

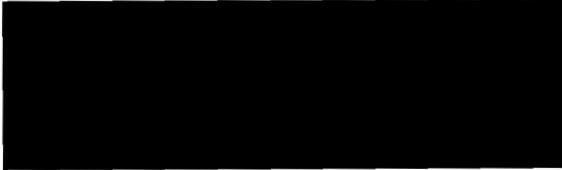


U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER
[consolidated therein]

Date: APR 22 2008

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) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The AAO notes that on appeal, the applicant requested 30-days to submit a brief and/or evidence to the AAO. *Form I-290B*, filed March 19, 2007. The record contains no evidence that a brief or additional evidence was filed within 30-days. Therefore, the record must be considered complete

The record establishes that the applicant is a native and citizen of El Salvador who initially entered the United States without inspection on December 17, 1984. On the same day, an Order to Show Cause (OSC) was issued against the applicant. On April 4, 1985, an immigration judge administratively closed the applicant's immigration case because the applicant could not be located. On October 16, 1986, the applicant's daughter, Evelin, was born in California. On March 1, 1988, the applicant's son, [REDACTED] was born in California. On June 25, 1989, the applicant was arrested for driving under the influence, and was convicted of this offense (Case number [REDACTED]). The applicant was sentenced to probation; however, on February 13, 1990, the applicant's probation was revoked. At some point, the applicant departed the United States. On April 16, 1990, the applicant entered the United States without inspection. On April 17, 1990, an OSC was issued against the applicant. On August 21, 1990, an immigration judge ordered the applicant deported *in absentia*. The applicant failed to depart the United States as ordered. On October 10, 1990, a Warrant of Deportation (Form I-205) was issued. On April 13, 1993, the applicant was arrested for inflicting corporal injury on a spouse. On January 7, 1994, the applicant's criminal charges of inflicting corporal injury on a spouse were dismissed in furtherance of justice (Case number [REDACTED]). On December 25, 1994, the applicant's son, [REDACTED] was born in California. On January 20, 1995, the applicant married [REDACTED] Ventura, in California. On June 29, 1997, the applicant was arrested for driving under the influence. On August 4, 1997, the applicant was convicted of driving a vehicle under the influence of .08% alcohol and was fined \$1,334 and sentenced to three (3) years probation (Case number [REDACTED]). On November 16, 1997, the applicant was arrested for inflicting corporal injury on a spouse. On February 10, 1998, the applicant was convicted of inflicting corporal injury on a spouse and was sentenced to one (1) year imprisonment and three (3) years probation (Case number [REDACTED]). On March 16, 1998, the applicant violated his probation in case number [REDACTED] and was sentenced to thirty (30) days in jail. On June 22, 1999, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On March 18, 2000, the applicant was arrested for unlawfully obstructing a peace officer and disorderly conduct: prostitution. On May 10, 2000, the applicant was convicted of disorderly conduct: prostitution, and was sentenced to two (2) years probation (Case number [REDACTED]). On March 30, 2001, the applicant's plea in case number [REDACTED] was set aside and vacated and the case was dismissed. On December 27, 2001, the Form I-130 filed by the applicant's spouse was approved. On August 18, 2003, the applicant was convicted of battery, and was sentenced to sixty (60) days in jail and thirty-six (36) months probation (Case number [REDACTED]). On August 19, 2005, the applicant's wife became a United States citizen. On June 15, 2006, the applicant filed a petition and order for expungement on case number [REDACTED], which the judge granted. On June 19, 2006, the applicant filed a petition and order for expungement on case number [REDACTED]; however, the judge denied the petition because there was no evidence that the applicant completed his probation. On June 20, 2006, the applicant filed a petition and order for expungement on case number [REDACTED], which the judge granted. On September 29, 2006, the applicant's plea in case number [REDACTED] was set aside and

vacated and the case was dismissed. Based on the applicant's previous order of deportation, the applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), and section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). 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 reside with his naturalized United States citizen spouse and United States citizen children.

The director stated that the applicant "must file the application for adjustment or status (Form I-485) concurrently or at the same time as this [Form I-212]...[and] [t]he evidence shows that [the applicant] ha[s] not yet filed a Form I-485 adjustment of status application or ha[s] filed the Form I-485 after the filing of the Form I-212. As a result, the waiver application [sic] was not filed in conjunction with the adjustment of status application." *Director's Decision*, dated February 27, 2007. Therefore, the director denied the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) accordingly. *Id.*

The AAO notes that the Director correctly stated that if the applicant was applying for adjustment of status, he would need to file the Form I-212 in conjunction with an Application to Register Permanent Resident or Adjust Status (Form I-485). *See* 8 C.F.R. § 212.2(e). However, since the applicant did not file a Form I-485, and there is no other evidence that he is applying for adjustment of status, he only needs to file his Form I-212 with the "district director having jurisdiction over the place where the deportation or removal proceedings were held," and there is no requirement that he must file a Form I-485 with the Form I-212. *See* 8 C.F.R. § 212.2(g)(1).

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered deported under section 240 or any other provision of law, and section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without admission or parole.

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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

Section 212(a)(6). Illegal entrants and immigration violators.-

(A) Aliens present without admission or parole.-

(i) In general.- An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General [now, Secretary, Department of Homeland Security], is inadmissible.

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, the applicant states his daughter "is a U.S. Citizen and she will submit a relative Petition on [his] favor and it could be approved in the period of six months." *Attachment to Form I-290B*, dated March 15, 2007. The AAO notes that there is no evidence in the record that the applicant's daughter filed a Form I-130 on behalf of the applicant; however, the applicant's United States citizen wife filed a Form I-130 which was approved on December 27, 2001. The applicant states that "[w]ith reference to [his] criminal record status, all were minors [sic] convictions and some of them were dismissed before [he] appear[ed] in Court." *Id.* The AAO notes that even though the majority of the applicant's criminal convictions have been expunged, he has still been convicted of crimes for immigration purposes. Section 101(a)(48) of the Act states that when an alien enters a plea of guilty, or is found guilty, and a formal judgment of guilt is entered by a court, where a judge has ordered some form of punishment, penalty, or restraint on the alien's liberty, there has been a conviction for immigration purposes.

The record of proceeding reveals that on December 17, 1984, the applicant initially entered the United States without inspection. At some point, the applicant departed the United States. On April 16, 1990, the applicant reentered the United States without inspection. On August 21, 1990, an immigration judge ordered the applicant deported *in absentia*. The applicant failed to depart the United States as ordered. On October 10, 1990, a Warrant of Deportation was issued. Based on the applicant's previous order of deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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.*

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (BIA) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the BIA's denial rested on discretionary grounds, and that the BIA had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the BIA had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an OSC had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980), the Ninth Circuit Court of Appeals (Ninth Circuit) reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds). In *Wang*, the alien sought discretionary relief and a finding of extreme hardship through

a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang*, that “[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country.”

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c) waiver of deportation discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the BIA’s weighing of equitable factors against unfavorable factors in the alien’s case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse’s possible deportation.

The AAO finds that the above-cited precedent legal decisions establish the general principle that “after-acquired equities” are accorded less weight for purposes of assessing hardship to a spouse and for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant’s United States citizen wife and children, general hardship they may experience, and the approval of a petition for alien relative. The AAO notes that the applicant’s marriage to his wife occurred after his order of deportation and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

The AAO finds that the unfavorable factors in this case include the applicant’s entries without inspection, his failure to abide by an order of deportation, his criminal record, and periods of unauthorized presence and employment.

The applicant’s actions in this matter cannot be condoned. 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 he 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.