



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: JUN 16 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 dismissed.

The applicant is a native and citizen of Ecuador who, on May 19, 1998, was apprehended at his place of work by immigration officials for being present in the United States without inspection and presenting a fraudulent lawful permanent resident card and social security card in order to gain employment in the United States. The applicant indicated that he had entered the United States without inspection in July 1995. On May 19, 1998, the applicant was placed into immigration proceedings under the name [REDACTED]. On July 13, 1998, the immigration judge ordered the applicant removed *in absentia*. On October 9, 1998, a warrant for the applicant's removal was issued. The applicant failed to surrender for removal or depart from the United States. On July 9, 2002, the applicant's employer filed an Application for Labor Certification (Form ETA-750) on behalf of the applicant. On April 23, 2004, after the Form ETA-750 was approved, the applicant's employer filed a Petition for Alien Worker (Form I-140) on behalf of the applicant, which was approved on August 24, 2004. On June 20, 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 legalize his status in the United States.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated February 21, 2007.

On appeal, counsel contends that the applicant is not required to apply for permission to reapply for admission and, in the alternative, that the director minimized the applicant's positive factors in exercising his discretion to deny the Form I-212. *See Attachment to Form I-290B*, dated March 21, 2007. In support of his contentions, counsel submits only the referenced Form I-290B and the attachment. The entire record was considered in rendering a decision in this case.

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 does not indicate that the applicant has a lawful permanent resident or U.S. citizen spouse, parent or child. The applicant is in his 30's.

The AAO notes that the director erred in indicating that the applicant might be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for making a material misrepresentation when he obtained employment. The applicant's use of fraudulent documentation to gain employment in the United States does not render him inadmissible pursuant to section 212(a)(6)(C)(i) of the Act as this misrepresentation was not intended to gain an immigration benefit. *See Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994). However, the applicant's use of a fraudulent lawful permanent resident card and social security card in order to gain employment in the United States are factors to be considered in exercising discretion. Counsel states that the applicant has never been charged with fraudulent use or obtaining a fraudulent lawful permanent resident card and social security card. While counsel contends that the applicant's use of these documents cannot be used as negative factors when the applicant has not be charged with or convicted of these allegations, a conviction is not required in utilizing these facts as negative factors in exercising discretion.

On appeal, counsel contends that the applicant is not required to apply for permission to reapply for admission to the United States because it has been more than five years since he was ordered removed from the United States. The AAO, however, finds counsel's contentions to be unpersuasive. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and is, therefore, inadmissible for a period of *ten years*. Moreover, only an applicant who can provide evidence that he has remained *outside the United States* for the full period of inadmissibility is not required to seek permission to reapply for admission. Here, the applicant has never complied with the order of removal and, therefore, has failed to spend the requisite period of time outside the United States that would render permission to reapply for admission moot.

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

On appeal, counsel contends that the director minimized the applicant's positive factors, such as his steady employment in the United States and the absence of any criminal history. Counsel submits clearance letters from Wallingford Police Department in Connecticut, Port Chester Police Department in New York and Bridgeport Police Department in Connecticut. Counsel states that the applicant has been a positive contributing member of society in the United States and has never been a burden to the U.S. government. Counsel states that while the applicant entered the United States illegally, there are millions of undocumented workers who have entered the United States without inspection and have been granted pardons through past Amnesty programs. Counsel contends that, because of these past programs, the applicant's status as an undocumented worker who entered the United States illegally should not be held against him. Counsel contends that the director unjustly found this negative factor to rise to a level that overcomes the applicant's

positive factors. The AAO notes that the applicant does not have an application or petition that would qualify him for any of the past Amnesty programs.

In a separate statement, the applicant asserts that he should be granted a pardon because he loves the United States and is a hard working person who pays his taxes and is not a threat to national security. The applicant further states that he did not leave the United States because he was never notified by the legacy Immigration and Naturalization Service that he was supposed to depart. The AAO notes, however, that the applicant received notification of the date and place of his immigration hearing in person and in the Spanish language. The applicant was also notified that if he failed to appear for his immigration hearing he would be ordered removed from the United States. The decision of the immigration judge was also mailed to the applicant and received at what was then the address of the person issuing bond on his behalf.

The record contains documentation establishing that the applicant owns a painting business and that he filed taxes on behalf of this business in 2004 and 2005.

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 payment of U.S. taxes in 2004 and 2005, the absence of a criminal record and an approved employment-based immigrant visa petition.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; his use of fraudulent documentation in order to gain unlawful employment; his failure to appear at an immigration hearing; his failure to comply with a removal order; and his extended unlawful presence and employment in the United States.

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates 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.