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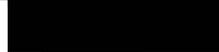
U.S. Citizenship
and Immigration
Services

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FILE:



Office: ATLANTA, GA

Date:

JAN 11 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)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 District Director, Atlanta, Georgia, 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 dismissed.

The applicant is a native and citizen of Mexico who, on April 24, 1995, was placed into proceedings after he was apprehended as a member of the Latin Kings street gang, palatine faction. On February 15, 1996, the immigration judge ordered the applicant removed *in absentia*. On March 1, 1996, a warrant was issued for the applicant's removal. On August 21, 1996, the applicant pled guilty to and was convicted of carrying a dangerous weapon, a knife, and was sentenced to 75 days in jail. On December 31, 1996, the applicant was apprehended and removed from the United States. The applicant was returned to Mexico. On January 19, 2001, the applicant married his spouse, [REDACTED] in Swannanoa, North Carolina. On March 22, 2001, 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 on his behalf by [REDACTED]. On June 24, 2002, the Form I-130 was approved. On October 9, 2002, the applicant filed the Form I-212. On February 3, 2003, the Form I-485 was denied. 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). 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 the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated January 26, 2006.

On appeal, the applicant's spouse contends that her family requires the applicant's presence in the United States. *See Form I-290B*, dated February 13, 2006. In support of her contentions, the applicant's spouse submits the referenced Form I-290B, medical documentation, letters of recommendation and financial documentation. The entire record was reviewed in rendering a decision in this case.

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 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 failed to comply with an order of removal until December 31, 1996. The record also reflects that 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 January 19, 2001, the date on which he married his spouse in North Carolina. 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 U.S. citizen by birth. The applicant and [REDACTED] have a four-year old son and may also have a one-year old child, both of whom are U.S. citizens by birth. The applicant is in his 30's and [REDACTED] is in her 20's.

On appeal, [REDACTED] asserts that she is a U.S. citizen who has been married to the applicant for five years. She asserts that they have a son and are expecting another child. She asserts that her son is on daily medication of Singulair and breathing treatments of Xopenex to prevent asthma. She asserts that she and the applicant own their house and two vehicles. She asserts that they have a car payment for a third vehicle. She asserts that she and the applicant love each other very much. She asserts that she wants her husband to stay in the United States because she wants to give her children a good education and a better life. She asserts that without the applicant's income she cannot provide for her children alone. She asserts that her monthly income is \$1,300. She asserts that, most importantly, her children need their father with them, and she requires her husband's presence.

[REDACTED] in a 2002 affidavit accompanying the Form I-212, states that her joint monthly income with her husband is \$3,026 and their monthly expenses for the household are \$1,964. She states that if the applicant's Form I-212 is denied she will suffer financial hardship as her income is insufficient to meet the household's expenses. She states that she will suffer emotional hardship if separated from the applicant.

Medical documentation reflects that [REDACTED] was pregnant on February 9, 2006, with a due date of October 17, 2006. Medical documentation also reflects that, between October 2005 and February 2006, the applicant's son was prescribed singulair, levalbuterol, zithromax, pulmicort, and amoxicillin. Medical documentation further indicates that from November 15, 2005 until November 22, 2005, the applicant's son utilized a compressor (nebulizer). No medical statement regarding the status of the applicant's son's health is found in the record.

A letter from the applicant's pastor states that [REDACTED] and the applicant are active and productive members of St. Margaret May Catholic Church in Swannonoa, North Carolina. The letter states that Ms. [REDACTED] and the applicant provide a respected model of family unity and security and are exemplary parishioners serving the community of faith in many aspects of parish life.

A letter from the applicant's employer states that he has been employed since September 3, 1998, as an order selector and his attendance and work performance are above average. A letter from [REDACTED] employer states that she has been employed since March 18, 2002, and has a large extended family who live in Asheville, North Carolina, and have been a part of the community for many years. The letter states that Ms. [REDACTED] family's support has helped the applicant and [REDACTED] establish roots in the community.

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-Mumoz 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.

The favorable factors in this matter are the applicant's U.S. citizen spouse, two U.S. citizen children, the general hardship to family members, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; his involvement in gang activity; his failure to comply with an order of removal until December 31, 1996; his criminal conviction for carrying a dangerous weapon; his extended unlawful presence

and employment in the United States; and his reentry into the United States without a lawful admission or parole and without permission to reapply for admission.

The applicant in the instant case has multiple immigration violations and a criminal conviction. The AAO finds that the applicant's marriage, birth of his children, and approval of the immigrant visa petition benefiting him occurred after the applicant was placed into proceedings and ordered removed. The AAO finds these factors to be "after-acquired equities" and therefore accords them diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

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 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.