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U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

FEB 01 2008

IN RE:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 applicant is a native and a citizen of Guatemala who entered the United States without inspection on or about July 9, 2002. The applicant was subsequently placed in removal proceedings and the immigration judge (IJ) ordered the applicant removed *in absentia* on November 12, 2002. The applicant filed an appeal with the Board of Immigration Appeals (BIA) and on April 5, 2004, the BIA determined that it was precluded from considering the appeal. The applicant is currently in the United States and 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 in the United States.

The district director determined that the applicant did not establish eligibility for the benefit sought as he did not file the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) in conjunction with Form I-485, Application to Register Permanent Residence or Adjust Status, and the application was denied accordingly. *Director's Decision*, dated December 21, 2006.

On appeal, the applicant states that he is attaching a duly executed Form I-485, he is a person of good moral character, he has never been arrested and separation from his wife will cause irreparable damage. *Form I-290B*, at 1, undated.

Based on the applicant's removal, he is inadmissible to the United States under section 212(a)(9)(A) of the Act, which states in pertinent part:

- (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 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 continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the alien's reapplying for admission.

In denying the application, the director cited 8 C.F.R. § 212.2(e), which states, in pertinent part:

*Applicant for adjustment of status.* An application for adjustment of status under section 245 of the Act...must request permission to reapply for entry in conjunction with his or her application for adjustment of status.

The AAO notes that the record does not include a Form I-485 for the applicant, nor any evidence that the applicant is currently eligible to file Form I-485. Therefore, the record does not establish him as an applicant for adjustment of status and the AAO does not find him to be subject to the regulatory requirement at 8 C.F.R. § 212.2(e). The applicant's Form I-212 is being filed pursuant to 8 C.F.R. § 212.2(g).

8 C.F.R. § 212.2(g) states, in pertinent part:

*Other applicants.* (1) Any applicant for permission to reapply for admission under circumstances other than those described in paragraphs (b) through (f) of this section must file Form I-212.

Therefore, the AAO will adjudicate the application based on its merits.

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.

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 (7<sup>th</sup> Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board 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 Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7<sup>th</sup> 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 Order to Show Cause 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 *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> 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 Board’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 favorable equities in the exercise of discretion.

The favorable factors in this case include the applicant’s U.S. citizen spouse, whom he married on March 25, 2006, and the lack of a criminal record. The AAO notes that the applicant’s spouse is an after-acquired equity and is given diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant’s entry without inspection, his failure to attend a removal hearing, his failure to depart subsequent to his removal order, his period of unauthorized stay and his unauthorized 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.