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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

H4

FILE:

Office: LOS ANGELES, CA

Date:

OCT 25 2010

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)

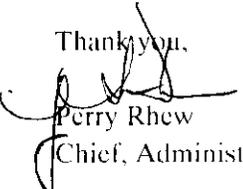
ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Los Angeles, California, 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 Guatemala who, on March 6, 1979, pled guilty to and was convicted of assault with a deadly weapon in violation of section 245(c) of the California Penal Code (CPC). The applicant was sentenced to 12 months of probation and 52 days in jail. On March 16, 1979, the applicant was placed into immigration proceedings for having entered the United States without inspection on December 28, 1978. On March 21, 1979, the applicant was ordered removed from the United States. On March 29, 1979, the applicant was removed from the United States and returned to Guatemala.

On July 1, 1983, the applicant was again placed into immigration proceedings for having entered the United States without inspection. On August 26, 1983, the applicant was granted voluntary departure until August 30, 1983. 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 September 2, 1983, the applicant was removed from the United States and returned to Guatemala.

On February 14, 1991, the applicant married [REDACTED] ([REDACTED]), a lawful permanent resident, in Los Angeles, California. On March 1, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by [REDACTED]. The Form I-485 indicates that the applicant reentered the United States without inspection in August 1983. On January 17, 2002, the applicant filed the Form I-212, indicating that he resided in the United States. On August 18, 2009, the Form I-485 was denied. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) for a period of twenty years. 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 lawful permanent resident spouse, four U.S. citizen adult children and one U.S. citizen child.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated August 18, 2009.

On appeal, counsel contends that the field office director improperly found the applicant's arrest for burglary to be a negative factor. Counsel contends that the applicant's criminal history is not quite egregious as indicated by the field office director. Counsel contends that the applicant is now a hard working man fully dedicated to his family and is a productive member of American society. *See Counsel's Brief*, dated October 5, 2009. In support of her contentions, counsel submits only the referenced brief. 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 of an 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. [emphasis added]

Counsel contends that the field office director improperly found the applicant's arrest for burglary as a negative factor since the applicant was cleared of any wrongdoing and was falsely arrested on the charge of burglary. The AAO finds that the applicant was cleared of the burglary charges and that such an arrest without further evidence of wrongdoing is not a factor to be considered in the applicant's case.

Counsel contends that the applicant's sole criminal conviction is for an assault in 1979 and is not "quite egregious" as described by the field office director. The AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of assault with a deadly weapon, a crime involving moral turpitude.<sup>1</sup> The applicant is eligible to apply for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h); however, because the applicant's crime is also a crime of violence, an exercise of favorable discretion in granting such a waiver would be subject to the applicant establishing that a qualifying relative would suffer **exceptional or unusual hardship**, a standard much harder than extreme hardship. See 8 C.F.R. § 212.7(d). To seek a waiver under section 212(h) of the Act, an applicant must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).

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<sup>1</sup> The statute under which the applicant was convicted reflects that the applicant's crime involved serious physical injury and/or a deadly weapon, both aggravating factors which render the conviction a crime involving moral turpitude.

The AAO finds that the field office director erred in stating that there is no hope of the applicant ever being legally admitted to the United States.

The record reflects that [REDACTED] is a native and citizen of Guatemala who became a lawful permanent resident in 1989. The applicant has a 32-year-old son and a 23-year-old daughter from a prior relationship who are both U.S. citizens by birth. The applicant and [REDACTED] have a 19-year-old daughter, an 18-year-old son and a 17-year-old son who are all U.S. citizens by birth. The applicant is in his 50's and [REDACTED] is in her 40's.

Counsel contends that the applicant's applications have been pending for more than eight years and the field office director is guilty of intentionally failing to timely adjudicate the application and it is not appropriate to claim that the applicant does not deserve a favorable exercise of discretion.

[REDACTED] in her affidavit accompanying the Form I-212, states that she and the applicant have not been separated since the time they met. She states that the applicant is the family's sole source of emotional as well as financial support. She states that the applicant works two jobs and drives the family around. She states that she does not drive because she does not have a driver's license. She states that the applicant is a good man who should not be penalized for an old removal in 1983. She states that she has resided in the United States since 1981. She states that she passed her naturalization interview in 1996 but was never called for the ceremony. She states that she will reapply for citizenship once the applicant's case is resolved.

A Good Conduct Certificate from the County of Ventura indicates that the applicant does not have a criminal record.

The record reflects that the applicant filed taxes in 1981, from 1983 through 1986 and from 2000 through 2002. The applicant has been employed in the United States since at least September 1984. The applicant has been issued employment authorization from April 4, 2001 until April 3, 2002; October 2, 2002 until May 22, 2005; and May 31, 2005 until May 30, 2010. The AAO notes that the applicant's employment authorization was automatically revoked when the applicant's Form I-485 was denied on August 18, 2009.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 a discretionary determination. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> 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 legal decisions 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 lawful permanent resident spouse, five U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, the applicant's otherwise clear criminal history since 1979, filing of tax returns and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, the birth of the applicant's four youngest children and the filing of the immigrant visa petition benefitting him occurred after the applicant was placed into immigration proceedings in 1979. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original unlawful entry into the United States; his conviction for assault with a deadly weapon; his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act; his illegal entry into the United States after having been removed; his failure to comply with voluntary departure; his second illegal entry into the United States after having been removed; his unauthorized employment in the United States, except for periods of authorized employment; and his unauthorized and unlawful presence in the United States.

The applicant in the instant case has multiple immigration violations and a criminal conviction. 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.