



U.S. Citizenship
and Immigration
Services

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H4

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: AUG 28 2008

IN RE:

[REDACTED]

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:

[REDACTED]

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 Director, Vermont Service Center 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 the Dominican Republic who, on December 28, 1984, was admitted to the United States as a lawful permanent resident. On April 7, 1993, the applicant pled guilty to and was convicted of criminal possession of a weapon, a loaded firearm, in the third degree in violation of Public Law 265.02(04). The applicant was sentenced to five years of probation. On September 19, 1996, the applicant was placed into immigration proceedings as an alien deportable under former section 241(a)(2)(C) of the Immigration and Nationality Act (the Act), for having been convicted of a firearms violation. On May 19, 1997, the immigration judge ordered the applicant removed from the United States *in absentia*. The applicant filed a motion to reopen. On June 25, 1997, the immigration judge granted the motion to reopen. On February 2, 1998, the immigration judge ordered the applicant removed from the United States as charged. The applicant failed to depart the United States. On August 13, 1998, the applicant's naturalized U.S. citizen mother, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on September 21, 1998. On October 24, 2005, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside in the United States with his U.S. citizen mother and children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied his Form I-212 accordingly. *See Director's Decision* dated March 16, 2007.

On appeal, counsel contends that the director understated or ignored the favorable factors and exaggerated or inferred the negative factors in the applicant's case. *See Form I-290B*, dated March 23, 2007. The Form I-290B indicated that counsel would submit a separate brief or evidence on appeal within 30 days. On July 18, 2008, the AAO informed counsel that he had five days in which to submit additional documentation to support the appeal. As of the date of this decision, the AAO has not received a response from counsel. The record is, therefore, considered complete.

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 on a 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that [REDACTED] is a native of the Dominican Republic who became a lawful permanent resident in 1978 and a naturalized U.S. citizen in 1993. The applicant has a 19-year old son, a 15-year old son and a 7-year old son from prior relationships who are all U.S. citizens by birth. The applicant is in his 50's and [REDACTED] is in her 80's.

On appeal, counsel asserts that the director required a higher standard of hardship of the applicant's family than the law requires. He asserts that the director misinterpreted and misapplied the facts and the law in an egregious abuse of administrative discretion and contrary to law and procedure.

The AAO now turns to a consideration of positive and adverse factors in the present case.

The applicant, in his affidavit, states that he has three U.S. citizen children. He states that his two oldest sons reside with their mother in Michigan and he provides them with \$150 every two weeks. He states that he sends his sons \$500 at Christmas. He states that these two sons stay with him for two to three weeks in the summer and also for two weeks during the Christmas holidays. He states that his youngest son resides in New Jersey with his mother and he provides him with \$50 per week. He states that, as his youngest son grows, his needs will increase. He states that he plans to provide him with more money in the future and occasionally buys clothing for him. He states that he gives this son \$100 at Christmas. He states that he sees his son almost every day during the summer and his son lives with him while his other two sons are visiting. He states that the youngest son stays with him almost every weekend. He states that his sons have come to depend on him not just financially, but for fatherly advice. He states that it would be a hardship for his three U.S. citizen sons if he were not permitted to remain in the United States. He states that his mother is 78-years old and in poor health.

[REDACTED], in her letter, states that she resides with the applicant, who is a good son. She states that the applicant helps her with food and money. She states that she needs him by her side.

The mother of the applicant's youngest son, in her letter, states that the applicant is an excellent father and has constant contact with his child. She states that she receives \$200 per month in cash from the applicant.

The mother of the applicant's two elder children, in her letter, states that the applicant is an excellent father who has constant contact with his children. She states that she receives \$300 per month and \$500 every six months for the children's clothes and other expenses.

A letter from the applicant's employer, dated March 25, 2004, indicates that the applicant has been employed full-time since August 18, 2003.

A letter from _____ indicates that _____ is his patient. It states that _____ has been diagnosed with pernicious anemia, mild cerebrovascular disease, hypertension, osteoarthritis, osteoporosis and vitamin B12 deficiency. It states that _____ requires frequent medical visits, diagnostic testing and multiple medications.

The record reflects that the applicant paid federal taxes in 2000, 2001 and 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 7th Circuit Court of Appeals 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-Munoz 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 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.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen mother, his three U.S. citizen children, the general hardship that family members would suffer if the applicant is denied admission, his mother's medical history, his steady employment, his payment of federal taxes, the absence of a criminal record since 1993, and an approved immigrant visa petition for alien relative. The AAO notes that the birth of the applicant's youngest son and the filing of the immigrant visa petition benefiting him occurred after the applicant was placed into immigration proceedings. Both of these factors are "after-acquired equities" and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's conviction for a weapons violation; his failure to comply with an order of removal; and his unauthorized presence and employment in the United States after he was ordered removed.

The applicant's conviction, his failure to comply with an order of removal, and his unauthorized presence and employment, 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application approved.