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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

PUBLIC COPY

H4

FILE:

[REDACTED]

Office: LIMA, PERU

Date:

OCT 29 2010

IN RE:

Applicant:

[REDACTED]

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:

[REDACTED]

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.

Thank you,

Tariq Syed
for

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Acting Field Office Director, Lima, Peru, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Chile who was found inadmissible to the United States under section 212(a)(9)(A)(ii)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for departing the United States while an order of removal was outstanding. The applicant 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 wife, son, and parents.

On March 11, 2009, the Acting Field Office Director denied the applicant's Form I-212, finding that the applicant had failed to establish that he merited the favorable discretion. *Decision of the Acting Field Office Director, dated March 11, 2009.*

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) "did not accord the appropriate weight to the equities that weigh in [the applicant's] favor, such as his family ties, his employment history, and his lack of a criminal record, and focused on the unfavorable factors, such as his unlawful presence subsequent to a deportation order issued in absentia." *Form I-290B, filed April 13, 2009.*

The record includes, but is not limited to, counsel's appeal brief; statements from the applicant, his wife, and his parents; letters of support for the applicant and his wife; medical and psychological documentation for the applicant's wife, mother, and father; medical documentation for the applicant's mother-in-law; tax documents, insurance documents, credit card and student loan statements, bank statements, and household and utility bills; letters from Los Angeles County Department of Health Services regarding the applicant's wife and son receiving welfare and Medicaid; articles on respiratory disease among children in Chile and air pollution in Chile; articles on depression, bulimia nervosa, and lupus; country information on Chile; and documents from the applicant's removal proceedings. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The record of proceeding reveals that on February 19, 1993, an immigration judge ordered the applicant deported from the United States *in absentia*. On March 6, 2008, the applicant voluntarily departed the United States. As such, the applicant is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act for departing the United States while an order of removal was outstanding.

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 of Immigration Appeals (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.

In counsel's appeal brief dated May 11, 2009, counsel states that since the applicant returned to Chile, his wife's "mental health has worsened." In a psychological evaluation dated April 22, 2009, [REDACTED] states in October 2007, she diagnosed the applicant's wife with major depressive disorder, recurrent episodes, and bulimia nervosa, purging type, and during "2007 to 2008, [the applicant's wife] was making a lot of progress in therapy: Bulimia was close to being in remission and she was less depressed." However, "in January 2008, her psychological functioning was getting a lot worse as she was getting more and more nervous and depressed about [the applicant's] status and possibility of him having to leave her and their young son." "At this time, ... [the applicant's wife] is experiencing severe level of depression, often numb to her feelings, unable to experience happy moments that she used to enjoy, eating less and not feeling any appetite, thus instead of making progress on her eating disorder, Bulimia has transformed into Anorexia." The AAO notes that the applicant's wife was prescribed a medication for her depression. Counsel states the applicant's son suffers from asthma and moving to Chile would "worsen his asthma, due to the pollution." In a statement dated May 6, 2009, the applicant's wife states that since the applicant departed to Chile, her son "has become more anxious" and he "keeps waiting anxiously for [the applicant] to come home." Counsel states the applicant's son "has already begun to experience massive amounts of anxiety as a result

of his separation from [the applicant].” [REDACTED] diagnosed the applicant’s son with separation anxiety disorder and major depressive disorder, moderate severity. Additionally, [REDACTED] noticed the applicant’s son has developed a motor tic.

The applicant’s wife claims that “[w]ithin three months of [the applicant’s] absence..., the line of credit on [their] home was put on freeze” and “[t]his line of credit...was the only means of cash flow that [they] depended on to survive.” She states that she was forced to give up their home, she had to return their leased vehicle, she could not afford a daycare provider for her son, and she has credit card bills “that cannot be paid which will force [her] to file bankruptcy.” The AAO notes that the record establishes that the applicant’s wife has received collection notices for her unpaid credit card bills and her health insurance was terminated because of non-payment of dues. Additionally, the record establishes that the applicant’s wife and son are now receiving government assistance, in the form of food stamps, cash aid, and Medi-Cal. The applicant’s wife claims that because of “everyone’s personal struggles and the unstable situation [she] was putting [their] son into,” she moved in with her mother, where she and her son share a bedroom with her mother. She states her mother was diagnosed with lupus so “[i]t is extremely hard to rely on her for help with [her son].” Additionally, she states that when her mother’s disease is debilitating, she has taken on the role of mother for her younger siblings.

The applicant’s wife states she cannot move to Chile because she does not speak Spanish and she has no family ties there. Additionally, she claims that taking her son to Chile “would make his asthma so much worse.” Counsel claims that the applicant’s wife “cannot leave the United States because her mother has been diagnosed with lupus” and she takes care of her mother. Counsel states the applicant’s wife “recently completed a certification program to be a pharmacy technician, but that certification is useless outside of California.”

Counsel states the applicant’s parents “have established a life for themselves in the United States” and “[g]oing back to Chile is not an option for them: they cannot afford to relocate and their home is now the United States.” Counsel also states the applicant’s mother “has developed an extreme case of rheumatoid arthritis” and in “May 2007, [she] fractured her collar bone, which required surgery.” In a statement dated May 5, 2009, the applicant’s parents state the applicant assisted his mother “with her rehabilitation and physical therapy. [The applicant] played a crucial role in the recovery of his mother.” The applicant’s parents state they are in “extreme depression” from constantly worrying about the applicant. In a statement dated May 10, 2009, [REDACTED] states the applicant’s parents “are experiencing severe symptoms of depression reactive to the loss of [the applicant] and the current financial struggles.”

Counsel states the applicant “does not dispute that the root of his immigration troubles began with his failure to depart after the entry of a deportation order against him and that such behavior should not be condoned or easily excused.” However, counsel claims that the applicant “did not have any criminal arrests or convictions,” he “has not been ‘hiding in the shadows’ as a fugitive during his time in the United States,” and he and his family “have been attempting for years to regularize his status.” Even though the applicant claims he did not know about his immigration hearing and/or the *in absentia* deportation order against him, the AAO notes that the applicant made no effort to contact the immigration court or follow-up on his request to change venue. Therefore, the applicant’s failure to appear at his hearing before the immigration judge

and his failure to abide by the immigration judge's removal order are unfavorable factors. Additionally, the AAO notes that the applicant was unlawfully present in the United States from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until March 6, 2008, the day he departed the United States, and that period of time is an unfavorable factor. Further, the AAO notes that the applicant was working without authorization and that is another unfavorable factor.

The favorable factors in this matter are the applicant's family ties to his United States citizen wife, son, and lawful permanent resident parents; extreme hardship to his spouse; hardship to his son and parents; letters of support for the applicant and his wife; the lack of a criminal record; 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 May 6, 2005, 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 failure to appear at his removal hearing, his failure to depart the United States when required, and his lengthy period of unauthorized presence and employment in the United States.

While the applicant's actions cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.