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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

PUBLIC COPY



APR 16 2003

FILE  Office: MADRID, SPAIN Date:

IN RE: Applicant: 

APPLICATION: Application for Permission to Reapply for Admission after Removal; Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(ii)

ON BEHALF OF APPLICANT: 

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 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 for permission to reapply for admission after removal was denied by the Acting Officer in Charge, Madrid, Spain. The application is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Spain, who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A) for having been ordered removed from the United States on April 16, 2001. The applicant married a United States citizen in New York on February 17, 2001, and he is the beneficiary of an approved petition for alien relative. The applicant seeks permission to reapply for admission to the United States after removal (Form I-212). He additionally seeks a waiver of inadmissibility pursuant to section 212(a)(9)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(ii) (Form I-601), in order to travel to the United States to reside with his spouse and child.

The acting officer in charge (OIC) determined that the applicant failed to establish the favorable factors in the applicant's case outweighed the unfavorable factors and denied the application for permission to reapply for admission after removal (Form I-212) accordingly.

In support of his decision, the acting OIC stated:

A review of your record reveals the following favorable factors: A Petition for Alien Relative, or Form I-130, that was filed on your behalf by your United States citizen spouse has been approved by the Service.

Your record also reveals the following unfavorable factors: It appears that the equity noted above was acquired as a fruit of your illegal presence in the United States. You have admitted overstaying your period of authorized presence in the United States on two occasions, and having entered the United States on those occasions with the intention of seeking employment. You have admitted not paying federal taxes, and not filing a federal income tax return, both of which are required by federal law. You have further admitted using a fraudulent social security card to obtain employment in the United States, in violation of Title 42, United States Code Section 408(e), which is a felony cognizable under federal law.

The above facts establish a willful and flagrant

disregard for the laws of the United States, without a hint of reformation.

See *Acting OIC Decision*, dated July 24, 2002 at 3.

The record reflects that the applicant first entered the United States (U.S.) under the Visa Waiver Pilot Program (VWPP) in 1998. The record indicates further that the applicant entered the U.S. with the intention of finding temporary employment and that he overstayed his visa and remained in the U.S. until December 1999. The applicant re-entered the U.S. under the VWPP on February 26, 2000 and he departed the country in September 2000. On December 16, 2000, the applicant entered the U.S. a third time under the VWPP. He married a U.S. citizen on February 17, 2001, however no I-130 petition for alien relative was filed at that time. The applicant was apprehended by a border patrol agent and subsequently ordered removed pursuant to section 217 of the Act, 8 U.S.C. § 1187, on April 16, 2001. The applicant's wife filed an I-130 petition for alien relative in Madrid, Spain on December 31, 2001.

Section 217 of the Act states, in pertinent part:

(a) Establishment of [Visa Waiver] Program. -

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(1) Seeking entry as tourist for 90 days or less. - The alien is applying for admission during the program (as defined in subsection (e)) as a nonimmigrant visitor . . . for a period not exceeding 90 days.

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(7) No previous violation. - If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(b) Waiver of Rights. - An alien may not be provided a waiver under the program unless the alien has waived any right -

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

On appeal, counsel asserts that the applicant has established he is a law-abiding individual who has respect

for U.S. immigration laws. Counsel states that the applicant is deeply religious and that he voluntarily departed the U.S. in November 1999, because he did not want to continue to overstay his VWPP visa or to continue to violate U.S. laws. Counsel submitted several affidavits from members of the applicant's church stating that shortly before departing the United States in November 1999, the applicant testified in front of his church congregation that he had disobeyed United States immigration laws by overstaying his non-immigrant visa and that he had a religious conviction to cease his violation of the law and to return to Spain. Counsel asserts that the applicant does not have a criminal record and that the applicant did not work illegally after his last entry into the U.S. In addition, counsel asserts that the applicant showed remorse and responsibility to the laws of the U.S. when he left on his own after being ordered removed in April 2001, despite the fact that he was married to a U.S. citizen. Counsel states that the applicant has a U.S. citizen wife and newborn child who will be separated from their family and suffer economic, personal and religious hardship if the applicant is not allowed to return to the U.S.

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 an application for permission to reapply after deportation:

The basis of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to family members if the applicant were not allowed to return to the U.S.

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 good 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.*

Although the guidelines for considering permission to reapply for admission applications were promulgated in *Matter of Tin* and *Matter of Lee*, subsequent Congressional legislation has made it increasingly clear that Congress desires to limit the relief available to individuals who violate immigration laws, and that less weight is now given to favorable factors gained by an alien after the violation of immigration laws.

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), Pub. L. 104-208, 110 Stat. 3009, and is now codified as section 212(a)(9)(A)(i) and (ii). 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. Section 212(a)(9)(A)(i) of the Act provides that aliens who have been ordered removed from the United States through expedited removal proceedings or removal proceedings initiated on the alien's arrival in the United States and who have actually been removed (or departed after such an order) are inadmissible for 5 years.

Moreover, even the *Tin* decision found that an alien's unlawful presence in the United States was evidence of disrespect for the law. See *Matter of Tin*, *supra* at 373. 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 be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The favorable factors in this case are the applicant's marriage to a United States citizen and the prospect of general hardship to his U.S. citizen spouse and newborn U.S. citizen child if they moved to Spain, or in the alternative, if they were forced to live apart. It is noted, however, that these equities were acquired as a result of the applicant's illegal presence in the United States. They can thus be given only minimal weight.

The applicant's wife indicated that she will move to Spain to be with her husband if he is not allowed to return to the United States. She lists an inability to practice her Evangelical Christian religion as one of the most important hardships she would face in Spain. A review of the 2002 U.S.

Department of State International Religious Freedom Report (the Report) indicates, however, that the applicant's wife would be able to practice her faith in Spain. The Report states that government policy continued to contribute to the generally free practice of religion and that generally amicable relationships existed among the various religions. Moreover, the Report states that foreign and national missionaries proselytize without restriction in Spain and that the Federation of Evangelical Religious Entities (FEREDE) represents 35,000 Spanish protestants and estimates that there are at least 800,000 foreign Protestants who reside in the country at least 6 months a year.

Moreover, the question of what constitutes hardship was analyzed in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996). In that case, the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that is unusual or beyond that which would normally be expected upon deportation. The court stated further that the common results of deportation are insufficient to prove extreme hardship. In *Matter of Pilch*, Interim Decision 3298, (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation. Furthermore, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The question of hardship was further analyzed in *Hassan v. INS*, 927 F.2d 465 (9th Cir. 1991). In that case, the Ninth Circuit Court of Appeals stated that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. In addition, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The unfavorable factors in this case include the fact that the applicant worked illegally in the U.S. and overstayed his VWPP visa in 1998 and 1999. The applicant subsequently reentered the U.S. on two occasions in violation of section 217(a)(7) of the Act, which states in pertinent part, that, "if the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant." The purpose of the applicant's entry in July 2000, was to seek employment, in violation of VWPP provisions. Moreover, the applicant overstayed his period of authorized presence in the United States after his last entry into the United States in December 2000. The applicant admitted that he did not pay federal taxes or file

a federal income tax return, both of which are required by federal law. He further admitted that he used a fraudulent social security card to obtain employment in the United States, in violation of Title 42, U.S.C. § 408(e), a felony under federal law.

The applicant has not established that the favorable factors outweigh the unfavorable factors in this case. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility 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 Attorney General's discretion is warranted.

Immigration and Naturalization Service (now the Bureau of Citizenship and Immigration Services) instructions at O.I. 212.7, specify that when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility, the Form I-212 application will be adjudicated first. If the form I-212 application is denied, the application for waiver of grounds of inadmissibility should be rejected and the fee refunded. Accordingly, the appeal of the Form I-212 denial will be dismissed and the application for waiver of grounds of inadmissibility will be rejected.

ORDER: The appeal of the denial of the Form I-212 is dismissed. The application for waiver of grounds of inadmissibility is rejected.