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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: Office: PANAMA CITY, PANAMA Date: APR 25 2003

IN RE: Applicant:

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 (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) filed in conjunction with Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Act, 8 U.S.C. 1182(h), and section 212(a)(9)(B)(v) of the Act, 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

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 for permission to reapply for admission into the United States after deportation or removal was denied, and the application for waiver of grounds of inadmissibility was rejected, by the Officer in Charge, Panama City, Panama. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native of Hong Kong and citizen of Venezuela who was found by a consular officer to be inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) for having been removed from the United States on February 23, 1999; under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude; and under section 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The applicant is married to a citizen of the United States and is the beneficiary of an approved petition for alien relative. He seeks permission to reapply for admission to the United States after deportation or removal, as well as a waiver of grounds of inadmissibility, in order to travel to the United States to reside.

Service 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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) will be adjudicated first. Service instructions also specify that if the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected.

In a single decision addressing both the Form I-212 and Form I-601 applications, the officer in charge denied the application for permission to reapply as a matter of discretion. The officer in charge then rejected the application for waiver of inadmissibility.

On appeal, counsel asserts that the officer in charge erred in stating that qualifying relationships in themselves are insufficient to warrant approval of an application for waiver of grounds of inadmissibility; erred in finding that the applicant's spouse and children did not suffer extreme hardship as a result of the applicant's deportation; and failed to consider and analyze the documentation provided regarding the extreme hardship claim.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are ineligible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) CRIMINAL AND RELATED GROUNDS.-

(A) CONVICTION OF CERTAIN CRIMES.-

(i) IN GENERAL.- Except as provided in clause (ii), an alien convicted of, or who admits having committed, or who admits committing such acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, is inadmissible.

* * *

(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon an 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) OTHER ALIENS.-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) EXCEPTION.-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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) ALIENS UNLAWFULLY PRESENT.-

(i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

* * *

(v) WAIVER.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(h) of the Act states:

The Attorney General may, in his discretion, waive application of subparagraphs (A)(i)(I),...if-

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i)...the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have who have committed a crime involving moral turpitude or have been present in the United States without a lawful admission or parole. 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).

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). 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.

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the

United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

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. *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). 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).

In *Matter of Tin*, the Regional Commissioner held that unlawful presence 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. Following *Tin*, an equity gained while in an unlawful status can be given only minimal weight.

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 record reflects that the applicant initially entered the United States in 1974 as a J-1 nonimmigrant participant in an exchange visitor program, subject to the requirement that he reside in his own country for two years following the completion of his program before becoming eligible for permanent residence in the United States.

On February 14, 1978, the applicant married [redacted] and applied for adjustment of his status to that of a lawful permanent resident. On April 20, 1978, he was paroled into the United States in order to pursue that application. On August 31, 1978, the application was rejected and returned to the applicant because he was subject to the two-year foreign residence requirement. On November 16, 1989, his status as a parolee was revoked.

On October 25, 1991, the applicant applied for a waiver of the two-year foreign residence requirement. That application was denied. On June 3, 1993, the applicant and his first spouse were divorced. It is noted that while married to his first spouse, the couple had two children, both born in the United States. Although the record does not contain the specific dates of birth of the children, it is indicated that the applicant's daughter is now approximately twenty years-old and his son is seventeen.

On July 23, 1993, an immigration judge ordered the applicant excluded and deported from the United States based on his having been convicted of embezzlement in 1979. The record also reflects that the applicant's criminal activity include charges of violating parole in 1981, and issuing bad checks in 1979 and 1992.

On September 22, 1993, the applicant married [redacted] On May 16, 1997, the applicant's second spouse also filed a petition for alien relative on the applicant's behalf and on September 4, 1997, the applicant filed a second application for a waiver of the two-year foreign residence requirement. The Bureau approved the a waiver of the two-year residence requirement on October 9, 1997, based upon a no-objection statement received from the United States Information Agency. On August 20, 1998, the visa petition filed in the applicant's behalf by his second spouse was also approved.

On February 23, 1999, the applicant was removed from the United States based upon the immigration judge's July 23, 1993 order of deportation.

On appeal, counsel submits documentation including a brief dated December 5, 2001; an affidavit from the applicant's daughter dated December 3, 2001; and an order of eviction dated November 8, 2001. Counsel states that the officer in charge failed to consider the extreme hardship that the applicant's children have faced since his removal. Counsel also asserts that hardship to the applicant's current spouse should be taken into consideration, noting that they have been separated from each other for half of their marriage.

The applicant's daughter states that her natural mother was mentally ill and abandoned the children in order to reside in California. The applicant took care of the children and provided them with everything they needed to survive as comfortably as

possible. The daughter asserts that upon her father's removal from the United States in 1999, her mother returned to reside with the children. The daughter then moved out on her own. Eventually, her mother and brother were evicted from their apartment, her brother stopped going to school, started getting into trouble with the law, and now lives with her. She states that she is currently in college, works full-time, and is trying to take care of herself and provide for her brother.

The applicant's equities in this matter include his family ties as the spouse and father of United States citizens. The favorable factors include his family responsibilities, as well as the emotional and financial hardships his family has faced since his removal.

The unfavorable factors in this matter include the applicant's history of immigration violations including his unlawful presence, criminal conviction, and deportation.

The applicant's actions in this matter cannot be condoned. His equity (marriage) gained after having been ordered excluded and deported from the United States 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 that he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the decision of the officer in charge to deny the Form I-212 application and reject the Form I-601 application will be affirmed. The appeal will be dismissed.

ORDER: The appeal is dismissed.