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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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MAY 06 2009

FILE:

Office: VERMONT SERVICE CENTER

Date:

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting 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 Egypt whose U.S. citizen brother, [REDACTED] on August 21, 1990, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On May 28, 1991, the Form I-130 was approved. On August 23, 1991, the applicant was admitted to the United States as a nonimmigrant. The applicant overstayed his nonimmigrant status, which expired on September 23, 1991. On October 8, 1992, immigration officers apprehended the applicant at the Department of Health. On the same day, the applicant was placed into immigration proceedings. On August 19, 1993, the applicant was granted voluntary departure. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On December 6, 1993, the applicant married [REDACTED] a U.S. citizen, in Manhattan, New York. On January 3, 1994, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Form I-130 filed by [REDACTED] on his behalf. On June 7, 1994, the applicant filed a motion to reopen immigration proceedings with the immigration judge. On August 1, 1994, the motion to reopen was denied. On May 24, 1994, a warrant for the applicant's removal was issued. On January 3, 1995, the Form I-130 was denied for failure to appear for an interview. On July 19, 1995, the applicant and [REDACTED] were divorced. On February 11, 1997, the Form I-485 was denied. On May 10, 2002, the applicant filed the Form I-212, indicating that he continued to reside in the United States. 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 reside in the United States with his U.S. citizen brother.

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 December 17, 2002.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Letter*, dated January 13, 2003. In support of his contentions, counsel submits the referenced letter, divorce, residence and financial documentation. The entire record was reviewed 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 reflects that [REDACTED] is a native of Egypt who became a lawful permanent resident in 1986 and a naturalized U.S. citizen in 1990. The applicant does not appear to be married or to have any children. The applicant is in his 40's and [REDACTED] is in his 50's.

Counsel contends that the applicant's overstay of his nonimmigrant status should not be an unfavorable factor because the applicant is eligible to adjust status under section 245(i) of the Act. Counsel contends that the applicant's attempt to apply for a vendor's license using fraudulent documentation should not be considered an unfavorable factor in the applicant's case because it occurred more than 12 years ago. Counsel's contentions are unpersuasive. Section 245(i) of the Act has relevance to an applicant's grounds of inadmissibility and eligibility to adjust status, but it does not affect the factors to be considered in an application for permission to reapply for admission. Even though the applicant's attempt to use fraudulent documentation in 1992 does not have bearing on the applicant's good moral character in regard to an application for adjustment of status, because it did not occur within five years of such an application, the applicant's actions are still a factor to be considered in an application for permission to reapply for admission.

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

On appeal, counsel states that the applicant does not have a criminal record in the United States or abroad. Counsel states that the applicant is eligible to adjust status under section 245(i) of the Act. Counsel contends that the applicant has earned income in the United States from 1992 through 2002. Counsel states that the applicant does not own a permanent dwelling and currently leases an apartment. Counsel contends that the applicant has submitted letters of recommendation, including a letter from his sister-in-law, whose identity he did not attempt to hide or conceal. Counsel contends that the applicant is a person of good moral character who has resided in the United States for twelve years, who would be severely punished and suffer hardship if he is forced to return to Egypt.

The applicant, in a letter and documentation accompanying the Form I-212, states that he has waited twelve years for the petition filed on his behalf by his brother to become current. He states that he did not depart the United States because Egypt has a lot of problems and if he goes back he will be unable to survive. He states that he loves the United States more than anything. He states that he has always paid taxes and not had any problems with the law. He states that someday he would like his children to be born in the United States. He states that he has not had a petition filed for him by his spouse; however, in separate documentation the applicant states that his attorney of record led him to believe that he could remain in the United States once he was married to [REDACTED] and the Form I-485 and Form I-130 were filed. He states that he did not depart the United States because his attorney gave him misinformation.

Letters of recommendation from the applicant's family and friends state that the applicant is an honest, trustworthy, reliable and respectful person. They state that he is hardworking and a person of good moral character. They state that the applicant has not been involved in any crimes. They state that he would be a productive member of U.S. society.

Police clearance letters from Jersey City, West New York, North Bergen, and Egypt, indicate that the applicant does not have any criminal records on file.

The record reflects that, on October 8, 1992, immigration officers apprehended the applicant at the Department of Health after he attempted to obtain a vendor's license by presenting a fraudulent I-688 Temporary Resident Alien Card. Counsel contends that the applicant was not aware of what the document was at the time he attempted to obtain the vendor's license and that a colleague had referred him to an individual who provided the applicant with the I-688. The record reflects, however, that the applicant had purchased the I-688 for \$2,000 and was aware that the document was fraudulent. While this does not render the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), because he did not attempt to use the fraudulent document to obtain immigration benefits or entry into the United States, it is a factor to be considered in exercising discretion.

Counsel contends that the applicant's prior marriage is not relevant to his application for permission to reapply for admission because he is no longer married to [REDACTED]. Counsel's contention is unpersuasive. The applicant has offered as an explanation for his failure to comply with voluntary departure his marriage to [REDACTED], her filing of a Form I-130 and the ineffective assistance of counsel in the matter. While the applicant submits a complaint filed against his attorney of record at the time, the applicant has failed to submit the disciplinary committee's finding in the matter. Moreover, the AAO finds that the applicant's claims are unfounded. The record clearly reflects that the immigration judge, upon granting the applicant voluntary departure and in light of the applicant's planned marital union, warned the applicant in open court that he had to leave the United States and that such a marriage and filing of a Form I-130 would not absolve him of his obligation to comply with voluntary departure. The record reflects that the immigration judge warned the applicant of the full consequences of his failure to depart the United States by February 19, 1994, in his native language.

The record reflects that the applicant has been employed in the United States from 1992 until at least 2002. The applicant was issued employment authorization in the United States from November 23,

1992 until November 21, 1993. The applicant filed federal taxes in 1993, and from 1995 through 2002.

Counsel contends that the applicant has only the use of the fraudulent I-688 as an unfavorable factor; however, the AAO notes that the applicant has been able to reside and work in the United States, while others have waited outside the United States for their petitions to become current.

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. *Supra*.

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 U.S. citizen brother, the general hardship to the applicant and his family if he were denied admission to the United States, his otherwise clear background, his filing of federal taxes and the approved immigrant visa petition filed on his behalf.

The AAO finds that the unfavorable factors in this case include the applicant’s original overstay of his nonimmigrant status; his use of fraudulent documentation in an attempt to obtain a vendor’s license; his failure to comply with an order of voluntary departure; his failure to comply with an order of removal; his extended unlawful presence in the United States; and his extended unauthorized employment in the United States except for dates on which he was granted employment authorization.

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.