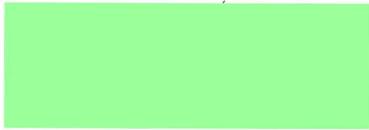


(b)(6)

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

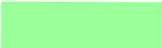


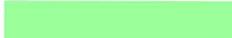
U.S. Citizenship  
and Immigration  
Services



Date: JUL 18 2013

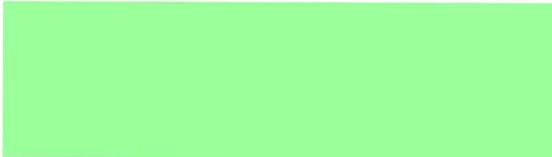
Office: NEW YORK, NY

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting 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.

The record reflects that the applicant is a native and citizen of Ecuador who was apprehended by the U.S. Border Patrol on October 22, 1994, after entering the United States at or near Buffalo, New York. The applicant was placed into deportation proceedings. On March 7, 1995, the applicant failed to appear at his deportation hearing and was ordered deported *in absentia*. 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 his U.S. citizen wife and three U.S. citizen children.

In her decision, dated December 9, 2011, the district director found that the negative factors in the applicant's case outweighed the positive such that a favorable exercise of discretion was not warranted. More specifically, the district director asserted that the record contained no evidence of the applicant initiating overseas immigrant visa processing or that he intended to leave the United States. She noted the positive factors in the applicant's case as being his family ties to the United States, but that his disregard for U.S. immigration law outweighed these factors. The application for permission to reapply for admission was denied accordingly.

On appeal, counsel states that the positive factors in the applicant's case outweigh the negative such that the applicant warrants the favorable exercise of discretion. He states that the applicant did not willfully fail to appear at his deportation hearing and he is the sole source of financial support for his family.

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 at or near Buffalo, New York on October 22, 1994. On March 7, 1995, the applicant failed to appear at his deportation hearing and was ordered deported *in absentia*. 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. 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.

The applicant's eligibility for an immigrant visa is based on an Alien Relative Petition (Form I-130) filed on August 2, 1996 by his U.S. citizen spouse. We note that the district director's assertions regarding the applicant's failure to initiate overseas immigrant visa processing have little bearing on the present matter, 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 do note that upon the applicant's departure he will also 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.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 record contains documentation regarding the applicant's previous filings in regards to immigration, financial documentation, a psychological evaluation for the applicant's spouse, and documentation establishing the applicant's family ties to the United States.

The favorable factors in the applicant's case are his U.S. citizen spouse, three minor U.S. citizen children, his record of self-employment to support his family financially, the hardship his spouse and children would face as a result of separation, the applicant's record of paying income tax in the United States, and his lack of any criminal record in the United States.

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 appear at his deportation proceeding, and his failure to comply with his deportation order.

We note that all of the favorable factors in the applicant's case are after-acquired equities and as such have been afforded less weight in this discretionary determination. Nevertheless, we find that the favorable factors in the applicant's case outweigh the unfavorable such that a favorable exercise of discretion is warranted. The record indicates that in the 18 years since the applicant the applicant's deportation order he has started a family and a successful construction business; he has been supportive of his family both emotionally and financially; he has paid taxes on the income he has made as a self-employed business owner; and he has had no criminal record.

We acknowledge that the applicant has violated U.S. immigration law and resides in the United States unlawfully and in defiance of his deportation order. Mitigating these unfavorable factors is the applicant's record of attempts to reconcile his immigration status. The record indicates that the applicant attempted to reopen his deportation order asserting that he never received notice of his deportation hearing. We recognize that it is ultimately the applicant's responsibility to notify the immigration court of any change of address and this is why his efforts were not successful at having his deportation proceedings reopened. However, in this proceeding, due consideration will be given to his statements regarding his reasons for not appearing at his deportation hearing and the fact that the Notice to Appear for the hearing was returned to the court as unclaimed. Similarly, after his marriage to a U.S. citizen and approved Alien Relative Petition, the applicant attempted to file for adjustment of status but was unsuccessful given his deportation order. Thus, in fully weighing both the unfavorable and favorable factors in the applicant's case, we 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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.