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U.S. Department of Homeland Security  
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U.S. Citizenship  
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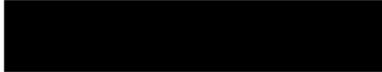


Office: CHICAGO, IL

Date:

OCT 31 2007

IN RE:



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 District Director, Chicago, Illinois, 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 sustained and the application approved.

The applicant is a native and citizen of Mexico who, on July 16, 1980, was convicted of felony criminal mischief in violation of the Texas Penal Code. The applicant was sentenced to five years in jail. On April 3, 1981, the applicant was placed into immigration proceedings. On June 25, 1981, the immigration judge ordered the applicant removed from the United States. On April 9, 1982, the applicant was removed from the United States and returned to Mexico. On June 4, 1987, the applicant married his spouse, [REDACTED]. On September 5, 1989, [REDACTED] became a lawful permanent resident of the United States. On November 23, 1996, [REDACTED] became a naturalized citizen. On April 21, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by [REDACTED]. On September 27, 2002, the applicant filed the Form I-212. The applicant is 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) and 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 reside in the United States with his U.S. citizen spouse and children.

The district director determined that section 241(a)(5) of the Act applies in this matter and that no waiver is available for the applicant's inadmissibility under section 212(a)(9)(A)(iii) of the Act. The district director then denied the Form I-212 accordingly. *See District Director's Decision.*

On appeal, counsel contends that section 241(a) of the Act does not bar the applicant from re-admission since he has the right to apply for a *nunc pro tunc* waiver under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9). *See Form I-290B*, dated January 18, 2005. In support of her contentions, counsel submits only the referenced Form I-290B. The entire record was reviewed in rendering a decision in this case.

Section 241(a) of the Act states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The regulation at 8 C.F.R. § 241.8 states that:

(b) *Notice.* If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

A review of the record indicates that the applicant in the present matter was not issued a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required by 8 C.F.R. section 241.8(b). Accordingly, the AAO finds that the applicant's prior removal order has not been reinstated and will determine whether the applicant is eligible for relief pursuant to the filing of the Form I-212.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years 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.
- (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 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 reflects that the applicant was removed from the United States on April 9, 1982, under a final order of removal. The applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to June 4, 1987, the date on which he married his spouse in Chicago, Illinois. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

The record reflects that [REDACTED] is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized citizen in 1996. The applicant and [REDACTED] have a 28-year old daughter, a 27-year old daughter, a 23-year old daughter, a 22-year old daughter and a 16-year old daughter who are all U.S. citizens by birth. The applicant is in his 50's and [REDACTED] is in her 40's.

A letter, prepared by [REDACTED], an employee of the Chicago Department of Public Health, states that the applicant's 23-year old daughter is being treated for a diagnosis of Schizoaffective disorder. The letter states that the daughter's treatment consists of psychiatric consultation, medication and group therapy. The letter concludes that the daughter's prognosis is favorable.

A letter, prepared by [REDACTED] a certified psychologist for the Chicago Department of Public Health, states that the applicant's spouse has been diagnosed with schizoaffective disorder, major depression, recurrent with dysthymia and generalized anxiety disorder. The letter states that [REDACTED] with continue her stabilization as long as she complies with her pharmacotherapy treatment.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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-Munoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> 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 (5<sup>th</sup> 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 these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The record does not establish that the district director considered the applicant's U.S. citizen spouse, five U.S. citizen children, the potential general hardship to all his family members, the psychological hardship to his spouse and 23-year old daughter who suffer from schizoaffective disorder, the absence of any criminal record since 1980, his payment of U.S. taxes and his approved immigrant petition for alien relative. As the applicant's marriage, birth of his three youngest daughters and approval of the immigrant visa petition benefiting him occurred after the applicant was placed into proceedings, the AAO finds these factors to be "after-acquired equities" and accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States, his criminal conviction for felony criminal mischief, his illegal reentry into the United States after having been removed and his extended unlawful presence and employment in the United States.

The applicant's original illegal entry into the United States, his criminal conviction for felony criminal mischief, his illegal reentry into the United States after having been removed and his extended unlawful presence and employment in the United States cannot be condoned. However, 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.