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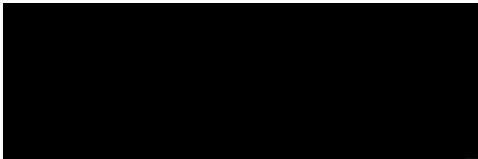
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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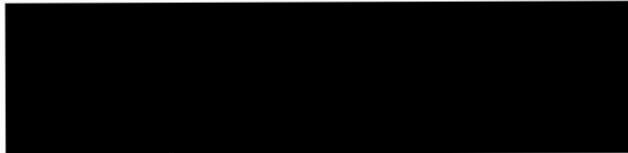
FILE:  Office: CALIFORNIA SERVICE CENTER

Date:  
**APR 22 2008**

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.

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 dismissed.

The applicant is a native and citizen of Mexico who, on January 18, 1996, pled guilty to and was convicted of hit and run with injury in violation of section 20001(a) of the California Vehicular Code (CVC) and to personally inflicting great bodily injury in violation of 1192.7(c)(8) of the California Penal Code (CPC). The applicant was sentenced to 240 days in jail and 3 years of probation. On June 13, 1996, the applicant was placed into immigration proceedings. On June 29, 1996, the applicant married his spouse [REDACTED]. On July 30, 1996, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on August 27, 1996. The applicant applied for adjustment of status before the immigration judge, based on the approved Form I-130. The applicant testified that he had entered the United States without inspection in 1988. On December 4, 1996, the immigration judge denied the applicant's application for adjustment of status and voluntary departure and ordered him removed from the United States. The applicant filed an appeal to the Board of Immigration Appeals (BIA). On May 31, 2002, the BIA dismissed the applicant's appeal. The applicant filed an appeal with the Ninth Circuit Court of Appeals (Ninth Circuit) and requested a stay of removal. On October 16, 2002, the Ninth Circuit dismissed the applicant's appeal, but noted that the stay of removal previously granted the applicant remained in effect until the court's decision was mandated on December 9, 2002. On July 21, 2003, a warrant for the applicant's removal was issued. The applicant failed to comply with the order of removal. On October 9, 2003, the applicant was removed from the United States and returned to Mexico, where he has since resided. On March 7, 2006, the applicant filed the Form I-212. As the applicant is seeking admission to the United States within ten years of his removal, he 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). He 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 naturalized U.S. citizen spouse and children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated September 15, 2006.

On appeal, counsel contends that the director erred and abused his discretion in finding the unfavorable factors in the applicant's case outweighed the favorable factors. *See Counsel's Brief*, dated November 15, 2006. In support of her contentions, counsel submits only the referenced brief. The entire record was considered 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 of Mexico who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 1996. The applicant and [REDACTED] have a 10-year old daughter and a 5-year old son who are both U.S. citizens by birth. The applicant and [REDACTED] are in their 40's.

On appeal, counsel asserts that the director erred in finding that the applicant had accrued unlawful presence in the United States because his residence in the United States from June 1996 until July 2003 was with authorization from the Immigration and Naturalization Service (INS) (now, Citizenship and Immigration Services (CIS)). Section 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii), defines the term "unlawfully present" for purposes of section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), as an alien who is present after the expiration period of stay authorized by the Attorney General or present in the United States without being admitted or paroled. Although the applicant applied for adjustment of status before the immigration judge, only the proper filing of an *affirmative* application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* Aliens who file an application for adjustment of status after being placed into immigration proceedings are not present in the United States pursuant to a period of stay authorized by the attorney general. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs dated June 17, 1997.* While the applicant was afforded employment authorization while he was in removal proceedings because he applied for adjustment of status, the applicant was not in a stay authorized by the Attorney General and accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until October 9, 2003, the date on which he was removed from the United States.

The AAO now turns to a consideration of positive and adverse factors in the present case.

On appeal, counsel asserts that the applicant is married to a U.S. citizen and has two U.S. citizen children. She asserts that the applicant is the beneficiary of an approved immigrant visa petition. She asserts that the applicant first entered the United States in 1988 and his conviction for hit and run with injury is not a crime involving moral turpitude. She asserts that the applicant owns a home with [REDACTED] and that, until he was removed from the United States, the applicant was steadily employed. She asserts that the applicant has an excellent work history and is considered an invaluable employee by his past employer who has a job

waiting for him upon his return to the United States. She asserts that the applicant and [REDACTED] have a very close relationship and they care very much for each other. She asserts that they regularly attended church and contributed to church fundraisers prior to the applicant's removal. She asserts that the applicant has many friends and is well thought of in his community. She asserts that the applicant helped to form and maintain a community soccer league. She asserts that the applicant now works as a waiter and is only able to earn sufficient income to pay his rent and buy food in Tijuana, Mexico. She asserts that it has been very difficult for the family to be separated. She asserts that [REDACTED] has supported the family since the applicant's removal, paying the bills, maintaining the house and caring for the children by herself. She asserts that it has been very difficult for [REDACTED], a housekeeper, to be a single working parent and the children have been very upset without their father. She asserts that the applicant's daughter has developed behavioral problems while the applicant's son has become withdrawn and barely knows his father. She asserts that, because [REDACTED] has to work to support the family, she is unable to spend sufficient time with the children and the children suffer from the lack of attention. She asserts that the family members travel to visit the applicant in Mexico on the weekends and it is when the family travels to see the applicant that the children begin to improve. She asserts that the applicant has remained in Mexico and has not attempted to re-enter the United States illegally. She asserts that the applicant has established a close-relationship with his extended family, especially his mother-in-law, who is also suffering hardship as a result of her separation from the applicant and witnessing [REDACTED]' pain and anguish at being forced to live apart from the applicant.

Counsel contends that the director has misunderstood the concept of an "after-acquired" equity and its weight in the exercise of discretion. She asserts that the point at which an equity is acquired is not a relevant factor to be considered in determining whether an applicant warrants permission to reapply for admission. Counsel argues that the purpose of the Form I-212 is to reunite families and the director confuses the "after-acquired" standard used for waivers other than the Form I-212, citing case law without considering the current state of immigration law and the extension of the period of time an applicant is prohibited from reentering the United States. Counsel's arguments are unpersuasive. Moreover, she fails to provide any case law to support her view on "after-acquired" equities in the context of applications for permission to reapply for admission.

The Ninth Circuit Court of Appeals, in *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> Cir. 1980), held that a child who had become a lawful permanent resident after the applicant had been placed into immigration proceedings is an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) and need not be accorded great weight by the district director in considering discretionary weight. 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. 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 the 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. Accordingly, the AAO finds that the director did not err in finding that equities gained after commencement of proceedings, the applicant's marriage, birth of his children, and the approved immigrant visa petition benefiting him, should be accorded diminished weight.

[REDACTED] in her declarations, states that the applicant supported the family, owned a house and filed income taxes while he resided in the United States. She states that she cannot join the applicant in Mexico

because she has to work to pay the bills in the United States. She states that if she left the United States she would lose her house and her daughter would have to start over in school because she does not read or write in Spanish. She states that her daughter needs after school programs for her weight that she could not afford in Mexico. She states that she has no one to help her in caring for the house, bills or in raising her children. She states that her son is hyper and needs constant attention while her daughter is mischievous and causes trouble. She states that her daughter's teachers noticed changes in her behavior after the applicant's removal and she was sent to counseling once a week as a result of the problems she was having in school. She states that, in approximately August 2005, the applicant moved to Tijuana, Mexico and the family visits him every weekend. She states that the children are very happy to visit their father but it is difficult for them to return to San Diego. She states that it is very difficult for her to maintain two households as the applicant has been unable to find work that pays more than a few dollars per week and she has to give him money for food and rent. She states that, prior to the applicant's removal, she was able to work on a part-time basis and stay home with the children and now she is unable to provide them with the same amount of attention. She states that she sometimes has to take the children with her to work because she is unable to afford a babysitter and she is finding it difficult to keep up with the family's debts without the applicant's help.

The applicant, in his letter, states that his family feels his absence, but that his daughter feels it the most. He states that his salary in Mexico is low and that he earns \$320 per month while his rent is \$120 and he spends \$200 on food, telephone, transportation and personal items. He states that it would be hard for his family to live in Mexico because his income would not cover all the necessities that a family needs to have a decent standard of living.

Letters of recommendation from the applicant's employers, friends and colleagues indicate that he is a hard-worker, good friend and father, a trustworthy person and that his family misses his presence in their lives.

A letter from [REDACTED], Lead Teacher, Los Altos Child Development Center, San Diego City Schools, indicates that both the applicant and [REDACTED] were involved and concerned for their daughter's academic development, attending school functions and parent meetings. [REDACTED] states that she had noticed a change in the applicant's daughter's attitude once her father was no longer present in the home and that she was very sad, crying and isolating herself from other children.

A letter from [REDACTED], a Family Service Assistant with a Head Start Program, indicates that Ms. [REDACTED] is an excellent mother who always follows up with her child's physical and dentals, etc. The letter states that the applicant's removal from the United States has been hard on the family and the applicant's daughter has faced behavior problems at school and is visiting a psychologist. The letter states that Ms. [REDACTED] has faced many financial, social and emotional problems, and that the applicant is a very good father and hard-working man, who is responsible, well-educated and respectful to others.

A letter from [REDACTED], a District Counselor with the San Diego City Schools, indicates that the applicant's daughter did receive regular counseling sessions from January 2004 through April 2004 because [REDACTED] was concerned about the emotional toll that the applicant's removal had taken on her daughter. The letter states that the applicant's daughter was stable and doing well in school and that her attendance was good. The letter indicates that the applicant's daughter went to eight counseling sessions where she focused on developing a relationship with a caring adult at school, expressing her feelings and developing coping strategies to deal with her father's absence. The letter concludes that the applicant's daughter appeared to be functioning well, even though her sense of security had been impacted by her father's

departure. There is no evidence in the record to establish that the applicant's daughter has received or required any further psychological assistance since April 2004.

While the applicant's conviction does not render him inadmissible to the United States for having committed a crime involving moral turpitude, it is, nevertheless, an unfavorable factor to be weighed in the exercise of discretion. The AAO notes the record includes a copy of the immigration judge's oral decision in the applicant's removal proceeding, which indicates that the immigration judge concluded that the applicant had knowingly hit an elderly woman and then purposely left the scene of the accident to avoid responsibility. The immigration judge also found that the applicant was not genuinely concerned about the welfare of his victim and was disturbed by the lack of substantial evidence showing that the applicant made any genuine effort to assist his victim after he was arrested. *See Immigration Judge's Oral Decision*, dated December 4, 1996.

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.*

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, two U.S. citizen children, the general hardship the family members would suffer if the applicant is denied admission and an approved immigrant visa petition for alien relative. The AAO notes that the applicant's marriage, the birth of his children, his payment of U.S. taxes, and the filing of the immigrant visa petition benefiting him occurred after the applicant was placed into immigration proceedings. All of these factors are "after-acquired equities" and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; his extended unauthorized stay and employment in the United States prior to placement into immigration proceedings; his conviction for hit and run with injury and personally inflicting great bodily injury; the circumstances surrounding his conviction for hit and run; his failure to comply with a removal order; and his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act for unlawful presence.

The applicant in the instant case has a criminal conviction and multiple immigration violations. 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 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.