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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

FILE: [redacted] Office: Chicago Date: MAR 20 2003

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)

ON BEHALF OF APPLICANT: [redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Chicago, Illinois, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ireland who was admitted to the United States on May 31, 1993, as a nonimmigrant visitor with authorization to remain until November 30, 1993. The applicant remained longer than authorized without applying for or receiving an extension of temporary stay. On February 17, 1998, he was served with a Notice to Appear after being detained at Cook County Jail for violating a court order and Driving under the Influence. The applicant was initially encountered by the Illinois State Police in the process of purchasing a firearm with a fraudulent Firearm Owner's Identification Card (FOID). The applicant was released on bond on February 18, 1998.

On September 25, 1998, the applicant's U.S. citizen wife filed a Petition for Alien Relative in his behalf. On March 11, 1999, the Petition for Alien Relative was abandoned and a denial notice issued. On October 28, 1999, an immigration judge granted the applicant until February 25, 2000, to depart the United States voluntarily in lieu of removal. The applicant departed on February 24, 2000, without notifying the Bureau. He obtained a new Irish passport in the name of [redacted] and was admitted to the United States as [redacted] under the Visa Waiver Pilot Program (VWPP) on March 25, 2000, with authorization to remain until June 24, 2000.

The applicant failed to surrender to INS custody on May 25, 2000, and his bond was breached. On December 19, 2000, the applicant was arrested as an overstay and his fraudulent FOID card was confiscated and turned over to the Illinois State Police. He was removed from the United States on December 28, 2000, under section 217 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1187. Therefore, he is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i).

The applicant married [redacted] a U.S. citizen, on May 9, 1998, while in removal proceedings, and he is the beneficiary of an approved Petition for Alien Relative filed on December 15, 2000. 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).

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

On appeal, counsel states that the Bureau gave undue weight to the negative factors without adequately considering the positive ones. Counsel addresses the economic hardship faced by the applicant's wife who works at a low income job, the financial toll of requiring a baby sitter, her need to continue employment to maintain health insurance for her two children, and her need to resort to public assistance if her husband does not return.

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.
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> (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 Secretary, Department of Homeland Security, has consented to the alien's reapplying for admission.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (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 for considering permission to reapply for admission applications were promulgated 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. It is specifically noted that the Commissioner in *Matter of Lee*, referred to the intent of Congress in enacting former sections 212(a)(16) and (17) of the Act, 8 U.S.C. 1182(a)(16) and (17), in the conclusions and recommendations of the Senate Committee on the Judiciary in their report dated 1950. The Committee also reviewed section 3 of the 1917 Act in their study.

Even though the decisions in *Tin* and *Lee* have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in their intent, and 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. Many of the considerations listed in *Tin* in 1973 are now moot based on this IIRIRA amendment by Congress.

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 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*, 22 I&N Dec. 408 (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 in 1993 as a nonimmigrant, remained longer than authorized, married his spouse in May 1998 while unlawfully present in the United States, departed voluntarily in February 1999, entered under the VWPP in March 2000 with a passport issued in a modified name, remained longer than authorized and was deported on December 28, 2000. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties, the need for the applicant's presence to care for two 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 remaining longer than authorized on two occasions, his deportation, and his arrests and attempt to purchase a firearm with a

counterfeit identification card, and his lengthy presence in the United States without a lawful admission or parole.

The applicant's actions in this matter cannot be condoned. His equity (marriage), gained after violating his nonimmigrant status in the United States and after being placed in removal proceedings, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant 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.