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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

Hy

[REDACTED]

FILE:

[REDACTED]

Office: EL PASO, TEXAS

Date: **JUL 29 2008**

IN RE:

Applicant:

[REDACTED]

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:

[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 application for permission to reapply for admission after removal was denied by the District Director, El Paso, Texas, and 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 attempted to enter the United States on July 31, 1994, by presenting a Resident Alien Card (Form I-551) in someone else's name.¹ On August 3, 1994, an immigration judge ordered the applicant excluded and deported from the United States. On the same day, the applicant was deported to Mexico. In September 1996, the applicant reentered the United States without inspection. On February 22, 2001, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On August 30, 2002, the District Director denied the applicant's Form I-485. On September 18, 2002, the applicant filed a motion to reopen the District Director's decision, which the District Director granted. On December 15, 2003, the District Director denied the applicant's Form I-485 based on the applicant's misrepresentation and reentry into the United States after being deported. On January 23, 2004, the applicant filed another Form I-485. On May 3, 2004, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On May 10, 2004, the District Director denied the applicant's second Form I-485 and Form I-212. On June 9, 2004, the applicant filed a motion to reopen the District Director's denial on the Form I-485. On October 25, 2004, the District Director dismissed the applicant's motion to reopen. The applicant is inadmissible to the United States 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 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 United States citizen wife.

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for being ordered removed from the United, and he denied the applicant's Form I-212 accordingly. *District Director's Decision*, dated May 10, 2004. Additionally, the AAO notes that the District Director determined that the applicant was "subject to the reinstatement of the original deportation pursuant to Section 241(a)(5) of the Act." *Id.*

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

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now, Secretary, Department of Homeland Security] 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:

¹ The AAO notes that applicant's used his brother's Form I-551.

(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. § 241.8(b). Accordingly, the AAO finds that the applicant's prior removal order has not been reinstated and that he is not precluded from applying for relief by section 241(a)(5) of the Act.

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 [Secretary] has consented to the aliens' reapplying for admission.

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, through counsel, asserts that “[t]he I-212 was improperly denied...[T]he I-212 was properly filed with his application for adjustment of status, and if approved, it should apply retroactively, thus negating the Service’s reasons for denial...The [applicant] entered the U.S. before IIRIRA took effect and thus, there was no unlawful presence.” *Form I-290B*, filed June 9, 2004. The AAO concurs with counsel that the applicant is not inadmissible under section 212(a)(9)(B) of the Act since he has not departed the United States since his last return. However, the AAO notes that the applicant has resided in the United States without authorization and that is an unfavorable factor. The applicant states that “[i]f this waiver is not granted [he] will be forced to live without [his] wife’s emotional support and will, as a result suffer extreme hardship. This hardship will result primarily due to [his] inability to remain in the United States and resultant loss of [his] income will lead to the improper assistance and care of [his] wife. [His] wife recently got laid off, therefore, [his is] the only source of income and [his] wife would be unable to maintain the household without [his] assistance.” *Affidavit from the applicant*, dated April 28, 2004. The AAO notes that there was no evidence submitted establishing that the applicant’s wife is not working and that the applicant is the primary wage earner in the family. Additionally, the AAO notes that the applicant is working in the United States without authorization and that is an unfavorable factor. The applicant’s wife states that “[i]t would be impossible to adequately maintain [herself] and the household without [the applicant’s] income...Should [she] have to follow [the applicant] to Mexico, [she] will be unable to receive adequate medical treatment should [she] grow ill, or if [she] suffer[s] a medical condition.” *Affidavit from [redacted]* dated April 28, 2004. The AAO notes that there was no documentation submitted establishing that the applicant’s wife is currently suffering from any medical condition. Additionally, the AAO notes that unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant’s wife, but it will be just one of the determining factors.

The record of proceedings reveals that on August 3, 1994, the applicant was deported from the United States. In September 1996, the applicant reentered the United States without inspection. Based on the applicant’s previous removal, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) 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 (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 (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 Order to Show Cause (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 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 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 family ties to his United States citizen wife, general hardship she may experience, and no criminal record. The AAO notes that the applicant's marriage to his wife occurred after his order of removal 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 attempted entry into the United States by presenting a Form I-551 in someone else's name, his illegal reentry into the United States subsequent to his August 3, 1994 deportation, 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.