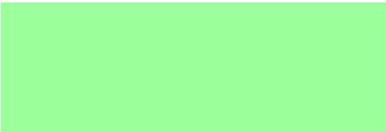




U.S. Citizenship
and Immigration
Services

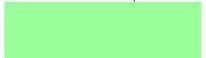
(b)(6)



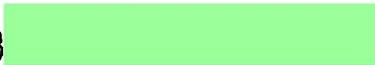
Date:

Office: HOUSTON, TX

FILE:

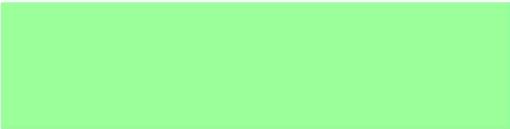


IN RE: FEB 13 2013



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,

Ron Rosenberg,
Acting Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The Field Office Director, Houston, Texas, 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 Mexico who entered the United States on or about May 5, 1994. On September 17, 2001, the applicant was granted voluntary departure by an immigration judge. He was required to depart the United States on or before January 15, 2002. He failed to comply with his voluntary departure and on November 9, 2002, he was ordered removed. The applicant has not departed the United States. Upon his departure, he will be 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 conditional approval of his 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 U.S. citizen brother.

In a decision dated July 20, 2012, the field office director found that as the applicant is not eligible to adjust his status inside the United States and there is no approved petition according the applicant eligibility to adjust his status in the near future, permission to reenter the United States would serve no purpose.

On appeal, counsel asserts that the applicant has family ties to the United States and is of good moral character such that a favorable exercise of discretion is warranted.

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

(b)(6)

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 at or near [REDACTED] Texas on May 5, 1994. On September 17, 2001, an immigration judge found that the applicant was subject to removal and granted him voluntary departure until January 15, 2002. The applicant failed to depart and on November 9, 2002 he was ordered removed. The applicant remains in the United States. Upon the applicant's departure he will be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and will require permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act to reenter the United States. He now seeks conditional approval of his permission to reapply for admission.

8 C.F.R 212.2(j) states:

(j) *Advance approval.* An alien whose departure will execute an order of deportation shall receive a conditional approval depending upon his or her satisfactory departure. However, the grant of permission to reapply does not waive inadmissibility under section 212(a)(9)(A) of the Act resulting from exclusion, deportation, or removal proceedings which are instituted subsequent to the date permission to reapply is granted.

We note that the applicant's eligibility for an immigrant visa is based on an Alien Relative Petition (Form I-130) filed on April 23, 2012 by his U.S. citizen brother. The current U.S. visa bulletin shows that immigrant visas for siblings of U.S. citizens from Mexico with filing dates of August 1996 are currently being processed. Thus, it is estimated that the applicant's immigrant visa, based on this I-130 petition, will not be available for another 16 years. Furthermore, upon his departure the applicant will become inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

While there is some merit to the field office director's decision that no present purpose would be served by adjudicating the applicant's Form I-212, as 8 C.F.R § 212.2(j) does not state that conditional approval of an applicant's Form I-212 must be supported by an underlying application, we will review the application for permission to reapply for admission.

(b)(6)

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.

(b)(6)

Page 5

The favorable factor in the applicant's case is his U.S. citizen brother. We note that the applicant's wife is residing in the United States based on Temporary Protected Status, but she will not be considered a favorable factor in this case because her status is not permanent. In addition, the record indicates that on August 5, 2009, the applicant's spouse filed a temporary protection order against him.

The unfavorable factors in the applicant's case include his illegal entry into the United States, his unlawful residence in the United States, his failure to comply with his removal order, and his serious criminal record. The record indicates that the applicant previously entered the United States without inspection near [REDACTED] Texas in October 1980; was convicted on August 12, 1986 in [REDACTED] Texas of Attempted Murder; and was deported as an aggravated felon. We note that the record includes an Order Dismissing Cause and Terminating Probation, dated April 22, 1994, from [REDACTED] Texas, which states that the applicant has unsatisfactorily fulfilled the conditions of his probation, but his judgment of conviction was set aside. Without the full record of conviction for this offense, we cannot ascertain whether this court record reflects as favorable to the applicant.

As the applicant's only favorable factor is one sibling in the United States and the applicant has an over 25 year history of violating the immigration laws of the United States, including a possible serious criminal record, we cannot find that the applicant warrants the favorable exercise of discretion.

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.