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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

FILE [redacted] Office: Los Angeles Date: APR 21 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]

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 was denied by the District Director, Los Angeles, California, and is now before the Office of Administrative Appeals on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who was present in the United States without a lawful admission or parole on April 13, 1983. On April 14, 1983, an Order to Show Cause was issued. On April 12, 1984, an immigration judge denied the applicant's application for asylum and granted him until May 11, 1984, to depart the United States in lieu of deportation. An appeal of that decision was dismissed by the Board of Immigration Appeals (the Board) on July 24, 1989. The Board granted the applicant an additional 30 days from the date of the decision to depart the United States voluntarily in lieu of deportation. The applicant failed to depart by that date. 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). A Warrant of Deportation was issued on his behalf on March 13, 1990, and he was ordered to surrender on April 2, 1990.

The applicant admitted to having departed the United States and in October 1990 was present in the United States again without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony).

The applicant married a native and citizen of Mexico on January 26, 1989, while in deportation proceedings. He is the beneficiary of an approved Petition for Alien Relative as the spouse of a lawful permanent resident. 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 district director determined that the applicant fell within the purview of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), and he may not apply for any relief under the Act while he is present in the United States.

On appeal, counsel states that the applicant has been married to a lawful permanent resident since 1988 and they have five children. Counsel states that he was married before deportation.

Section 241(a)(5) of the Act, 8 U.S.C § 1231(a)(5), provides that:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after reentry.

The applicant departed from the United States in September 1990 while under an order of deportation. The record reflects that the applicant unlawfully reentered the United States in October 1990 and before April 1, 1997, the effective date of section 241(a)(5). Therefore, he is not subject to the provisions of section 241(a)(5) of the Act. *See, Matter of G-N-C-,*, 22 I&N Dec. 281, 297, 299 (BIA 1998). The district director's decision will be withdrawn. The application will be adjudicated *de novo* and denied on other grounds. The appeal will be dismissed on other grounds.

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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> (ii) Any alien not described in clause (i) who-
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> > (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)(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). 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 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.

Congress has increased the bar to admissibility from 5 to 10 years. Congress has also added a bar to admissibility for aliens who are unlawfully present in the United States. In addition, Congress 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. In IIRIRA, Congress has added new and amended crimes, new grounds of inadmissibility, new grounds of deportability, and has enhanced enforcement authorities. 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.

In support of this conclusion it is noted that the statute now provides at section 212(a)(6)(A)(i) of the Act that an alien who is

unlawfully present in the United States without a lawful admission or parole after April 1, 1997, is inadmissible and there is no waiver available. There is an exception for battered aliens. Such an alien cannot seek adjustment of status except for certain aliens eligible under section 245(i) of the Act. Therefore, many of the considerations listed in *Tin* in 1973 are now moot based on this IIRIRA amendment by Congress. In order for the alien to have the ground of inadmissibility under section 212(a)(6)(A)(i) of the Act removed, the alien must depart the United States.

It is also noted under section 212(a)(9)(C) of the Act, that aliens who were unlawfully present in the United States for an aggregate period of more than one year after April 1, 1997, and subsequently departed or who were previously ordered removed (and actually left the United States) and who subsequently enter or attempt to reenter the United States without being admitted on or after April 1, 1998, are inadmissible until they have resided outside the United States for at least 10 years. Therefore, 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 Bureau, following more recent judicial decisions and the Congressional amendments, has accorded less weight to an applicant's equities gained following the commencement of removal proceedings, if the equities were gained while the applicant was unlawfully present in the United States or after a violation of law. 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*, 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 unlawfully in 1983, was placed in deportation proceedings in 1983 and married his spouse in January 1989 while in deportation

proceedings. 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 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 unlawful entry, his failure to depart voluntarily, his felonious reentry without permission, his employment without Bureau 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 (marriage) 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.

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 Attorney General's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.