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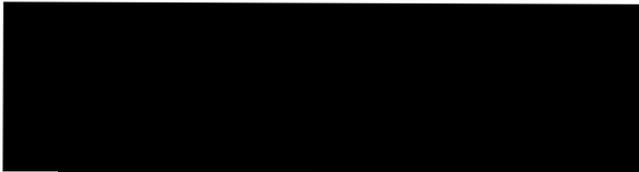
Applicant:



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 Acting Director, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Ecuador who entered the United States without a lawful admission or parole on or about July 11, 1989. On October 31, 1989, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and an Order to Show Cause (OSC) for a hearing before an immigration judge was served on him. On or about December 11, 1989, the applicant filed a Request for Asylum in the United States (Form I-589) with the office of the immigration judge. On May 21, 1991, an immigration judge denied the applicant's request for asylum and withholding of deportation and granted him voluntary departure until May 21, 1992, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart the United States on or before May 21, 1992, changed the voluntary departure order to an order of deportation. On September 15, 1992, a Warrant of Removal/Deportation (Form I-205) was issued and a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear at the Baltimore, Maryland District Office in order to be removed from the United States. The applicant failed to appear as requested. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. 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 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 12, 2006.

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

On appeal, counsel submits a brief in which he states that the Acting Director's decision is arbitrary and failed to acknowledge that the applicant's children will suffer hardship if the applicant were deported. Counsel states that one of the applicant's children suffers from cerebral palsy, spastic quadriplegia, and asthma, and the other from pervasive developmental disorder with traces of autism. In addition, counsel states that the applicant's spouse suffers from ovarian cancer. Counsel further states that the fact that the applicant's children require constant care because of their life-long disabilities and their special needs is a favorable factor due "maximal" weight. In addition, counsel states that the applicant remained in the United States after the expiration of his voluntary departure order because of his fear or persecution in Ecuador and because of his children's special needs. Additionally, counsel states that the applicant is a loving husband and father, he has never been arrested by the police, has never used false documents and has paid his taxes. Furthermore, counsel states that if the applicant is removed from the United States his spouse and children will suffer hardship due to the separation because they depend on him emotionally and physically. Finally, counsel states that the applicant's family will suffer extreme hardship if they decide to relocate with him in Ecuador because they will not be able to receive adequate medical care for their medical conditions.

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 be a condonation of the alien's acts and could encourage others to enter without being admitted and 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 October 7, 1997, approximately five and one half years after his voluntary departure order had expired. 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 be given appropriate weight.

In her decision, the Acting Director stated that the unfavorable factors in the applicant's case included his failure to depart after being granted voluntary departure, his failure to appear for removal after a Form I-166 was forwarded to him, his marriage while in removal proceedings, and his employment without authorization while living illegally in the United States. The Director concluded that these factors outweighed the facts that the applicant has no criminal record and has a Form I-130 approved on his behalf.

The AAO finds that the Acting Director failed to consider the serious medical conditions of the applicant's children and the hardship his family will suffer if he is removed from the United States. The AAO notes that one of the applicant's children has been diagnosed with cerebral palsy, spastic quadriplegia, mental retardation and asthma. The applicant's second child suffers from pervasive developmental disorder with traces of autism. Both children would face economic, educational and social hardship if they relocate to Ecuador, or in the alternative, if they remain in the United States without the applicant.

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 absence of any criminal record, and the potential of hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry, his failure to depart the United States after he was granted voluntary departure and his periods of unauthorized employment and presence in the United States.

While the applicant's actions cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.