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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H4

Date: JUL 26 2012

Office: SAN DIEGO, CA

FILE:

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)(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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Diego, 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 record reflects that the applicant is a native and citizen of [REDACTED] who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). 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 wife and children.

The district director stated that U.S. Citizenship and Immigration Service (USCIS) records indicate that the applicant was deported from the United States on February 18, 1981 and March 18, 1983 for entering the United States without inspection, and that at the April 8, 2005 adjustment of status interview the applicant, under oath, denied having been deported from the United States. The district director stated that the applicant's adjustment of status application was denied and the applicant was removed from the United States to Mexico on October 13, 2010, and that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(A)(i) of the Act.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

On appeal, counsel contends that in view of *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the applicant's Form I-212 should be granted in the matter of discretion. Counsel asserts that the applicant is needed in the United States to support his wife and child. Counsel states that the applicant's wife has a medical condition and there is extreme hardship if the applicant is not available to support his wife and child. Counsel states that the applicant and his wife own a house together, and the applicant has good moral character. Counsel argues that the applicant lawfully entered the United States in 1987, and it is unclear whether his alleged deportation was actually a voluntary departure or an administrative voluntary removal. Counsel contends that the alleged deportations in 1981 and 1983 occurred more than 25 years ago and should not be considered an overriding negative factor in the case.

The record contains birth certificates, financial records, and other documentation.

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 district director determined that the applicant was deported from the United States on February 18, 1981 and March 18, 1983.

The record reflects that on February 8, 1981, the applicant entered the United States without inspection. The Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien (Form I-221S) dated February 9, 1981 reflects that the applicant was placed in deportation proceedings and ordered to appear before an immigration judge on February 19, 1981. The Form I-221S indicates that the applicant requested an immediate hearing of his case, and was deported to Mexico from Calexico, California, on February 13, 1981.

On March 18, 1983, the applicant (using the name “ [REDACTED] ”), was arrested and charged with illegally entering the United States. On March 21, 1983, he was convicted for illegal reentry after deportation in violation of 8 U.S.C. § 1325, and sentenced to 30-days imprisonment. The record reflects that the applicant was released from detention on March 22, 1983 and a warrant was issued for his arrest.

On August 12, 2002, an Immigrant Petition for Relative (Form I-130) filed on the applicant’s behalf was approved. On September 26, 2003, the applicant filed the Form I-485, which was denied on August 14, 2006. The director noted in the denial that the applicant failed to disclose his prior deportations and unlawful entries into the United States. On October 13, 2010, the applicant was removed from the United States pursuant to reinstatement of a prior removal order.

Accordingly, in view of the records before the AAO, the applicant is inadmissible pursuant to section 212(a)(9)(A)(i) 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 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 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 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.

In the instant case, we acknowledge that the record shows that the applicant has had a lengthy residence of 11 years in the United States and has been married for 26 years to his wife. In addition, the record conveys that applicant and his U.S. citizen wife have had seasonal employment as field workers. Submitted income tax records for 2010 show the applicant and his wife's total income was \$28,566, of which \$14,554 was from unemployment compensation to the applicant's wife and \$12,172 was from the applicant's wages. Tax records show the applicant's U.S. citizen son and daughter, who were born in [REDACTED], respectively, were dependents on their parent's income tax records for 2010. The mortgage interest statement reflects that the applicant's wife and someone other than the applicant owned the residence at [REDACTED], which is where the applicant formerly resided in the United States. The monthly mortgage payment for the residence was \$1,007. The tuition statement for tax purposes for 2010 reflects that the applicant's son was a student at a state university. Income tax records reflect the applicant was employed in 2009, 2008, and 2007, earning \$9,622, \$3,950, and \$12,550, respectively, and that his wife also worked and received unemployment benefits in each of these years. Thus, in regard to financial hardship, the income tax records reflect the applicant has contributed to his family's income, and the applicant's son and daughter are financially dependent on both the applicant and his wife. Accordingly, there is evidence of hardship to the applicant and his wife, son, and daughter if the Form I-212 application is denied. However, the record is not clear as to the degree of their hardship as the applicant has not provided evidence of all of their household expenses, including the extent of his wife's financial obligation for the residence at [REDACTED]. The record also contains no medical records in which to support counsel's contention that the applicant's wife has health problems.

In addition, USCIS records reflect that the applicant has manifested a consistent disregard for the immigration laws of the United States. On February 8, 1981, the applicant entered the United States without inspection, and was deported to Mexico on February 13, 1981. On March 21, 1983, the applicant was convicted of illegal reentry after deportation in violation of 8 U.S.C. § 1325, and sentenced to 30-days imprisonment. The applicant appears to have departed the United States after completion of his sentence. Contrary to counsel's assertion that the applicant legally entered the United States in 1987, the applicant's sworn statement dated October 13, 2010 establishes that the

applicant entered the United States without inspection on December 2, 1987 at Calexico, California. The district director noted in the denial letter that the applicant failed to disclose at his adjustment interview on April 8, 2005 his prior deportations and unlawful entries into the United States. The applicant's removal from the United States on October 13, 2010 was based on reinstatement of a prior removal order. Thus, the applicant may very well be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. However, because this decision addresses only the Form I-212 application, we will not make a determination of whether the applicant is, in fact, inadmissible under section 212(a)(6)(C)(i) of the Act for failing to disclose his prior deportations and unlawful entries at the adjustment interview. In view of the favorable and unfavorable factors in the instant case, we find that, based on the record before the AAO, the applicant has not established that a grant of consent to reapply for admission into the United States is warranted.

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.