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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

**PUBLIC COPY**

H4

[REDACTED]

FILE:

Office: CHICAGO, IL

Date:

SEP 20 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]

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 District Director, Chicago, Illinois, 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 Guatemala who, on February 13, 1983, was apprehended by immigration officers after he had entered the United States without inspection. On February 14, 1983, the applicant was placed into proceedings. On March 8, 1983, an immigration judge ordered the applicant removed from the United States. On March 23, 1983, the applicant was removed from the United States and returned to Guatemala. On May 18, 1990, the applicant married his lawful permanent resident spouse, [REDACTED]. On September 29, 1997, [REDACTED] filed a Petition for Alien Relative (Form I-130) on the applicant's behalf. On December 14, 1998, the Form I-130 was approved. On September 2, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On September 2, 2003, the applicant filed the Form I-212. The Form I-485 indicates that the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission on June 10, 1984. The record indicates that the applicant has since remained in the United States. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 remain in the United States and reside with his lawful permanent resident spouse.

The district director determined that the applicant was inadmissible pursuant to section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for entering the United States without being admitted after having been removed. The district director determined that the unfavorable factors in the applicant's case outweighed the favorable ones. The district director denied the Form I-212 accordingly. *See District Director's Decision* dated September 29, 2005.

On appeal, counsel contends that the district director gave undue weight to the unfavorable factors and only cursory consideration to the favorable factors in the applicant's case. Counsel contends that the factors supporting a grant of permission to reapply for admission outweigh the unfavorable factors. *See Form I-290B and Attachment*, submitted October 27, 2005. In support of his contentions, counsel submits only the referenced Form I-290B and attachment. The entire record was reviewed in rendering a decision in this case.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (ii) Other aliens.-Any alien not described in clause (i) who-
  - (I) has been ordered removed under section 240 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that [REDACTED] is a native and citizen of El Salvador who became a lawful permanent resident in 1989. The applicant and [REDACTED] do not have any children. The applicant is in his 40's and [REDACTED] is in her 50's.

The AAO notes that the district director erred in finding the applicant to be inadmissible pursuant to section 212(a)(9)(C) of the Act. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he may have been ordered removed prior to April 1, 1997, must have unlawfully reentered or attempted unlawful reentry after April 1, 1997, the date of enactment of the provision. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs* dated June 17, 1997. The AAO finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because his unlawful re-entry into the United States occurred prior to April 1, 1997. However, 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 AAO notes that counsel asserts on appeal that the district director erred in denying the applicant's application for adjustment of status because the applicant applied for adjustment of status under section 245(i) of the Act which permits certain immigrants who are unlawfully present in the United States to adjust status prior to reinstatement of a prior removal order. However, the AAO has no authority to review the decision of the district director in regard to section 245(i) of the Act. The only issue before the AAO is whether the applicant who is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, is eligible for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

On appeal, counsel contends that the district director erred in finding the applicant to have made a material misrepresentation of fact on the Form I-485 by neglecting to indicate that he had been previously removed from the United States. The record indicates that the applicant filed the Form I-212, which states he was previously removed, with the Form I-485 on September 2, 2003. Therefore, the AAO accepts counsel's assertion that the applicant's failure to indicate his prior removal on the Form I-485 was unintentional and does not constitute misrepresentation of a material fact.

On appeal, counsel asserts that the district director erred in finding the applicant's arrest in 1992 for grand theft of a motor vehicle to be a negative factor because no charges were filed against him. Counsel asserts that the police arrested the applicant when he unknowingly bought a stolen vehicle. To establish that no charges were ever filed against the applicant in this matter, counsel submits a certificate of no record from the Clerk of the California Superior Court in Compton, California. The applicant, however, was arrested by the

Norwalk Sheriff's Office in California. Accordingly, the documentation required to establish that no charges were filed against him for grand theft is a certificate from the Norwalk Sheriff's Office.

On appeal, counsel asserts that the applicant's basis for his removal, being an alien who was present in the United States without inspection, renders his removal not as grievous as those aliens who are removed for acts such as murder, subversion or terrorism. Counsel asserts that the applicant is not the only alien who has worked without authorization in the United States. Counsel asserts that the applicant's unlawful physical presence and employment in the United States are favorable factors because it shows his ability to support himself and his wife without asking for public benefits. Counsel asserts that the applicant does not have a criminal record in the United States and is a person of good moral character. Counsel asserts that the applicant's spouse would suffer hardship if the applicant were removed from the United States because she has not been employed since 2001.

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 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 these precedent legal decisions to 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 lawful permanent resident spouse, the absence of any criminal record, his steady employment, the general hardship to the applicant's wife, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry, his illegal reentry into the United States after having been removed and his extended unlawful presence and employment in the United States.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage, his steady employment and approval of his immigrant petition are after-acquired equities, as they occurred after the applicant was placed into proceedings. Any favorable weight derived from them must, therefore, be accorded diminished weight. In that 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, the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.