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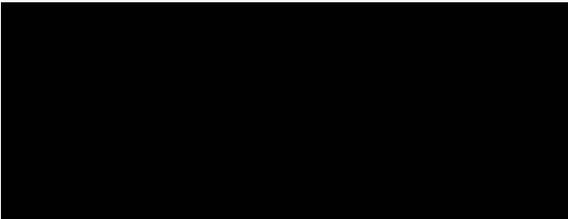
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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#4



FILE:



Office: MEXICO CITY [PANAMA]
(consolidated therein)

Date: **JAN 08 2010**

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.

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia who initially entered the United States on September 10, 1986, on a B-2 nonimmigrant visa with authorization to remain in the United States until March 9, 1987. On September 16, 1986, the applicant filed an Application for Change of Nonimmigrant Status (Form I-506) from a B-2 nonimmigrant to an F-1 student. On October 17, 1986, the Director, Miami, Florida, denied the applicant's Form I-506, and ordered the applicant to depart the United States by December 1, 1986. On an unknown date, the applicant departed the United States.

On October 8, 2002, the applicant married his first wife, [REDACTED], a native and citizen of Colombia, in Colombia. On February 22, 2003, the applicant entered the United States without inspection. On the same day, a Notice to Appear (NTA) was issued against the applicant. On November 13, 2003, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On or about March 8, 2004, the applicant divorced his first wife. On March 26, 2004, the applicant married his second wife, [REDACTED], a native of Colombia, in Florida. On April 6, 2004, an immigration judge denied the applicant's Form I-589 and ordered the applicant removed from the United States. On April 23, 2004, the applicant, through counsel, filed an appeal of the immigration judge's decision with the Board of Immigration Appeals (Board). On August 30, 2005, the Board summarily affirmed the immigration judge's decision. On October 24, 2005, the applicant, through counsel, filed a petition for review with the Eleventh Circuit Court of Appeals (Eleventh Circuit). On December 16, 2005, the Eleventh Circuit dismissed the applicant's appeal. On January 11, 2006, a Warrant of Removal/Deportation (Form I-205) was issued. On January 12, 2006, the applicant, through counsel, filed an Application for Stay of Deportation or Removal (Form I-246). On January 20, 2006, the Field Operation Director, Miami, Florida, denied the applicant's Form I-246. On February 1, 2006, the applicant was removed from the United States.

On March 10, 2006, the applicant divorced his second wife. On March 25, 2006, the applicant married his third wife, [REDACTED], a naturalized United States citizen, in Colombia. On July 10, 2006, the applicant's third wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On October 4, 2006, the applicant's Form I-130 was approved. On May 29, 2007, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and an Application for Waiver of Ground of Excludability (Form I-601). On January 10, 2008, the District Director, Mexico City, Mexico, denied the applicant's Form I-212 and Form I-601, finding that the applicant failed to establish that extreme hardship would be imposed on his spouse or that he merited the favorable discretion. On September 8, 2008, the applicant was paroled into the United States for ninety (90) days. There is no evidence in the record that the applicant departed the United States when his authorization expired. On February 11, 2009, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). 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 in the United States with his naturalized United States citizen wife.

The District Director determined that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for being unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States, and section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182 (a)(9)(A)(ii)(I), for being ordered removed from the United States. The District Director denied the applicant's Form I-212 and Form I-601 accordingly. *Decision of the District Director*, dated January 10, 2008.

The AAO notes that the applicant accrued unlawful presence from February 22, 2003, the date he entered the United States without inspection, until November 13, 2003, the date the applicant filed his Form I-589. The applicant accrued 264 days of unlawful presence, since the filing of the applicant's Form I-589 stops the tolling of unlawful presence. Pursuant to section 212(a)(9)(B)(iii)(II) of the Act, "[n]o period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i)...". On December 17, 2005, the applicant again began accruing unlawful presence the day after the Eleventh Circuit dismissed the applicant's appeal, until February 1, 2006, the date the applicant was removed from the United States. The applicant accrued 46 days of unlawful presence. On December 8, 2008, the applicant again began accruing unlawful presence the day after his parole authorization expired, until February 11, 2009, when the applicant filed his Form I-485. The applicant accrued 65 days of unlawful presence. The AAO notes that the proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [now, Secretary, Department of Homeland Security] as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. The AAO finds that even though the applicant accrued a total of 375 days of unlawful presence, he only accrued 310 days of unlawful presence during his first stay and 65 days of unlawful presence during his second stay; therefore, the applicant did not accrue the required amount of unlawful presence, which is one year, during a single stay. Therefore, the AAO finds that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9) of the Act provides, in pertinent part:

(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, claims that the applicant "has not displayed a complete disregard and disrespect for the laws of the United States." *Form I-290B*, filed February 12, 2008. The AAO notes that on February 22, 2003, when the applicant was apprehended by the Border Patrol officers after entering the United States without inspection, he misrepresented his nationality to the officers. Counsel states that the applicant was "never charged with making fraudulent statements." *Appeal Brief*, page 2, filed February 28, 2008. The AAO notes that even though the applicant was not charged with making fraudulent statements, it is still an unfavorable factor that he misrepresented his nationality to the Border Patrol officers. Additionally, the AAO notes that the applicant's entry without inspection is an unfavorable factor. The applicant failed to mention his first marriage to the Service when filing his Form I-130. Counsel states the applicant "did not intentionally fail to state a previous marriage on federal documents." *Form I-290B, supra*. However, the AAO notes that on or about March 8, 2004, the applicant divorced his first wife, and he filed his Form I-130 on July 10, 2006, but the applicant still failed to list his first marriage. Counsel states that the applicant did not file a frivolous asylum claim. The AAO notes that the Service did not adjudicate the applicant's asylum case; therefore, the Service relies on transcripts from the asylum hearing before the immigration judge.

Counsel states that the applicant has many equities in his favor, including his United States wife and child. Counsel states that the applicant's wife "suffers from very intense migraine headaches" for which she takes prescription medication, and she has endometriosis. *See appeal brief, supra* at 6-7. Counsel claims that the applicant's wife's children and mother are suffering hardship because of the applicant's wife's numerous travels to Colombia. *Id.* at 9-10. Counsel states that the applicant's wife is the "owner of her own business" as a mortgage broker and she "makes her living from this business." *Id.* at 11. "Unfortunately, due to a decline in the real estate market, [the applicant's wife] has recently experienced a severe decline in her ability to earn money through her business." *Id.* The AAO notes that it has not been established that the applicant cannot obtain employment in Colombia to help support his family. Counsel states that the applicant's son is also suffering hardship. Regarding the hardship the applicant's wife and son 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 and child, but it will be just one of the determining factors. The AAO notes that any period of time that the applicant was unlawfully present in the United States is an unfavorable factor. Additionally, the AAO notes that the applicant was working without authorization and that is another unfavorable factor.

The record of proceeding reveals that on April 6, 2004, an immigration judge ordered the applicant removed from the United States. On August 30, 2005, the Board summarily affirmed the immigration judge's decision. On December 16, 2005, the Eleventh Circuit dismissed the applicant's appeal. On January 11, 2006, a Form I-205 was issued, and on February 1, 2006, the applicant was removed from the United States. Based on the applicant's order of removal from the United States, 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 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 and child, general hardship they may experience, the lack of a criminal record besides his immigration violation, and the approval of a petition for alien relative filed by the applicant's wife on his behalf. The AAO notes that the applicant's marriage to his wife occurred on March 25, 2006, 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 without inspection; the willful misrepresentation of his nationality when he was apprehended by Border Patrol officers; his failure to depart the United States when ordered removed by an immigration judge, the Board, and the Eleventh Circuit; and his lengthy period of unauthorized presence and employment in the United States.

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.