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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

Hly

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

MAY 11 2007

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]

**PHOTOCOPY**

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*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 sustained and the application approved.

The applicant is a native and citizen of the Philippines who, on May 22, 1996, was admitted to the United States as a nonimmigrant. The applicant was authorized to remain in the United States until November 21, 1996. On October 15, 1996, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589). On November 22, 1996, the applicant's asylum application was referred to an immigration judge and the applicant was placed into proceedings. On April 8, 1997, the immigration judge denied the applicant's application for asylum and withholding of removal and granted the applicant voluntary departure until June 1, 1997. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On February 26, 1999, the BIA dismissed the applicant's appeal and granted him 30 days to voluntarily depart the United States. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. The applicant filed a motion to reopen before the BIA. On October 13, 1999, the BIA denied the applicant's motion to reopen. On July 9, 2002, immigration officers apprehended the applicant. On August 5, 2002, the applicant was removed from the United States and returned to the Philippines, where he has since resided. On October 29, 2002, the applicant filed the Form I-212. The applicant was found 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) for seeking admission within ten years of departing the United States after being ordered removed. 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 travel to the United States and reside with his U.S. citizen spouse and children.

The director determined that the applicant was inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for seeking admission within ten years of departing the United States after being removed. The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Director's Decision* dated March 24, 2005.

On appeal, counsel contends that the director erred in finding that the unfavorable factors outweighed the favorable factors in the applicant's case. *See Counsel's Brief*, dated April 21, 2005. In support of the appeal, counsel submits the referenced brief, medical documentation, affidavits from friends and family, and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

The AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

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 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 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, when granted voluntary departure, the applicant 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 on August 5, 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.

The record reflects that, on November 7, 1995, the applicant married [REDACTED]. [REDACTED] is a native of the Philippines who became a lawful permanent resident in 1995 and a naturalized U.S. citizen in 2001. On October 27, 2004, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on May 24, 2006. The applicant and [REDACTED] have a 16-year old daughter and a 15-year old son who are natives of the Philippines who became derivative U.S. citizens in 2003. The applicant and [REDACTED] have a nine-year old daughter and a six-year old daughter who are U.S. citizens by birth. The applicant and [REDACTED] are in their 40's.

On appeal, counsel contends that the applicant's U.S. citizen wife and children are experiencing extreme and exceptional hardships as a result of his removal. He states that, without her husband, [REDACTED] alone bears the responsibility of raising her four children, one of whom has been diagnosed with a heart defect and that she lacks the academic and professional background to obtain employment that will provide sufficient income to support her family's needs. The record includes medical reports that establish that [REDACTED] nine-year old daughter has a heart murmur, the result of a small ventricular defect that does not currently restrict her diet or activities and has not resulted in any cardiovascular complaints. In her statements, Ms. [REDACTED] asserts that she cannot obtain full-time employment to provide financially for her children because she must care for them, as well as a sister with Down's Syndrome who lives with her. Documentation of an unexecuted Disability Report (Form SSA 3368-F6) for [REDACTED]'s sister, as well as medical appointment letters related to her claim for Medi-Cal disability benefits are included in the record. [REDACTED] also contends that if she were to join the applicant in the Philippines, her life would be hard and it is too late for her to start over, her children would not receive education comparable to that in the United States and her nine-year old daughter would not receive adequate medical attention should her heart defect worsen.

Counsel asserts that the director erred in concluding that the applicant entered the United States with intentions to circumvent U.S. immigration laws, that he made a material misrepresentation of fact in order to obtain immigration benefits or that the applicant submitted a frivolous asylum application. The AAO finds no

evidence that the applicant made a material misrepresentation of fact in order to obtain the nonimmigrant visa on which he traveled to the United States or that he originally entered the United States in order to circumvent U.S. immigration laws. The AAO also finds that the immigration judge did not make a finding that the applicant's claim was fraudulent or frivolous. As such, there is no evidence that the applicant filed a frivolous asylum application.

On appeal, counsel asserts that the applicant failed to comply with voluntary departure because his child was born with a heart defect and he did not have the courage to leave a sick child who required additional attention, despite doctor's reassurances that her condition was not severe. While the AAO acknowledges the applicant may have been concerned by his daughter's heart condition, as discussed above, the record does not establish that she required additional care or medication, and it does not excuse his failure to comply with voluntary departure or the removal order.

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.*

Section 101(f) defines "good moral character" as:

For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was

....

(6) one who has given false testimony for the purpose of obtaining any benefits under this act;

The fact that any person is not within the foregoing class shall not preclude a finding that for other reasons such person is or was not of good moral character.

The 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 AAO finds that the director failed to consider the applicant's family ties in the United States, his U.S. citizen spouse, four U.S. citizen children, the absence of any criminal record, an approved immigrant visa petition for alien relative and the general hardship that the applicant's family members would suffer. The AAO finds that the birth of his U.S.-born children, the adjustment of his Filipino-born children to that of derivative U.S. citizens and approval of his immigrant visa petition occurred after the applicant was placed into proceedings. The AAO finds these factors to be "after-acquired equities" and that any favorable weight derived from the birth of his children, adjustment of his Filipino-born children to that of derivative U.S. citizens or his approved immigrant visa petition must be accorded diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's failure to depart the United States under an order of voluntary departure, and non-compliance with an order of removal until he was apprehended in 2002.

While the applicant's failure to depart the United States under an order of voluntary departure and after being ordered removed cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

**ORDER:** The appeal is sustained and the application approved.