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U.S. Citizenship
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[REDACTED]

FILE:

Office: VERMONT SERVICE CENTER

APR 23 2007
Date:

IN RE:

[REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[REDACTED]

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 Mexico who, on August 9, 1999, was apprehended by immigration officers and placed into immigration proceedings. The applicant testified that he had entered the United States in January 1994 and remained in the United States since that date. On October 13, 1999, the immigration judge granted the applicant voluntary departure until February 10, 2000. 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 August 11, 2000, a warrant of removal was issued for the applicant and he was informed that he should present himself for removal from the United States on August 31, 2000. The applicant failed to present himself for removal or to depart the United States. On June 4, 2001, a Petition for Alien Worker (Form I-140) was filed on behalf of the applicant, which was approved on November 16, 2001. On June 11, 2002, the applicant filed the Form I-212. On March 2, 2005, immigration officers apprehended the applicant. On March 8, 2005, the applicant filed a motion to reopen with the immigration judge. On March 16, 2005, the motion to reopen was denied. On May 17, 2005, the applicant was removed from the United States and returned to Mexico. 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 reside in the United States with his two U.S. citizen children.

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 March 21, 2005.

On appeal, counsel contends that the applicant's children, fiancée and the children of his fiancée would suffer extreme hardship should he not be allowed to remain in the United States. Counsel also contends that the applicant's failure to comply with the order of voluntary departure and removal order was due to ineffective assistance of previous counsel. *See Counsel's Brief*, dated April 20, 2005. In support of his contentions, counsel submits the referenced brief, affidavits from friends and family, financial documentation for the applicant and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

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 he was apprehended and removed in 2005. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

The record reflects that the applicant has a six-year old daughter and a three-year old son who are both U.S. citizens by birth. The record reflects that the applicant had these children with [REDACTED] a native and citizen of Mexico who became a lawful permanent resident in 1999. Counsel asserts that the applicant has resided with [REDACTED] since 1997 and has cared for her three U.S. citizen sons as if he were their father. Counsel asserts that [REDACTED] intends to marry the applicant but has been unable to do so because she still remains married to the father of these three children. [REDACTED] in her affidavit, states that she has filed for a divorce and intends to marry the applicant once the divorce is finalized. [REDACTED] in her affidavit, asserts that she, the applicant's children and her children from the previous relationship, would suffer severe hardship if the applicant were denied admission to the United States because she is unemployed and he is the sole source of financial support. She asserts that the children are going through difficulties adjusting to the absence of the applicant. She states that, without the applicant's income, she will be unable to meet the house payments and may have to send the younger children to live with the applicant in Mexico to enable her to work in the United States.

On appeal, counsel asserts that the applicant failed to comply with the order of voluntary departure and the order of removal due to the ineffective assistance of prior counsel. The record reflects that an Application for Labor Certification (Form ETA-750) was filed on behalf of the applicant on February 14, 2000, and was approved on March 16, 2001. The approved Form ETA-750 was the basis for the approved Form I-140. [REDACTED] in her affidavit, states that she was present when the applicant's prior counsel informed the applicant that he would file the Form ETA-750 prior to the expiration of the applicant's voluntary departure on February 10, 2000. She states that prior counsel informed the applicant that he did not need to depart the United States because the Form ETA-750 had been filed and he would take care of everything. She states that the applicant was unaware that he was required to leave the United States until she consulted current counsel.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637

(BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The AAO finds that the applicant has not met the standard set forth in *Lozada*. He has not provided a detailed affidavit in regard to the agreement between him and prior counsel, there is no evidence that prior counsel has been confronted with the applicant's accusation of ineffective assistance of counsel and has been provided with an opportunity to respond to such accusations and there is no indication as to whether a complaint has been filed with the appropriate disciplinary authority or, if none has been filed, why a complaint has not been filed. *Matter of Lozada, Id.* at 637. Moreover, the record indicates that the applicant was served with a warrant for his removal after the order of voluntary departure had expired and failed to report for removal on August 31, 2000.

On appeal, counsel asserts that the applicant has an otherwise clear criminal background, is a family man and is involved in his local ministry.

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. *Supra.*

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-Munoz 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 to be 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 children, his otherwise clear criminal background, his involvement in the local ministry, an approved Form I-140 and his support of and relationship with [REDACTED] and her children.

The AAO finds that the unfavorable factors in this case include the applicant's extended unauthorized residence and employment in the United States, failure to depart the United States under an order of voluntary departure and non-compliance with an order of removal.

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 birth of the applicant's children and approval of the Form I-140 occurred after the applicant was placed into immigration proceedings. Accordingly, these favorable factors are "after-acquired equities" and the AAO accords them diminished weight. The AAO notes that if the applicant were to marry [REDACTED] his marriage to her and legalized relationship to her children would also be after-acquired equities and would be 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.