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



U.S. Citizenship
and Immigration
Services

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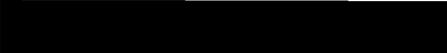


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DATE: DEC 06 2011

OFFICE: NEWARK

FILE: 

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Newark, New Jersey. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO), and this matter is now before the AAO on a motion to reconsider. The motion to reconsider will be granted. The application for permission to reapply for admission will be approved.

The applicant is a native and citizen of Ecuador who entered the United States without admission or parole on or about February 3, 1994. He was placed in deportation proceedings based on the manner of his entry to the United States and failed to appear before the court on May 4, 1994 and August 3, 1994. He was ordered deported in absentia on August 3, 1994. On August 17, 1994, the applicant was mailed a notice to report for removal. The applicant failed to report and remained in the United States. 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). 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 spouse and children.

The Field Office Director concluded that the applicant failed to demonstrate that his favorable equities outweigh his unfavorable factors and determined that the applicant does not have an avenue to adjust in the United States because he is inadmissible pursuant to section 212(a)(6)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i)(I). The Field Office Director denied the application accordingly. *See Decision of the Field Office Director*, dated July 28, 2010. On appeal, the AAO also found that the applicant is not eligible for adjustment of status pursuant to section 212(a)(6)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i)(I), and dismissed the appeal accordingly. *See Decision of the AAO*, dated February 2, 2011.

Counsel for the applicant filed a motion to reconsider the AAO decision and asserts that the approval of an I-212 application is not dependent upon an applicant possessing an avenue to adjust status in the United States and the applicant may apply for conditional approval of Form I-212 before departing the United States, notwithstanding his ineligibility for adjustment of status, under 8 C.F.R. § 212.2(j). Counsel further states that the applicant merits a discretionary I-212 waiver grant because his U.S. citizen spouse and children live in the United States and the bulk of his immigration violations occurred when he was a minor.

In support of the waiver application, appeal, and motion to reconsider, the applicant submitted a marriage certificate, identity documents for the applicant's spouse, children, parents, and brother, an affidavit from the applicant, the first page of 2009 income tax records, and evidence of a pending I-130 petition. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

The record reflects that the applicant was ordered deported from the United States on August 3, 1994. The applicant's departure from the United States will, therefore, render him inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and he requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. Counsel is correct in asserting that the applicant may apply for conditional approval of Form I-212 under 8 C.F.R. § 212.2(j) before departing the United States, notwithstanding his ineligibility for adjustment of status. *See Instructions for Form I-212.* The approval of Form I-212 under these circumstances is conditioned upon the applicant's departure from the United States, and the Field Office with jurisdiction over the applicant's place of residence has jurisdiction over the application, irrespective of whether a waiver under section 212(g), (h), (i), or 212(a)(9)(B)(v) is needed.¹ *See Instructions for Form I-212, Appendix I.*

¹ It is noted that this applicant, upon departure from the United States, will have accrued over a year of unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until the date of the applicant's departure. As such, the applicant will be inadmissible pursuant to section

The record further reflects that the applicant married his U.S. citizen spouse on April 6, 2002, and a Form I-130 filed on his behalf on June 22, 2010, is currently pending. The applicant submitted identity documents to demonstrate that he and his wife have two U.S. citizen children, the applicant's parents are lawful permanent residents, and the applicant's brother is a U.S. citizen.

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 Seventh 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-

212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). In order to seek a waiver of inadmissibility, the applicant will be required to file a Form I-601 waiver pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), together with his application for an immigrant visa.

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 (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 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.

The favorable factors include the applicant's U.S. citizen spouse, his two U.S. citizen children, his lawful permanent resident parents and U.S. citizen brother who live in the United States; the applicant's apparent lack of a criminal record; gainful employment in the United States; evidence of the payment of taxes; and the fact that the applicant has been residing in the United States for over seventeen years.

The unfavorable factors for this applicant include the applicant's immigration violations including the applicant's initial entry into the United States without admission or parole, failure to attend two immigration hearings, an order of removal from the United States, and failure to report in response to a notice to report for removal. Further, upon the applicant's departure from the United States, he will have accrued over a year of unlawful presence in the United States.

The applicant's violations of immigration law cannot be condoned, but it is noted that the applicant was a minor, sixteen year old, at the time that he committed the bulk of his immigration violations. Specifically, this applicant was sixteen years old when he entered the United States unlawfully, failed to attend immigration court proceedings, was ordered removed, and failed to report for removal. Given the applicant's age at the time of these violations, the positive factors for this applicant outweigh the negative 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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the motion to reconsider will be granted.

ORDER: The motion is granted and the application is approved, with approval conditioned on the applicant's departure from the United States.