopardized if she were separated from her husband.

Although the record reflects that the applicant's spouse has suffered from various medical disorders in the past, the record contains no independent corroboration to establish that the applicant's spouse's medical

disorders cannot be treated in a country other than the United States, or that her life would be jeopardized if she were to relocate with the applicant to Mexico.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's spouse, but it will be just one of the determining factors.

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.*

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 February 8, 1999, approximately one year after his illegal reentry subsequent to his deportation. 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 tie to the United States, his U.S. citizen spouse, an approved Form I-130, and the prospect of general hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry in July 1993, his illegal reentry subsequent to his deportation, his criminal record, 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 illegal reentry subsequent to his deportation, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh 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 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.