

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

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**U.S. Citizenship
and Immigration
Services**



H4

Date: **JUN 05 2012**

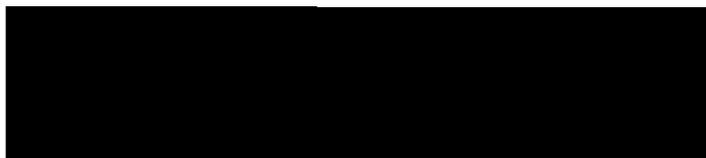
Office: NEW YORK, NY

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.

Thank you,

Perry Khew,
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, 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 sustained and the application will be approved.

The record reflects that the applicant is a native and citizen of Ecuador who accepted a voluntary departure order on April 24, 1989, and failed to depart the United States, thereby converting his voluntary departure order into an order of deportation. As such, the applicant was found 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 wife and daughter.

The District Director determined that the unfavorable factors outweigh the favorable factors in this case, and that therefore an approval of the Form I-212 was not warranted. The District Director denied the Form I-212 accordingly. *See District Director's Decision*, dated October 26, 2011.

On appeal, the applicant's counsel contends the District Director incorrectly found the applicant's inability to provide various tax returns was an unfavorable factor. He states that the applicant filed his taxes, but that the records for such taxes cannot be located. The applicant's counsel also indicates that the District Director made adverse credibility determinations regarding the applicant with respect to his failure to depart the United States after accepting a voluntary departure order and his failure to disclose his deportation order in his adjustment application. Further, the applicant's counsel believes that the District Director gave inappropriate weight to these unfavorable factors. The applicant's counsel asserts that the favorable factors in the applicant's case outweigh the unfavorable factors. The applicant's counsel indicates that the applicant is married to a U. S. citizen, has a U. S. citizen daughter, owns his own home, pays taxes and has shown his good moral character.

The record contains an appeal brief written on behalf of the applicant; affidavits from the applicant and his wife; financial documentation; an approved Petition for Alien Relative (Form I-130); documents establishing citizenship, relationships, and identities; photographs; documents submitted with a motion to reopen immigration-court proceedings in 2005; and documentation submitted in conjunction with the Application to Register Permanent Residence or Adjust Status (Form I-485).

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 entered the United States without inspection on or about March 11, 1989 and thereafter accepted a voluntary departure order on April 24, 1989. Because he failed to depart, his voluntary departure order thereby converted into a deportation order. He is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for having been ordered deported. The applicant requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

The record further reflects that the applicant is married to a U. S. citizen and has one U. S. citizen child. The applicant's wife's Form I-130 petition for the applicant was approved in December 2001. The record contains affidavits from the applicant's wife and letters from his employer that demonstrate the applicant's emotional and financial commitment to his family.

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.

The applicant is financially and emotionally assisting his wife in raising their U. S. citizen daughter, as verified by financial documentation concerning their income and expenses in the record. Such evidence reveals that the applicant's wife would suffer financial hardship if she had to support herself and her daughter without the financial assistance of the applicant. The affidavits from the applicant's wife also indicate that she requires his emotional support and is dependent upon the applicant. Further, the applicant has no criminal record, and his immigration violations occurred over twenty years ago. The applicant has lived in the United States for over twenty years and has not returned to Ecuador. Additionally, the applicant and his wife own a home in the United States, and the applicant has worked for the same employer for at least ten years. The AAO notes that the applicant's voluntary departure order converted into an order of deportation in 1989 and that he married in 2001 after the commencement and completion of his removal proceedings. As such, the

AAO acknowledges that most of the favorable factors discussed above constitute “after-acquired equities,” and accords them diminished weight. Nonetheless, the positive factors are significant.

The AAO finds that the unfavorable factors in this case include the applicant’s entry into the United States without inspection and his failure to depart the United States after accepting a voluntary departure order. Although the applicant’s violations of the immigration laws cannot be condoned, the positive factors in this case 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 applicant has met his burden and his appeal will be sustained.

ORDER: The appeal is sustained.