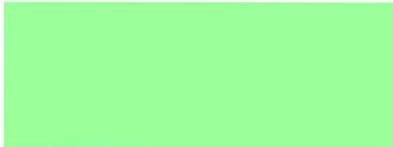


(b)(6)

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

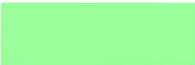


U.S. Citizenship
and Immigration
Services



DATE: FEB 03 2014

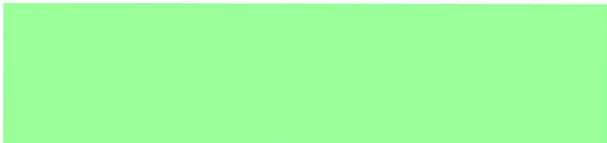
OFFICE: NEWARK

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Newark, New Jersey denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia who entered the United States on August 8, 1992 with a B2 visa, with authorization to remain in the United States until February 7, 1993. The applicant remained in the United States beyond that date and was issued a Notice to Appear in immigration court on November 3, 1999. An immigration judge granted the applicant voluntary departure until April 10, 2001, with an alternate order of removal. The Board of Immigration Appeals (BIA) affirmed the immigration judge's decision and granted the applicant voluntary departure within 30 days of its decision, issued October 21, 2002. The applicant has not departed from the United States since that date. A subsequent motion was rejected by the BIA on July 31, 2008 and a petition for review was denied by the Third Circuit Court of Appeals on December 29, 2008. 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 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).

The Field Office Director concluded that the applicant had not demonstrated that the favorable factors in his application outweighed the unfavorable factors and denied his I-212 application accordingly. *See Decision of the Field Office Director*, dated July 24, 2009.

Counsel for the applicant asserts that he was subjected to extreme cruelty by his now-deceased spouse, resulting in her failure to appear at adjustment of status interviews and a lengthy immigration process for the applicant. Counsel contends that the applicant has family and property ties in the United States, and his two U.S. citizen children rely upon his financial support.

In support of the waiver application and appeal, the applicant submitted identity documents, criminal records for his spouse, and background information concerning Colombia. 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 granted voluntary departure by an immigration judge on February 9, 2001. The applicant was granted until April 10, 2001 to voluntarily depart from the United States, but failed to depart within that time frame. The BIA affirmed the immigration judge's decision and granted the applicant voluntary departure within 30 days of its decision, issued October 21, 2002. The applicant remained in the United States and has not departed from the United States since this order. 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. The applicant seeks conditional approval of Form I-212 under 8 C.F.R. § 212.2(j) before departing the United States. *See Instructions for Form I-212.*¹

The record further reflects that the applicant has an approved Form I-130, as the father of a U.S. citizen child. The applicant submitted identity documents to demonstrate that he fathered two U.S. citizen children and legal documents to indicate that he owns property in the United States.

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:

¹ 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. *See Instructions for Form I-212, Appendix I.*

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-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.

Counsel asserts that the applicant merits a favorable exercise of discretion due to factors including his two U.S. citizen children, his length of stay in the United States, gainful employment, and the extreme cruelty he was subjected to by his former spouse.

The record indicates that the applicant has two U.S. children, a son and daughter, respectively 21 and 20 years of age. The record also indicates that the applicant has been residing in the United States for over 20 years. The transcript from the applicant's immigration proceedings indicates that he was residing with his children and their mother until his marriage to a U.S. citizen on June 12, 1996. The applicant also asserted that he resided with his U.S. citizen spouse until approximately the beginning of 1997, whereupon he again resided with his children and their mother. The applicant contends that he was still legally married to his U.S. citizen spouse upon her death on February 17, 2008.

The record contains copies of tax returns from 1999 and earlier indicating that the applicant was employed and paying taxes in the United States. The record does not contain updated financial records indicating the income of the applicant or demonstrating the extent to which his adult children rely upon his income. The record does contain a letter of employment for the applicant's son stating that he has been employed full-time for [REDACTED] since June 1, 2012. The record does not contain any updated financial documentation concerning the applicant's adult daughter.

Counsel for the applicant asserts that the applicant suffered extreme cruelty at the hands of his U.S. citizen spouse, which included threats of reporting him to immigration authorities if he reported any abuse and causing his adjustment of status application to be denied through her unavailability. Counsel contends that the applicant's former spouse subjected him to a life of turmoil, including drug and alcohol abuse, threats, disappearances, and her criminal activities. The applicant submitted criminal records for his former spouse; it is noted that none of the applicant's former spouse's arrests took place during their mutual residence of less than a year. In fact, the applicant, during immigration proceedings, testified that he never heard from his former spouse again after the beginning of 1997. It is also noted that the applicant filed a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, denied July 19, 2011, as a widower of a U.S. citizen, but did not file a self-petition as the spouse of an abusive U.S. citizen while she was alive.

On July 21, 2011, the Center Director, Vermont Service Center, denied the applicant's Form I-360, finding that the applicant resided at the same address prior to, during, and following his alleged residence with his U.S. citizen spouse, with no way to determine whether she ever resided at that address. The Center Director determined that information on the applicant's application was inconsistent with records and prior testimony. As such, and following a request for evidence, the Center Director found that the applicant failed to provide sufficient evidence to establish that he married his U.S. citizen spouse in good faith. On June 6, 2012, the BIA agreed that the applicant had failed to meet his burden of proving that his marriage to his former U.S. citizen spouse was valid for immigration purposes. As noted by the BIA, the applicant's former U.S. citizen spouse's death certificate, issued July 14, 2008, states that she was never married.

The favorable factors are the applicant's two U.S. citizen children, his length of residence in the United States, and his current employment. The unfavorable factors for this applicant are the applicant's immigration violations, including the applicant's years of employment without

authorization, failure to depart pursuant to a grant of voluntary departure, and an order of removal from the United States with a subsequent failure to depart. The applicant has a criminal violation, as he testified to being convicted of driving under the influence in April 1992. Further, the applicant has been unable to demonstrate that he entered into a bona fide marriage with his former U.S. citizen spouse.

After a careful review of the record, it is concluded that the unfavorable factors outweigh the favorable factors, and the AAO finds the applicant has not established that a favorable exercise of the Secretary's discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.