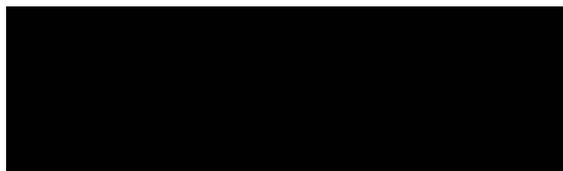




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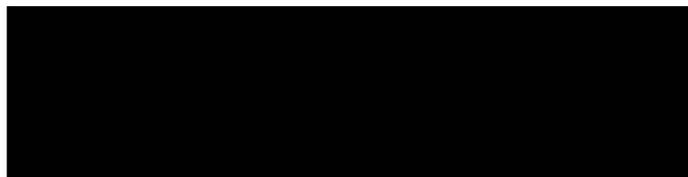


FILE:  Office: CALIFORNIA SERVICE CENTER Date: **AUG 13 2008**

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 sustained and the application approved.

The applicant is a native and citizen of Mexico whose father, on May 21, 2002, filed an Application for Asylum and Withholding of Removal (Form I-589). The applicant was included as a dependent on the Form I-589. The applicant's father indicated on the Form I-589 that the applicant had entered the United States without inspection in 1991. On June 25, 2002, the Form I-589 was referred to the immigration judge and the applicant was placed into immigration proceedings. On August 4, 2004, the immigration judge granted the applicant voluntary departure until October 4, 2004. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On December 1, 2005, the BIA dismissed the applicant's appeal and granted him voluntary departure for a period of 60 days from the date of the decision. The applicant failed to surrender for removal or depart from the United States, thereby changing the grant of voluntary departure to a final order of removal. The applicant filed an appeal and motion to stay removal with the Ninth Circuit Court of Appeals (Ninth Circuit). On December 17, 2005, the applicant married his U.S. citizen spouse, [REDACTED]. On December 20, 2005, the Ninth Circuit granted a temporary stay of removal. On April 18, 2006, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On May 26, 2006, the Ninth Circuit denied the applicant's appeal and mandated the decision on July 18, 2006. The Ninth Circuit did not reinstate the applicant's voluntary departure. On July 24, 2006, the Form I-130 was approved. On September 11, 2006, a warrant for the applicant's removal was issued. On September 12, 2006, the applicant was removed from the United States and returned to Mexico, where he has since resided. On November 21, 2006, the applicant filed the Form I-212. 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). 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 U.S. citizen spouse and son.

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 April 24, 2007.

On appeal, counsel contends that the applicant has submitted evidence conducive to a favorable adjudication of his application. *See Counsel's Brief*, dated June 15, 2007. In support of his 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 and citizen of the United States by birth. The applicant and [REDACTED] have a one-year old son who is a U.S. citizen by birth. The applicant and [REDACTED] are in their 20's.

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

On appeal, counsel asserts that the applicant has demonstrated good moral character, as evidenced by the absence of any criminal record. He asserts that the recency of the applicant's removal cannot be held against him since there has not been a finding of lack of moral character. He asserts that the applicant was only two years old when he was brought to the United States and he is unfamiliar with his country of origin. He asserts that the applicant has demonstrated reformation and rehabilitation by cooperating and complying with immigration regulations in order to rectify his current immigration status. He asserts that the applicant is married to a U.S. citizen and has shown dedication to his family responsibilities by finding and keeping employment in the United States in order to support his family. He asserts that the applicant has a U.S. citizen son. He asserts that the applicant's removal would be an unusual hardship to his wife and son because his wife would be a single mother. He asserts that the applicant's son would be unfairly deprived of his father. He asserts that the applicant has demonstrated his ability to provide for his family and to remove him would unfairly and unreasonably deprive his family of their provider and head of household. The AAO notes that, while the Form I-212 and the applicant's spouse indicate that the applicant has remained outside the United States since his removal, counsel's contentions indicate that the applicant may have reentered the United States.

[REDACTED], in her letter, states that she has a newborn U.S. citizen son. She states that she has resided in the United States her entire life. She states that her mother and two sisters are U.S. citizens and her whole family resides in the United States. She states that she was educated in the United States. She states that the applicant was raised and educated in the United States. She states that Mexico is a foreign country to the applicant and his first language is English. She states that the applicant is a hardworking individual and was the main provider for the family. She states that the applicant was not removed from the United States for committing a crime. She states that she needs the applicant to return to the United States to help her raise and provide for their child. She states that she feels very emotional and depressed.

The AAO notes counsel indicates that the applicant has paid federal taxes. However, no tax records have been submitted in support of this claim. Going on record without supporting documentary evidence is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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-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 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.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, his U.S. citizen son, the absence of a criminal record, and approved immigrant visa petition, and the young age at

which the applicant's brought him to the United States, which resulted in the passage of his formative years in the United States. The AAO notes that the applicant's marriage, the birth of his child, and the filing of the immigrant visa petition benefiting him occurred after the applicant was placed into immigration proceedings. The applicant's spouse, son and approved immigrant visa petition are "after-acquired equities" and the AAO, therefore, 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 failure to comply with an order of voluntary departure that became a final order of removal; and his inadmissibility pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for accumulating more than 180 days but less than one year of unlawful presence in the United States from February 1, 2006, the date on which the BIA's reinstated voluntary departure expired, and September 12, 2006, the date on which he was removed from the United States, and seeking admission within three years of his last departure.

The applicant's original illegal entry into the United States, his failure to comply with an order of voluntary departure that became a final order of removal, and his inadmissibility pursuant to section 212(a)(9)(B)(i)(I) of the Act, cannot be condoned. However, 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.

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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

The AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act, for accumulating more than 180 days but less than one year of unlawful presence and seeking admission within three years of his last departure from the United States. To seek a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the applicant will need to file an Application for Waiver of Ground of Inadmissibility (Form I-601).

ORDER: The appeal is sustained and the application approved.