U.S. Department of Justice

Immigration and Naturalization Service

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[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

AUG 2 1 2001

FILE: [redacted] Office: Texas Service Center Date:

IN RE: Applicant: [redacted]

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)

IN BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is before the Associate Commissioner on a motion to reopen. The motion will be dismissed and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Guatemala who was present in the United States without a lawful admission or parole on June 11, 1989. On June 16, 1989, he was ordered deported from the United States and he was removed from the United States on June 20, 1989. Therefore he is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The applicant was present again in the United States again without a lawful admission or parole on May 1, 1990 and without permission to reapply for admission in violation of section 276 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1326 (a felony).

The applicant married a United States citizen on September 25, 1993, following his felonious return to the United States, and he is the beneficiary of a petition for alien relative which was approved on August 5, 1999. The applicant 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), to remain with his family.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel states that section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. 1182(a)(9)(B)(i)(II), was misinterpreted. Counsel states that section 212(a)(9)(B)(i)(II) of the Act provides that a person who is unlawfully present in the United States for a continuous period of one year or more. Neither the director nor the Associate Commissioner made any reference to section 212(a)(9)(B) of the Act as presently amended in their decisions. The Associate Commissioner made reference to former section 212(a)(6)(B) of the Act which was redesignated as section 212(a)(9)(A) of the Act.

On motion, counsel asserts that, even if at the Commissioner's discretion an equity gained while being unlawfully present subsequent to a return in to be given only minimal weight, unlawful presence excludes periods prior to April 1, 1997. Whether it is termed as "unlawful presence" or "remaining in the United States in violation of law," the concept is the same.

On motion, counsel states that the Service misapplied the analysis used to dismiss the appeal and the decision was reached without due consideration of section 245(i) of the Act, 8 U.S.C. 1255(i).

Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former

sections 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former section 236 of the Act, 8 U.S.C. 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgements or decisions under certain sections of the Act, created a new expedited removal proceeding, and established major new grounds of inadmissibility. Nothing could be clearer than Congress' desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration law. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

Although both the Service and counsel refer to guidelines for considering permission to reapply for admission applications set forth in Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973), and in Matter of Lee, 17 I&N Dec. 275 (Comm. 1978), these holdings were rendered long before Congress amended the Act from 1981 through the present 1996 IIRIRA amendments and beyond. Even though these decisions have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in the legislation and in their decisions that less weight should be given to individuals who violate immigration law. The later statutes and judicial decision have effectively negated most precedent case law rendered prior to 1981. Such case law is still considered but less weight is given to favorable factors gained after the violation of immigration laws following statutory changes and judicial decisions.

Even the Regional Commissioner in Tin, held that an alien's unlawful presence in the United States is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of

an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully.

After reviewing the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, and after noting that Congress has increased the bar to admissibility from 5 to 10 years, has also added a bar to admissibility for aliens who are unlawfully present in the United States, and has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted, it is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

Nothing could be clearer than Congress's desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration laws. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

The court held in Garcia-Lopez 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. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993).

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as "after-acquired family ties") in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter feloniously reentered the United States in 1990 and married his spouse in 1993. He now seeks relief based on that after-acquired equity.

In section 301(c) of IIRIRA and codified as section 212(a)(6)(A) of the Act, 8 U.S.C. 1182(a)(6)(A), and effective April 1, 1997, most aliens who are "present in the United States without being admitted or paroled," are deemed to be inadmissible to the United States. Such persons present since before April 1, 1997 will be ineligible to adjust their status to permanent resident under section 245(a) of the Act, since they were not, and will not have been, "inspected and admitted or paroled" into the United States. This provision

applies to aliens seeking adjustment of status and there is no waiver for this provision except for battered spouses.

Under section 245(i)(1)(A) of the Act, which was not amended by IIRIRA, these aliens, if otherwise eligible, will continue to be specifically permitted to apply for adjustment of status under section 245(i)(1) of the Act. To establish eligibility to adjust under section 245(i) of the Act, most such persons must, among other things, pay a significant filing fee surcharge and they must continue to be admissible.

In enacting section 212(a)(6)(A) of the Act, Congress sought, in part, to redress the longstanding problem in which aliens who circumvented the inspection process were entitled to greater procedural and substantive rights than those who presented themselves to an inspector in the manner prescribed by law. Formerly, an alien who affected an "entry" into the United States, even by evading inspection, could not be placed into exclusion proceedings, only deportation proceedings, because such an act was not a ground for exclusion. Whereas aliens who presented themselves for admission at a designated port of entry were placed in exclusion proceedings because they had not yet "entered" the United States. Congress corrected the anomaly between exclusion and deportation in IIRIRA by redefining "entry" as "admission." Now the grounds of deportability apply to persons who have been admitted and the grounds of inadmissibility at section 212 of the Act apply to persons who have not been admitted. Congress then enacted a new section 212(a)(6)(A) of the Act which, for the first time, makes illegal entry a ground of inadmissibility.

In enacting this provision, however, Congress clearly did not intend to render <u>all</u> illegal entrants inadmissible to the United States. First, Congress specifically exempted certain battered spouses and children who entered without inspection from this new ground of inadmissibility. In addition, section 212(a) of the Act contains a savings clause exempting illegal entrants, as well as others, from inadmissibility if "otherwise provided" in the Act. By retaining the savings clause, Congress left the door open to the possibility that the policy concerns of other sections of the Act may outweigh those of the individual grounds of inadmissibility of section 212(a). Since section 245(i) of the Act expressly permits entrants without inspection to apply for adjustment of status, Congress, in effect, has deemed such persons "admissible" for the single purpose of filing an adjustment application under section 245(i) of the Act if they are not inadmissible under any other provision of section 212 of the Act or all grounds of inadmissibility have been waived.

The favorable factors in this matter are the applicant's family ties, the absence of a criminal record, the need for the applicant's presence to care for three minor children, the approved

petition for alien relative, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's two unlawful entries and one a felony, his deportation, his employment without Service authorization, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, supra, that he could only relate a positive factor of residence in the United States where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law, would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity (marriage and the birth of three children) gained while being unlawfully present in the United States (and entered into while in deportation proceedings) can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the decision dismissing the appeal will be affirmed.

ORDER: The motion is dismissed. The order of October 3, 2000, dismissing the appeal is affirmed.