H4

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

FIL[redacted] Office: Baltimore Date: 0 7 JAN 2002

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]

Public Copy

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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Baltimore, Maryland, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was present in the United States without a lawful admission or parole on January 25, 1988. The applicant's Request for Asylum was denied on November 7, 1988, and on March 10, 1989, an Order to Show Cause was served on him. On June 28, 1989, an immigration judge ordered the applicant deported *in absentia*. According to the record, the applicant departed the United States in 1992 and effected his deportation. 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 in the United States again without a lawful admission or parole (in March 1992 according to his Application for Employment Certification signed under oath, or in 1993 as indicated on his Form I-212 application, or in late 1993 or in early 1994 as indicated on a supporting statement by the Senior Assistant Manager of the Houston Restaurant, or 1995 according to counsel on appeal) and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. 1326 (a felony). The applicant commenced unauthorized employment in early 1994 according to a letter from his employer and W-2 forms in the record. The applicant applied for Temporary Protected Status and reapplied for asylum in January 1996. He was issued employment authorization in February 1995 and has continued to receive employment authorization through 2001. The applicant is married to a native and citizen of El Salvador, and the beneficiary of an approved petition for alien worker. 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 in the United States.

The district director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, counsel states that the applicant is the beneficiary of an approved labor certification with a priority date of September 1997 which allows him to be "grandfathered" in under section 245(i) of the Act, 8 U.S.C. 1255, as well as the reinstated section 245(i) under the LIFE act. Counsel states that the applicant paid the requisite penalty of $1,000 along with the requisite fees in filing his application for adjustment of status. Counsel states that the applicant has lived in the United States without incident, has no criminal record, and gained the majority of his work experience engaged in authorized employment.

It is noted that the district director includes the standard of "extreme hardship" in his decision. A showing of extreme hardship is not required in seeking permission to reapply for admission. The

issue regarding the applicant's alleged eligibility under section 245(i) of the Act must be addressed in another proceedings.

Section 212(a)(9)(A) of the Act provides, in part, that:

> (i) 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 5 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) Any alien not described in clause (i) who-
>
> > (I) has been ordered removed under section 240 of the Act 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) 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 Attorney General has consented to the alien's reapplying for admission.

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 unless the Attorney General has consented to the alien's reapplying for admission. The provision holding aliens inadmissible for 10 years after the issuance of an exclusion or deportation order applies to such orders rendered both before and after April 1, 1997.

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.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

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's 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 guidelines were promulgated for considering permission to reapply for admission applications 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 individuals who violate immigration law are viewed unfavorably. The later statutes and judicial decisions 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.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

The Service, following more recent judicial decisions, has accorded less weight to an applicant's equities gained after a deportation order is entered. The statute provides in section 240 of the Act, 8 U.S.C 1229, for the consideration of a certain amount of continuous physical presence in the United States for aliens seeking cancellation of removal. The present applicant is not seeking cancellation of removal.

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 after-acquired equities, 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 entered the United States unlawfully in 1988, was ordered deported *in absentia* in 1989, failed to depart until 1992, feloniously reentered in 1993, 1994, or 1995, and worked without authorization for part of the time until he refiled an application for asylum. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties, the absence of a criminal record, the need for the

applicant's services, the approved employment-based preference visa petition, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's unlawful entry, his failure to appear for the removal hearing, his failure to depart when required, his felonious reentry without permission, his employment without Service authorization for part of that time, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, supra, that residence in the United States could be considered a positive factor only 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 (employment certification) was gained while being unlawfully present in the United States and while in deportation proceedings. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.