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U.S. Citizenship
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FILE:

Office: VERMONT SERVICE CENTER

Date: SEP 14 2006

IN RE:

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of China who, on June 26, 1993, entered the United States without inspection. On July 18, 1994, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589). On April 28, 1995, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into proceedings. On September 10, 1996, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture, but granted the applicant voluntary departure until October 10, 1996. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On January 23, 2002, immigration officers apprehended the applicant. On August 1, 2002, the applicant was removed from the United States and returned to China. On September 30, 2002, the applicant married his naturalized U.S. citizen spouse. The applicant's spouse has a U.S. citizen daughter from a previous relationship. On December 3, 2002, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on his behalf. On December 10, 2002, the applicant filed the Form I-212. On December 27, 2002, the Form I-130 was approved. On June 2, 2003, the applicant's U.S. citizen son was born. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). 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) in order to return to the United States and reside with his U.S. citizen spouse, daughter and step-daughter.

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The director denied the Form I-212 accordingly. *See Director's Decision* dated February 16, 2005.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion because he failed to depart the United States due to the actions of an unscrupulous attorney, his wife can barely support the family while caring for a sick toddler, the applicant was continuously employed in the United States and paid taxes. *See Applicant's Brief*, dated March 15, 2005. In support of his contentions, counsel submitted the above-referenced brief and copies of documentation previously provided. Counsel also submitted, at a later date, documentation in support of his assertions that the applicant's spouse's prior marriage was not a "sham marriage," as claimed by the director. The entire record was reviewed in rendering a decision.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

(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 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 on a 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 contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The record of proceedings indicates that the applicant entered the United States without inspection and, when granted voluntary departure, failed to voluntarily depart the United States. The voluntary departure became a final order of removal with which the applicant failed to comply until immigration officers apprehended him in 2002. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

On appeal, counsel contends that the applicant had filed an affirmative non-frivolous asylum application and was entitled to remain in the United States because he had hired an attorney to file an appeal after the denial. Counsel asserts that the applicant's attorney failed to file the appeal which led to the applicant's non-compliance with the order of voluntary departure. However, there are no affidavits or documentation provided to support counsel's assertion. The statements of counsel as to matters of which they have no personal knowledge are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 3042 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 2820 (BIA 1980). Additionally, the AAO notes that the assertion that the applicant's non-compliance with the order of voluntary departure was due to the actions of an unscrupulous attorney occurred only after the Form I-212 was denied. Counsel provided no explanation as to why the applicant failed to comply with the order of voluntary departure in the documentation submitted with the Form I-212.

On appeal, it is unclear as to whether the applicant claims his spouse's daughter to be his natural child or his step-daughter. The applicant's spouse's affidavit indicates that her daughter is the applicant's natural child. However, the birth certificate indicates that the father of the applicant's spouse's daughter is the applicant's spouse's previous spouse and, on the Form I-130, the applicant does not list the applicant's spouse's daughter as one of his relatives.

On appeal, counsel contends that the director erred in finding that the applicant's spouse's prior marriage was a "sham marriage" and should not have used this as a negative factor in determining whether the applicant warranted a favorable exercise of discretion. The AAO notes that there has been no official finding that the applicant's spouse's prior marriage was a "sham marriage." The applicant's spouse's prior marriage is not a favorable or an unfavorable factor in determining whether the applicant warrants a favorable exercise of discretion.

On appeal, counsel contends that the applicant's spouse is having problems supporting the family financially because she has two children, one of whom is sickly. There is no evidence in record to suggest that the applicant's spouse is unable to support the family financially. The medical documentation in the record indicates that, while the applicant's spouse's daughter had been receiving medical care since her birth, there were no chronic problems. The medical documentation merely indicates that the applicant's daughter had been seen by the doctor on approximately 25 occasions during the year immediately following her birth. The medical documentation does not indicate any diagnosis or prognosis for the applicant's daughter, but it does indicate that the applicant's daughter does not have any chronic problems.

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 U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work in the United States 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.*

The 7th Circuit Court of Appeals held in *Garcia-Lopes 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. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie 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. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's U.S. citizen spouse, U.S. citizen son, U.S. citizen step-daughter, an approved immigrant petition for alien relative and payment of taxes.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States, unauthorized residence and employment in the United States prior to filing the Form I-589, failure to depart the United States under an order of voluntary departure, non-compliance with an order of removal and his extended unauthorized residence and employment in the United States after failing to comply with voluntary departure.

The applicant in the instant case has multiple immigration violations. The applicant's actions in this matter cannot be condoned. Moreover, the AAO finds that the applicant's marriage, approval of an immigrant petition, birth of his U.S. citizen son and birth of his U.S. citizen step-daughter occurred after the applicant failed to comply with the order of voluntary departure and the order of voluntary departure became an order of removal in 1996. The AAO finds that these factors are "after-acquired equities" and that any favorable weight derived from the applicant's marriage, immigrant petition or U.S. citizen children is accorded diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.