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H4



U.S. Citizenship
and Immigration
Services



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FILE: [Redacted] Office: MANILA

Date: NOV 23 2005

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) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:



NOV 23 2005

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The applicant is a native and a citizen of the Philippines who ostensibly entered the United States on January 11, 1992, at Tampa, Florida, as a non-immigrant authorized to remain in the United States until July 10, 1992.¹ The applicant did not depart the United States as required. Instead, prolonged his stay in the United States by filing an application for asylum on or about May 16, 1992, with the Los Angeles Asylum Office. That office sent the applicant a notice of interview, requesting that he appear for an interview on the application scheduled for August 10, 1992. The record contains a copy of a letter dated August 6, 1992, which purports to be a letter from the applicant to the Los Angeles Asylum Office acknowledging receipt of the asylum interview notice and requesting that the appointment be rescheduled due to the need for the applicant to obtain corroborating evidence from the Philippines. The record reflects that the interview was rescheduled for November 9, 1992, but the applicant failed to appear resulting in the denial of the application. On November 30, 1992, the asylum office denied the application based upon the applicant's failure to appear. The former Immigration and Naturalization Service (INS), instituted deportation proceedings by filing an Order to Show Cause (OSC, now known as a Notice to Appear or NTA) on July 23, 1993. The notices relating to both the asylum and the deportation proceedings were sent to the address the applicant had provided to immigration officials, i.e., [REDACTED] Cerritos, California. A hearing before the immigration judge was scheduled for December 16, 1993, at which time the applicant failed to appear, resulting in the issuance of an in absentia order of deportation.²

The record reflects that the applicant filed a second application for asylum with the Los Angeles Asylum Office in February of 1994, with the assistance of former counsel. According to the applicant's statement, he was advised to file a new application instead of seeking to track the status of the previously filed application. *Affidavit* [REDACTED] July 30, 2001. The applicant was subsequently advised by the office of his former counsel that the Los Angeles Asylum Office had responded that he was ineligible for asylum as the previously filed application had been denied following his failure to appear for an interview on the application. *Id*

Seven-and-a-half years after the issuance of the deportation order, on July 30, 2001, the former INS arrested the applicant in order to execute the order of deportation/removal. Thereafter, with the assistance of current counsel, the applicant filed a motion to reopen with the immigration judge seeking to reopen his previous deportation proceedings, claiming that the previous notice was deficient and that he never received notice of his previous immigration court hearing due to notary fraud. The motion also claimed that he was eligible for adjustment of status due to his marriage to a United States citizen, but admitted that the Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse had not yet been approved. Consequently, he submitted a copy of the second asylum application filed in 1994, stating that he was seeking to renew the application. *See Motion to Reopen*, dated August 1, 2001. The immigration judge denied the motion in a decision dated September 18, 2001, finding that the notice sent to the applicant was sufficient, and that the

¹ The issue of the applicant's admission, and the contradictory information that appears in the record, will be discussed in greater detail in a subsequent section of this decision.

² As will be discussed in greater detail, the applicant denies having received any notices from the INS or the immigration court relating to any asylum claim or deportation proceedings. According to the applicant, he did not receive the notice as he had been residing in Las Vegas since 1992, and had not been informed by anyone that the notices had been received. *See Affidavit of Jerson R. Caluya*, dated July 30, 2001.

applicant had failed to demonstrate prima facie eligibility for relief as no evidence in support of his eligibility for adjustment of status had been submitted.³

The applicant appealed the denial of the Motion to Reopen to the Board of Immigration Appeals (BIA), which denied the appeal in a decision dated January 15, 2002. The applicant's counsel filed a petition for review with the Ninth Circuit Court of Appeals, (Ninth Circuit), which ultimately denied the petition on September 8, 2003. Applicant's counsel filed a petition for a writ of certiorari with the United States Supreme Court, which denied the petition on March 22, 2004. The applicant subsequently departed the United States on or about April 5, 2004.

Subsequent to his departure from the United States, the applicant sought to re-enter by filing an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212), on October 14, 2004. The applicant also submitted an Application for Waiver of Ground of Inadmissibility (Form I-601), on October 7, 2004.⁴ The OIC considered the applications and issued a decision denying the I-212 on January 19, 2005, finding that the application should be denied as the unfavorable factors clearly outweighed the favorable factors. See *Decision of the Officer in Charge*, dated January 19, 2005.⁵ The instant appeal followed. The entire record has been considered in rendering a decision on the current appeal.

The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed. In addition, the applicant is also inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. In the present case, the OSC indicates that the applicant entered the United States on January 11, 1992, as a nonimmigrant visitor authorized to remain in the United States until July 10, 1992. Thereafter, the applicant remained in the United States without authorization. He married his current spouse on December 21, 2000. After departing the United States and self-deporting pursuant to the order of removal, the applicant filed an I-212 seeking permission to reapply for admission to the United States. In applying to re-enter the United States the applicant is seeking admission within 10 years of his April 5, 2004 departure from the United States. The applicant is therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year after April 1997.

He now 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) in order to travel to the United States and reside with his U.S. citizen spouse and his children.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

³ The immigration judge's decision expressed considerable skepticism regarding the applicant's claims, noting, "[r]espondent waited six years after the discovery of the alleged notary fraud to file his motion to reopen, and only after he believed himself eligible for some relief." *Decision Denying the Motion to Reopen*, dated September 18, 2001.

⁴ The applicant's spouse had attempted to file the I-601 in August of 2004, with the Portland District Office, which returned the application directing her to file it with the U.S. consulate in Manila.

⁵ The OIC did not reach the issue of the applicant's eligibility for an I-601 waiver, citing procedural instructions that required that the I-212 be adjudicated first. *Id.* at p. 4.

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

- (I) has been ordered removed under section 240 or any other provision of law, or
- (II) departed the United States while an order of removal was outstanding, and 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On appeal counsel asserts that the OIC erred in denying the I-212, arguing that the OIC misapplied the law, dismissed hardships to the couple, and punitively denied the waiver application. Counsel also asserts that there is "abundant evidence demonstrating [redacted] good moral character, respect for law and order, family responsibilities, hardships to him and to others, and the need for his valuable and unique services in the United States." See *Notice of Appeal (Form I-290B)*, dated February 14, 2005. Counsel supplemented the I-290B with an appeal brief which details the errors of law and fact that counsel claims were made by the OIC. See *Counsel's Brief in Support of Appeal*, dated February 7, 2005.

The AAO has reviewed the record of proceedings and will address counsel's various contentions of error allegedly made by the OIC but will first briefly review the principal law governing applications for permission to reapply for admission.

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 a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the United States. 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 condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

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 poor 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.*

Before addressing the specific arguments set forth by counsel in his appeal brief, and providing the AAO's evaluation of those arguments and the evidence in the record, the AAO will discuss generally, the evidence offered in support of the application. This is intended merely to identify the principal evidence in the record with additional detail being provided in the course of this decision.

The record contains numerous documents offered on behalf of the applicant's I-212 and I-601 applications that will be discussed in greater detail throughout the decision. In general, the documents submitted fall into the following categories: 1) affidavits and statements from the applicant and his U.S. citizen spouse; 2) documentation of the applicant's previous employment in 1991 as a musician for a major cruise line; 3) documents offered to demonstrate the applicant's creation of a charitable foundation in the Philippines; 4) documents offered to demonstrate the couple's operation of an adult foster care business in Oregon; 5) an excerpt of a medical record of the applicant's spouse from 2004 regarding her medical consultation for varicose veins; 6) an Oregon Income Tax Summary for the 2003 tax year, and payment schedule with the Oregon Department of Revenue for unpaid personal income taxes; 7) various utility bills for late 2004 and early 2005 corresponding to the properties owned by the couple; 8) various mortgage and insurance related documents pertaining to the two houses operated as adult day care facilities; 9) letters and documents from the applicant's children who reside in the United States and which describe their favorable relationship with the applicant and the hardship they and their stepmother experience due to his absence; 10) various letters from friends and supporters of the couple, requesting favorable and expeditious treatment of the applications and in some cases recounting examples of the applicant's service to the individual or the community.

The OIC determined that the applicant's only positive factors were his marriage to a United States citizen, and his two adult children from a previous marriage all of whom were residing in the United States. *Decision of the Officer in Charge*, dated January 19, 2005. The OIC cited as negative factors, the applicant's deliberate failure to abide by immigration rules, finding that the applicant had evaded the immigration rules and regulations for thirteen years, and obtained an economic advantage over others due to his illegal status. In addition, the OIC rejected the applicant's claim of having departed the United States voluntarily, noting that his original deportation order was upheld by the BIA and the Ninth Circuit. *Id.* The AAO now turns to counsel's contentions on appeal regarding the errors of law and fact alleged to have been made by the OIC in adjudicating the applicant's I-212.

Counsel's first contention of error is that the OIC erred in the application of *Matter of Tin*, to the applicant's case. Specifically, counsel argues that the OIC's finding that "an equity gained while in an unlawful status can be given only slight weight" was unsupported and the OIC created a "rule from whole cloth without notice and comment and thus in violation of the Administrative Procedures Act" and thus erred as a matter of law in applying such a standard to the case. *Counsel's Brief on Appeal*, at p. 3. While the AAO's

examination of the BIA's decision in *Matter of Tin*, fails to disclose the precise language used by the OIC in her decision, the AAO believes that counsel exaggerates in characterizing the OIC's reference to giving diminished weight to equities as some type of grievous error. While the BIA did not use the specific language employed by the OIC, it is clear that one of the effects of the BIA's decision was to not permit an applicant to benefit from a claim that his services were needed in the United States, as evidenced in that case by an approved labor certification, when such an equity arose from the alien's illegal status, and that to credit such an equity would result in encouraging others to enter and work illegally in the United States. Thus, the AAO disagrees with counsel's contention that the OIC has committed a reversible error in the interpretation of *Matter of Tin*.⁶ However, this does not mean, as will be discussed, that the AAO is satisfied with the OIC's analysis. Nevertheless, it was not inappropriate for the OIC to indicate that the applicant's equities would be given only some weight in accordance with *Matter of Tin*.⁷

The second argument raised by counsel on appeal is that the record does not support the OIC's finding that the applicant had "evaded" the immigration laws and regulations for thirteen years. *Counsel's Brief in Support of Appeal*, at p. 4. According to counsel, there was no evidence cited in the OIC's decision regarding the applicant's alleged evasion of the immigration law, and the record reflected that the applicant "merely overstayed his visa" and failed to appear at his immigration court hearing because "he was never notified of the hearing." *Id.* Counsel asserts that the fact that *someone* at the specified address received the notices does not mean that the applicant was aware of the existence of the deportation order, and cites to the applicant's affidavit that denies knowledge of its existence. Counsel further cites to the fact that during part of the period that the applicant was found to have evaded the deportation order, he was in INS custody, and was, for a considerable period of time during the litigation of his claim, the recipient of a stay of deportation issued by the immigration judge. *Id.*

The AAO's review of the record leads it to conclude that the applicant's immigration history reflects more than the simple visa overstay represented by counsel. There are sufficient facts in the record to support a finding that the applicant has failed to respect the immigration laws, has taken advantage of, and in the process manipulated the law and immigration procedures to his advantage while making misrepresentations to immigration officials. As previously noted, the charging documents, containing information derived from the applicant's assertions on the I-589, indicate that the applicant entered the United States in 1991, and was authorized to remain for a period of six months. This information is reflected in the OSC executed by the former INS and filed with the immigration court. The information in turn, came from information included by the applicant in the asylum application filed with the asylum office on May 16, 1992, which indicated his admission as a non-immigrant visitor.⁸ While the order of the immigration judge indicates that the applicant was admitted for a period of six months, other documentation in the record suggest that the applicant came to the United States as a crewman, and was authorized to transit and depart the United States on January 11, 2002, en route to meet a Northwest Airlines flight in Detroit. See *Crewman's Landing Permit (Form I-95AB)*,

⁶ In fact, an argument could be made that *Matter of Tin*, would actually endorse giving no weight to factors such as an employer's need for an applicant, thus any error made by the OIC in language attributed to the decision in *Matter of Tin*, was of little consequence.

⁷ Counsel has raised, as his fifth and sixth assignments of error, similar arguments regarding the OIC's citation of two other cases in her decision, i.e., the references to *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957) and *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Counsel's issue with the OIC appears to be the OIC's interpretation of the cases as standing for the proposition that the applicant "bears the full burden of eligibility" with respect to the showing of equities versus negative factors. Counsel's concern appears to be that the cases merely indicated that the applicant had the "burden of proof" and that the OIC was somehow elevating the standard to be used in evaluating the applicant's evidence. While counsel's language more accurately reflects the language employed in those decisions, the AAO does not find any error in this regard to have been of great consequence in the OIC's evaluation of the applicant's case.

⁸ The same information was included in the applicant's 1994 asylum application prepared with the assistance of counsel.

issued January 11, 1992. The implications of being a crewman as opposed to an overstay visitor are significant.

Turning to other inconsistencies in the record, assuming that the applicant had been authorized to remain until July of 1992, the record reflects that the Form I-589 filed with the Los Angeles Asylum Office misrepresented the applicant's correct address.⁹ In the I-589 filed in 1992, the applicant listed his address as [REDACTED] in Cerritos, California. The applicant's signature appears on that application, and also on the accompanying Biographic Information form (Form G-325A), which accompanied the I-589, and likewise lists the Cerritos address as the applicant's address since his arrival in January of 1992. See *Form I-589*, dated March 6, 1992, and *Form G-325A*, dated March 7, 1992. The applicant claims that he had the assistance of a couple from Bakersfield, California in submitting the application, and was actually residing at [REDACTED] Nevada from the time of his arrival in the United States. See *Affidavit* [REDACTED] July 30, 2001. This assertion was made in connection with his attempt to reopen his deportation proceedings in which he was required to establish that his failure to appear was due to exceptional circumstances or because he had not received proper notice of the hearing. See *Motion to Reopen*, dated August 1, 2001. However, numerous facts undermine the applicant's assertions.

First, the applicant does not assert that he was unaware that the address information provided on the application was incorrect, or why he nonetheless signed the application under penalty of perjury if it contained information that was not correct. Second, the applicant indicates in his affidavit that the address provided on the asylum application was actually the address of the couple in Bakersfield, California who assisted him with the application, and notes that the address provided actually contained their Post Office Box number. However, the address itself does not reflect that it is a P.O. Box, but rather a street address with a house or apartment number. Third, while the applicant initially referenced the alleged preparers of the document as simply a couple who assisted him, once the INS opposed the motion to reopen, the reference to the couple changed to that of "notarios" who were "not 'friends'" of the applicant's. Fourth, although the individuals receiving notice of the hearing are alleged to have no connection to the applicant, it seems unusual that they would have then taken the trouble to respond to the notice of interview sent to the applicant, by sending a reply seeking a rescheduling of the scheduled interview date, yet, according to the applicant's theory, this is what an adjudicator would be required to believe. Fifth, while the applicant disavows living at the Cerritos address, that same address appears in connection with an Application for Employment Authorization (Form I-765) also signed by the applicant under penalty of perjury on May 15, 1992. Sixth, while the applicant asserts that he had lived at the Las Vegas address from 1992 until 1996¹⁰, this information conflicts with additional address information supplied by the applicant in connection with his asylum and employment authorization filed in 1994, with the assistance of counsel. Those applications reflect yet a different address for the applicant of 768 N. Virgil Ave., Los Angeles, California. See *Form I-589*, dated February 2, 1994, and *Application for Employment Authorization*, dated February 3, 1994.

Furthermore, in the course of examining the documents in the record, the AAO has identified additional discrepancies in the information supplied by the applicant or on his behalf that cause the AAO to be skeptical

⁹ The applicant indicated that he would be persecuted on account of his activities against the New People's Army (NPA), which involved his participation in an intelligence unit of a paramilitary organization.

¹⁰ As evidence of his true address during the relevant time period, the applicant offers an undated letter from [REDACTED] who states that the applicant lived with him from 1992 through 1996. However, the letter is not in the form of a sworn statement and, more importantly, is not accompanied by objective evidence of the applicant's residence there such as copies of bills, employment records, or other similar evidence.

about the applicant's veracity in his dealings with immigration officials. For example, the applicant claims to have received a divorce from his first wife, [REDACTED] on January 23, 1992, less than two weeks after arriving in the United States.¹¹ See Affidavit [REDACTED] July 30, 2001. However, in the various applications submitted by the applicant, he has taken inconsistent positions regarding his marital status. In both the I-589 and I-765 filed in 1992, the applicant indicated his marital status as "single," instead of identifying himself as "divorced" which was the accurate designation given that both choices were given. In the 1992 G-325A the applicant identified his former wife, listed no date of marriage and did not indicate that she was a previous spouse in the line provided for the identification of former spouses. Instead, the applicant indicated "none" in response to the question regarding former spouse. See G-325A, dated March 7, 1992. The 1994 I-589 and I-765 conflict with each other, with the I-589 indicating that he was divorced¹², and the I-765 being ambiguous as to whether he was married or widowed due to the placement of the "x" between the two.¹³

The applicant has also supplied incorrect information in connection with his 1994 employment authorization application regarding whether he had applied for employment authorization previously. He indicated in the 1994 application that he had not previously applied for employment authorization when, in fact, he had done so. See *Application for Employment Authorization (Form I-765)*, dated February 3, 1994.¹⁴ In addition, the various applications signed by the applicant also contain conflicting information regarding his manner of entry into the United States. The 1992 applications represent that the applicant entered the United States by airplane at San Francisco, California as a visitor. In the 1994 asylum application, only the date of arrival was provided with the place of arrival being left blank, and the I-765 indicates the date of arrival as January 11, 1992, and the place as San Francisco, California, but leaves blank the manner of last arrival. Some of these discrepancies might seem innocuous were it not for the fact that the applicant's record contains a copy of the applicant's Crewman's Landing Permit (Form I-95), which reflects that the applicant arrived by means of the ship *Nieuw Amsterdam*, at Seattle, Washington, and was required to depart that same date at Detroit, Michigan, via Northwest Airlines flight 011.¹⁵

The pattern of inconsistencies continues when examining the statements made by the applicant in connection with his two applications for asylum. In his 1992 asylum application, he claimed that he feared persecution because of his role in the arrest of the highest level NPA commander in his town, in his capacity as a leader of the anti-communist group, "Contra Comunista." According to the applicant, he went into hiding with his family due to information from an intelligence contact that the NPA was planning an imminent kidnapping of his children. He claims to have later fled the Philippines due to a friend notifying him that a note had been found at the house threatening to kill him if he failed to cooperate. See *Form I-589 and Accompanying*

¹¹ The applicant's affidavit indicated January 3, 1992, but the date is presumably January 23, 1992, as reflected in other documents in the record. Interestingly, while the applicant's assertions and documents in the record indicate that he arrived in the United States on January 11, 1992, it appears that the applicant secured a divorce from his first wife in Las Vegas, Nevada after asserting that he was a resident of Nevada for the requisite period of time under state law. See *Decree of Divorce*, dated January 23, 1991. (This year appears to be in error, as the clerk filed the order on January 23, 2002.)

¹² The 1994 I-589 actually appears to bear a white out of the information indicating that the applicant was single, with a handwritten as opposed to a typed x indicating that the applicant was, in fact, divorced.

¹³ This, of course, may simply be attributable to a simple error in typing the information on the form.

¹⁴ The denial of the existence of a previous application for employment authorization likely resulted in immigration officials believing that the 1994 application was the first application, thus failing to discover that a previous asylum application that had been denied due to the failure to appear for the asylum interview, and making the applicant ineligible for employment authorization.

¹⁵ This information came to light during the course of efforts to obtain a travel document for the applicant in connection with efforts to remove him from the United States. The permit also indicates that the applicant was, at that time, in possession of passport [REDACTED] issued by the Philippines. The applicant later claimed to have lost the passport.

Statement, dated March 6, 1992. In contrast to this story, the applicant claimed in his 1994 asylum application that he and his family were targeted due to his political activities. His claim centered in his activities as a "KB Chairman" appointed by the late President [REDACTED]. According to the applicant, while he had had confrontations with an NPA subgroup, he had the support of his party and had hired security personnel, and thus felt safe. However, the applicant claimed that he eventually lost his power and security detail and left the country, leaving the family behind as he considered them to be safe there. He was, however, notified by his ex-wife that his family was in danger due to extortion threats. See *I-589 and Accompanying Statement*, dated February 3, 1994. The differences in the applicant's claims, both submitted under penalty of perjury, are significant and are an additional example of the inconsistencies and misrepresentations made by the applicant in his dealings with immigration officials.

Moving beyond the applicant's statements on his immigration documents, the record reflects an additional negative factor in the applicant's continued denial of any responsibility for the issuance of an *in absentia* deportation order in his case, insisting through counsel that his failure to appear was attributable to the actions of others. The record reflects that he claims that he did not receive notice of the immigration proceedings, but this argument has been rejected and is unsupported. The immigration judge and the BIA both found that the applicant was sent notice by certified mail to the address listed by the applicant in his asylum application. No change of address form appears in the record, and the applicant has not asserted that one was sent.

Thus, while counsel characterizes the applicant's immigration violation as a mere overstay, the reality is much different, and the record contains numerous instances of half-truths and misrepresentations, which, on the whole, can reasonably be interpreted as being evasive actions by the applicant. In addition, the applicant's continued insistence that he bears no responsibility for the situation leading to his *in absentia* deportation order, is either an example of the applicant failing to take responsibility for his failure to ensure that the immigration authorities were aware of his true whereabouts, and that he was aware of the status of his applications, or a misleading argument put forward by the applicant. In either event, it reflects negatively on his immigration history.

The third assignment of error raised by counsel is that the OIC "erred in dismissing the hardships" to the applicant and his spouse. Counsel asserts that the OIC failed to properly consider the hardship that the applicant or his spouse would experience as required to do so, and improperly dismissed such considerations due to the OIC's claimed illegal requirement that "an equity gained while in an unlawful status can be given only slight weight." *Counsel's Brief on Appeal*, dated February 7, 2005, at p. 4. The AAO does not agree that the district director disregarded the hardships to the applicant and his spouse by dismissing them as equities gained while in unlawful status. Rather, it appears from the decision that the OIC was simply not persuaded that the hardships the couple was experiencing or would experience were significantly different from those of other families under similar circumstances. See *Decision of the OIC*, dated January 19, 2005, at p. 3. Nevertheless, it is true that the OIC's decision did not adequately address the issue of hardship in the decision, and rather than considering it as one of the factors to be weighed in an assessment of factors in favor of a waiver and those against a waiver, analyzed it under an extreme hardship analysis that is proper for evaluating the applicant's eligibility for an I-601 waiver, but not for his eligibility for an I-212 waiver. The AAO will identify the remaining errors alleged by counsel to have been committed by the OIC, and will then discuss the evidence in the record and make its own assessment of the applicant's eligibility for relief, including the effect of hardship to the couple.

The fourth error that counsel asserts was committed, relates to the OIC's finding that the applicant enjoyed an economic advantage for thirteen years over those who abided by the immigration laws of the United States. *Counsel's Brief on Appeal*, at p. 5. According to counsel, there is no support in the caselaw for the OIC's treatment of "economic advantage" as a negative factor. The AAO notes that the OIC only briefly addressed the issue of economic advantage in a discussion of how the BIA had previously dealt with an alien's claimed equity of a job opportunity gained while in unlawful status. (See previous discussion of *Matter of Tin*.) As previously noted, the BIA did, in fact, discount the weight to be given to the equity by noting that it was an economic advantage gained while in unlawful status. Thus, the AAO finds no fault with the OIC's reference to economic equities gained while in an unlawful status, but does agree with counsel that the OIC's decision "failed to refer to any evidence of [redacted] economic status while he was in the United States to support its conclusion." *Counsel's Brief in Support of Appeal*, at p. 5.¹⁶ However, because the OIC's discussion of the positive and negative factors relating to the application was so abbreviated, the AAO is unable to determine whether the OIC's treatment inappropriately discounted any positive factors.

The fifth assignment of error relates to counsel's claim that the OIC mischaracterized and misapplied *Matter of Lee*, 17 I&N Dec., 275 (1978). According to counsel, the OIC's finding that "evidence of serious disregard for the law is viewed as an adverse factor" was not an appropriate assertion for the OIC to make. First, counsel contends that the legislative history indicates that I-212 waivers are remedial and not punitive in nature, and while acknowledging that *Matter of Lee*, supports a finding that serious immigration violations will not be tolerated, takes issue with any suggestion that the applicant has such a record. While the AAO agrees with counsel that an I-212 waiver is remedial in nature and intended to give aliens a second chance, that does not mean that a negative immigration history is ignored or somehow given diminished weight. While *Matter of Lee* indicated that viewing applications with "a punitive attitude" or attaching conditions in addition to those set forth by Congress was not allowed, it recognized that while Lee's immigration violations did not justify a finding that he lacked good moral character, a serious record of immigration violations would not be easily dismissed. *Matter of Lee*, at p. 277. In the instant case counsel's argument deals more with whether the applicant's immigration violations should be viewed as serious, as opposed to whether there was any mischaracterization of *Matter of Lee*. In counsel's brief, he raises several related arguments. Counsel asserts that the applicant's order was based on an in absentia order, rather than "an order on the merits" and the applicant was denied the opportunity to present his asylum application to an immigration court, and was unaware until years later than a deportation order had been entered against him. He also asserts that a record of lengthy residence in the United States is, at worst, a neutral factor, and notes that the applicant has demonstrated respect for law and order by the fact that he has never been convicted of a crime. While counsel acknowledges that he overstayed his visa, he adds, "there is no evidence of record that [redacted] ever attempted to evade the law or make misrepresentations for any benefit under the INA or other state or federal law." *Counsel's Brief in Support of Appeal*, at p. 10.

The remainder of counsel's brief addresses a variety of factors that counsel believes were positive and should have led the OIC to grant the applicant's request for permission to reapply for admission to the United States. The AAO finds that the OIC's decision did not adequately discuss the various factors, whether positive or

¹⁶ Nevertheless, the AAO disagrees with counsel's contention that even if the applicant were shown to have obtained an "economic advantage" it would be a positive equity rather than a negative equity because otherwise the applicant would have burdened U.S. taxpayers. To the extent that the economic advantage was obtained as a result of living and working unlawfully in the United States, it is difficult to view that as a positive factor. Moreover, counsel's statement that it is better for the applicant to be self-supporting rather than commit additional unlawful acts by seeking government welfare benefits that he would be ineligible for, is a bold assertion that the AAO finds unpersuasive.

negative, relating to the applicant's request for a waiver. In the next section, the AAO, pursuant to its de novo authority will examine those factors in greater detail. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The AAO's Review of the Evidence in the Record

The AAO finds that the applicant has significant adverse factors relating to his immigration history, which are only partially mitigated by the positive factors in the record. The applicant would have Citizenship and Immigration Services (CIS) understand his only transgression as a simple overstay of his initial six-month period of authorized stay. However, this decision has previously discussed the evidence in the record reflecting that the applicant came to the United States as a crewman who was required to depart that same date but failed to do so.¹⁷ Instead, the record reflects that shortly thereafter, the applicant submitted an asylum application to the Los Angeles District Office, which falsely represented his address as being in Los Angeles, when in fact, the applicant was residing, by his own admission, in Las Vegas. The applicant has asserted that the application was submitted with the assistance of "notarios" who were not friends of his and who allegedly included their own post office box instead of his address, thus causing him to fail to receive notices of his asylum interviews and the immigration court proceedings, and ultimately led to the issuance of a deportation order. As previously discussed, the applicant has argued that he was merely an innocent victim of the actions of others, and remained ignorant of the developments regarding his immigration status.

While the applicant portrays his immigration history as unremarkable and himself as the victim of the actions of others, it is not supported by the facts in the record. The applicant did not depart the United States in accordance with the authorization given to him to travel from Seattle to Detroit in order to depart the United States on the same date as his arrival. Instead, the applicant took up residence in the United States, presented an asylum application with false information regarding his whereabouts, and remained. When a notice of interview was sent to the applicant's last known address, someone sent the former INS a request to reschedule the interview. While the applicant disavows having submitted the request, there is no evidence that he ever supplied the INS with his correct address, or otherwise sought to inquire about the status of the asylum application that he filed in order to save his family from persecution including, possibly his own death. Moreover, even if one were to accept that the applicant may have been the victim of circumstance once, it is exceedingly unlikely that upon securing counsel in 1994, he would have again been led to submit a second application in lieu of ascertaining the status of his first application, and that counsel would have had him submit an address that was not his own, and not his true Las Vegas address. The record contains no evidence such as a statement or letter of explanation from the applicant's former counsel supporting his version of events.

Even assuming that the AAO were to again accept the applicant's claim of complete ignorance, it does not explain the misrepresentations made in those applications regarding the applicant's manner of entry into the United States. The applicant's immigration history is also considered more serious when one considers that although the applicant states that he learned in 1994 that his previous asylum application had been denied for his failure to appear, no information has been provided regarding efforts on his part to clear up the matter by

¹⁷ The AAO notes that there is no reason to believe that any of the individuals assisting the applicant were aware of the applicant's manner of entry as that information appears to have come to light in connection with efforts to secure a travel document in connection with efforts to remove the applicant from the United States.

providing his correct address, by ascertaining whether removal proceedings had been initiated, or even by informing the immigration officials regarding the fact that he had not received notice, and generally seeking to get his immigration matters back on track. Instead, it appears that the applicant merely ignored the fact that his asylum application had been denied, and continued to live illegally in the United States with no effort to regularize his status, until his arrest nearly seven years later, on July 30, 2001, by immigration officials on the outstanding deportation order, at which time he commenced a lengthy litigation process that culminated in an unsuccessful effort to have the Supreme Court hear his case.

Consequently, the AAO finds that the applicant does have a significant adverse immigration history, and notes that the applicant's history of misrepresentation of critical information on his applications regarding his immigration history, approaches behavior that would lead a reasonable adjudicator to find that the applicant lacks good moral character. Although the AAO does not make such a finding at this time, the applicant's negative immigration history must be overcome by sufficient positive equities to warrant a grant of permission to reapply for admission to the United States. The AAO turns now to examine the factors that support a grant of permission to reapply for admission to the United States.

Among the favorable factors are that the applicant is married to a citizen of the United States, and has two children living in this country, a daughter who is a United States citizen and a son who is a lawful permanent resident.¹⁸ In addition, the record contains numerous documents submitted in support of the claim that the applicant is a positive asset to the community and that he is an individual whose services are needed in the United States.

The principal documents to support this claim are the following letters of support.

- 1) A 2001 letter from nineteen members of the Columbia Gorge Seventh-Day Adventist Church urging prompt action on his application for permanent residence, noting that the applicant and his son have played music for them, and noting that the applicant's wife was struggling to care for the elderly people in their home without the applicant's help. The letter states that the members know him as "a fine violinist, well-educated and a credit to our country."
- 2) A letter dated July 31, 2001, signed by four or five individuals who indicate that the applicant is a caregiver and co-manager of an adult foster care facility who offers devoted care to each resident of the facility. The letter also notes that he is a loving husband and nurturing father and notes that he sets a high standard of personal behavior to which others should aspire.
- 3) Two letters dated October 14, 2001, from a husband and wife identified as [REDACTED] and [REDACTED], who state that they have met the applicant and are aware that he and his wife have been caring for elderly disabled people in their home. [REDACTED] who is the applicant's son's music teacher, states that the applicant is a good influence on his son, who, without the applicant's help was required to work at gardening in exchange for his music lessons. She also notes that the applicant's spouse requires his assistance to care for the patients.
- 4) A letter dated October 23, 2001, from the applicant's doctor who indicates that the applicant voluntarily performs for senior citizen groups, and helps young children with violin and piano. He also notes that he has driven an elderly couple to medical appointments.

¹⁸ The applicant's marriage to his first wife, a native of the Philippines was terminated by a divorce granted January 23, 1992, in Las Vegas, Nevada. The children are a product of that marriage, and the applicant's children acquired their residence through their mother who herself married a United States citizen.

- 5) A letter dated February 6, 2005, from [REDACTED] an orchestra director for the King's Canyon Unified School District, in which he states that the applicant has been a great influence on him, having been his violin teacher in his youth and providing guidance throughout his life.¹⁹
- 6) A letter dated August 5, 2004, from [REDACTED] in which the couple indicate that unless the applicant is permitted to return to the United States, the applicant's children will remain fatherless, and his spouse will be deprived of his expertise and counsel in operating the foster care.
- 7) A letter dated April 4, 2004, from [REDACTED] a friend of the applicant's spouse, who states that she has known the couple for many years and knows the applicant to be a compassionate and talented individual, who, along with his wife, operates a highly respected foster care facility which houses five patients who are totally dependent on them for all activities of daily living.
- 8) A letter dated August 4, 2004, from [REDACTED] the wife of a patient at the foster care facility who indicates that the applicant is missed by the patients, and notes that her husband was always well cared for and motivated by the applicant.

The letters contain differing degrees of specificity as to the contributions of the applicant. Aside from mentioning the applicant's support of his children, the letters generally emphasize the care given by the applicant to residents of the facility, and his role in its operation. These are positive factors in the evaluation of the applicant's waiver request and should have been addressed in the OIC's decision. The favorable evidence, however, must be examined in light of the negative factors to see if it overcomes those negative factors. The record contains serious negative factors, including his unlawful status, his efforts to continue presenting as valid an argument that has been soundly rejected at all levels of appeal. The applicant continues to fail to acknowledge or adequately explain his failure to provide truthful information regarding his current address, or his failure to keep immigration officials apprised of that address. In addition, the AAO has determined that the applicant's misrepresentations regarding his manner of entry, and his true address were actions that enabled him to remain longer in the United States pursuing applications for benefits while avoiding detection by immigration officials.

In view of the serious negative factors, including misrepresentations, the AAO gives careful scrutiny to the applicants' submissions on appeal. As a preliminary matter, the AAO notes that none of the letters submitted in support of the applicant's case were notarized or submitted under penalty of perjury, as were the submissions by the applicant. Nevertheless, and assuming, in the absence of evidence to the contrary, that the letters are legitimate submissions, the contents of some of the letter themselves raise some additional questions.

First, the statements from the applicant's family and friends conflict on the issue of the number of residents the applicant's spouse cares for. The record contains a sworn statement from the applicant's wife dated February 2, 2005, stating that she cares for three individuals. See *Statement* [REDACTED] February 2, 2005. She further states that she is unable to hire someone to provide additional assistance due to her dire financial situation, and describes her daily routine with the patients as one that is extremely difficult for her to fulfill, suggesting an inability to care for any more individuals. It is noted that the applicant's most recent letter (unworn), in support of the application, dated February 1, 2005, indicates that since the previous year, the couple has lost two residents from the adult foster care facility that they operate. The letter does not

¹⁹ It is noted that the author bears the same last name as the applicant, although the relationship to the applicant, if any, has not been made clear.

indicate if the residents were lost due to their death, or due to factors related to the fact of the applicant's absence from the facility, but appears clearly intended to describe the adverse economic impact upon the couple, the adverse personal toll on the applicant's spouse, and the adverse impact upon the residents that his absence has had. See *Letter from the Applicant* dated February 1, 2005. Yet, the record also contains a statement of the applicant's son, Ivan Caluya, whose letter, dated two days after that of his step-mother, indicates that the facility has *four* residents one more than stated by the applicant's spouse. Therefore, one of the two is providing inaccurate information regarding the number of residents. If it is the spouse, the discrepancy would indicate that she was able to take on the care of an additional resident, and was able to manage the care of the resident, and that she and the applicant sought to exaggerate the impact of the applicant's absence, or her ability to hire additional help.²⁰

Turning specifically to the claims surrounding the couple's operation of the adult foster care facility, the AAO notes that it has considerable doubts about the representations made regarding the nature of the operation, and the adverse impact upon the operations caused by the applicant's absence. First, while the couple presents the existence of the adult foster care facility as a significant equity evidencing the applicant's contributions and the need for his services in the United States, the record contains no official documentation regarding the couple's operation of an adult foster care facility. While the applicant's spouse asserts that it is a licensed adult foster care facility, no copy of the license, has been presented. Given the applicant's reliance on the facility to support a finding that his services are needed in the United States, it is reasonable to expect such a submission to be in the record as evidence that the couple operates a legally compliant facility. It would be yet another form of misrepresentation if the facility is not lawfully operated. The applicant and his spouse have failed to present any documents of incorporation for the facility. This is not to say that such documents were required, but it seems unlikely that the applicant and his spouse would not have incorporated, given that they previously incorporated a small charitable foundation honoring the applicant's deceased daughter. See *Certificate of Incorporation of the [REDACTED] Memorial Foundation, Inc.*, dated July 3, 2003.

The applicant and his spouse indicate in their statements that his absence has had significant adverse financial considerations for them, including the inability to make mortgage payments, a credit card debt of over \$12,000, and past due taxes in excess of \$8,000 which are being paid on an installment basis. However, the credit card debt is reflected in a statement from January 2005, with no evidence indicating that this debt is attributable to the applicant's absence from the United States. It may simply be an indication that even when the applicant was in the United States the couple was living above their means. With respect to the tax liability, the record contains a copy of a payment agreement dated December 17, 2004, which reflects a payment plan for an outstanding tax liability for the couple in regard to the couple's personal income taxes. There are no other documents, however, which would indicate the reason for the debt, or the tax year to which it related. Moreover, this indicates a tax liability relating to the personal taxes of the couple, but no corporate or partnership income tax has been submitted, nor has the couple submitted copies of the actual tax returns or copies of any additional tax returns or schedules relating to the returns. It is therefore, unclear to what extent, if any, the couple's debts actually relate to the applicant's absence.

The couple's statements also assert that the applicant's presence in the United States is needed in order to preserve the health of the applicant's spouse. The couple's statements assert that as a result of operating the

²⁰ In this regard it is noted that one of the statements submitted by the applicant, the July 31, 2001, letter from several individuals, lists, as one of the signers, an individual named [REDACTED] who lists as her address, the applicant's foster care facility. It is unknown whether this individual, who would appear to live-in employee of the couple, continues to be employed. However, no information was provided indicating that she no longer works at the facility.

foster care facility alone, the spouse's varicose vein condition has been aggravated and her primary care physician has recommended surgery. See *Statement* [REDACTED] dated February 2, 2005. However, the evidence in support of her medical condition is minimal and appears unreliable. There is no letter from the physician, nor is the physician even identified. The only submission is a single document that appears to be a photocopy of a medical chart entry, from November 2004, with no accompanying cover letter from the physician's office explaining its contents or providing a prognosis. The document submitted purports to be physician's notes indicating that the applicant's spouse has painful varicose veins and that a surgical consultation had indicated she was not a good surgical candidate. The medical entry indicates that she is being referred for a second surgical consultation. It also indicates that at the patient's request, a letter would be written for her to see if her husband could be returned to the United States to assist her in caring for the patients in the adult foster care facility. See *Medical Record Excerpt*, dated November 30, 2004. No such letter or other evidence of a medical consultation appears in the record, nor is any connection made in this document, or in any other document, between the spouse's medical conditions, and their aggravation in the absence of the applicant.

In addition to the claim that the applicant's absence is causing a significant hardship to the spouse, the applicant has submitted evidence in the form of statements from his son and daughter indicating that the applicant provides emotional and financial support to them and to his spouse. The AAO notes, however, that the applicant's children, while they may be living in the home, are not children of tender years, but rather are adults, with the daughter being twenty-two years old and the son being twenty-three years old. The record further reflects that their biological mother, who has remarried, resides and works in the United States. See *Letter from the Applicant*, dated February 1, 2005; *Applicant's Statement Accompanying the I-589 Dated February 3, 1994*, at p. 2.

In light of the foregoing, the AAO finds the evidence in the record to be weak, and insufficient regarding the need for the applicant's services in regard to the operation of the adult foster care facility and in regard to the effect of his presence on the applicant's health. Thus, while the applicant, according to the evidence has contributed to the operation of the adult foster care facility, and been supportive of his U.S. citizen spouse and his children, these factors do not overcome the significant negative factors in the case, and those same negative factors, coupled with the absence of clear evidence documenting the tangible effects of the applicant's absence, lead the AAO to conclude that the applicant has not established that he merits a waiver.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he 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 and in the alternative has failed to demonstrate statutory eligibility for a waiver of inadmissibility.

ORDER: The appeal is dismissed.