

identifying data deleted to
prevent identity re-assessment
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H 4

FILE:



Office: COLUMBUS, OHIO

Date: **OCT 17 2008**

IN RE:

Applicant:



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:



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 Field Office Director, Columbus, Ohio, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Haiti who initially entered the United States on April 30, 2000, by presenting a Haitian passport and an Alien Registration Card (Form I-551) in someone else's name. On May 5, 2000, a Notice to Appear (NTA) was issued against the applicant. On September 15, 2000, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On February 15, 2001, an immigration judge ordered the applicant removed from the United States. On February 21, 2001, the applicant filed an appeal with the Board of Immigration Appeals (Board). On April 29, 2002, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 21, 2002, the Board affirmed the immigration judge's decision. On August 19, 2003, a Warrant of Removal/Deportation (Form I-205) was issued against the applicant. On January 5, 2006, the applicant's Form I-130 was approved. On February 21, 2006, the applicant filed a motion to reopen the Board's decision. On April 20, 2006, the Board denied the applicant's motion to reopen. On November 23, 2007, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). The applicant is inadmissible to the United States under sections 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), and 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C). 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 Field Office Director determined that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud, and she denied the applicant's Form I-212 accordingly. *Field Office Director's Decision*, dated January 11, 2008. The applicant is also inadmissible to the United States pursuant to section 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii), for being ordered removed from the United States.

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 Attorney General [now, Secretary, Department of Homeland Security] 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.

Counsel asserts that the "Service failed to adequately consider the positive factors in the applicant's case, including the I-130 petition filed on his behalf by his US citizen wife, and his other relatives in the United States. Furthermore, the Service erred in finding that the applicant has not demonstrated any current hardships that his family would continue to suffer if he were not permitted to return to the United States." *Form I-290B*, filed February 14, 2008. Counsel contends that "the Applicant has shown that his U.S. citizen wife would suffer gravely if she [sic] were refused re-entry into the United States from Haiti. The Applicant has shown that the conditions in Haiti are terrible. Kidnapping, political violence, criminal violence, and systemic breakdowns and abuses in the judicial system make life extremely difficult for persons in Haiti. The general economic situation is notoriously bad, even more so in light of recent major hurricanes that have ravaged the island nation. The Applicant is unable to support his wife, and they are unable to have a family as long as he remains in Haiti." *Appeal Brief*, filed September 26, 2008.¹ Regarding the hardship the applicant's wife may face, 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. Aside from counsel's statements, nothing has been provided to establish any hardship the applicant's wife would face should he be removed from the United States. Furthermore, the AAO notes that the applicant's marriage to his wife occurred after he was ordered removed from the United States; therefore, his marriage is an after acquired equity and it will be accorded less weight when weighing the favorable factors against the unfavorable factors. Counsel states that "while the Applicant concedes that he presented a false passport and visa to the immigration officers who inspected him upon his entry, he immediately told the officers the truth as to his situation...The Applicant's immediate and consistent forthrightness concerning his identity and how he came to possess the documentation is a significant factor. The use of fraudulent documents must also be considered in light of the Applicant's fear of returning to Haiti. The Applicant was found to have a credible fear of returning to Haiti and was allowed to apply for asylum." *Appeal Brief, supra*. The AAO notes that counsel is correct that the

¹ Though counsel seem to indicate that the applicant is currently residing in Haiti, that is not supported by the record.

applicant immediately admitted to his true name and nationality when entering the United States; however, the applicant still presented documents in someone else's name in order to gain entry into the United States which is an unfavorable factor. The AAO notes that though the applicant was ordered removed from the United States, he failed to depart the United States as ordered, and most of his presence in the United States has been without authorization and that is an unfavorable factor.

The record of proceedings reveals that on February 21, 2001, an immigration judge ordered the applicant removed from the United States. On June 21, 2002, the Board affirmed the immigration judge's decision, and on August 19, 2003, a Form I-205 was issued against the applicant. Based on the applicant's order of 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 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 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 the approval of a visa petition filed by the applicant’s wife on his behalf. The AAO notes that the applicant’s marriage to his wife occurred on March 27, 2002, which was after the applicant was ordered removed from the United States, 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 initial entry by presenting documents in someone else’s name, his failure to abide by an immigration judge’s decision, 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.