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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

[REDACTED]

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FILE:

Office: MEMPHIS, TN  
RELATES)

Date:

DEC 02 2008

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)

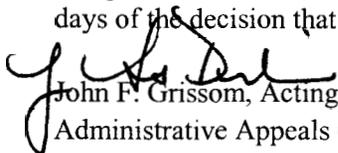
ON BEHALF OF APPLICANT:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Memphis, Tennessee 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 whose mother, on May 11, 1992, filed a Request for Asylum in the United States (Form I-589). The applicant was included as a dependent on the Form I-589. The applicant's mother indicated on the Form I-589 that the applicant had entered the United States without inspection on December 26, 1989. On September 24, 1992, the applicant was charged with shoplifting in California. The applicant pled guilty to and was convicted of trespassing to injure property in violation of 602(k) of the California Penal Code (CPC) and paid a fine more than fifteen years after the incident occurred. On January 18, 1994, the Form I-589 was referred to the immigration judge and the applicant was placed into immigration proceedings. On April 26, 1994, the immigration judge ordered the applicant removed *in absentia*. On November 2, 1994, a warrant for the applicant's removal was issued. On January 14, 1998, the applicant's U.S. citizen sister filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On November 30, 1998, the Form I-130 was approved. On March 29, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the Form I-130. On May 7, 2004, the Form I-485 was denied due to the Form I-130's priority date not being current. On May 28, 2004, the applicant married his U.S. citizen spouse, [REDACTED]. Ms. [REDACTED] had an approved Form I-130 as the daughter of a U.S. citizen. On March 10, 2006, [REDACTED] became a lawful permanent resident. On October 15, 2006, the applicant filed a second Form I-485. On March 30, 2007, the applicant appeared at the Memphis, Tennessee U.S. Citizenship and Immigration Services (USCIS) Field Office. The applicant testified that he had left the United States and attempted to reenter in 1994. He testified that he had been apprehended at the port of entry and returned to Mexico. He testified that he reentered the United States two weeks later, approximately in August 1994, without inspection. On April 27, 2007, the applicant filed the Form I-212, along with an Application for Waiver of Grounds of Inadmissibility (Form I-601). On July 30, 2007, the Form I-485 and Form I-601 were denied. On August 14, 2007, a second warrant for the applicant's removal was issued. On August 20, 2007, the applicant was removed from the United States and returned to Mexico. 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 lawful permanent resident spouse and three U.S. citizen children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision* dated July 30, 2007.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated September 21, 2007. In support of his contentions, counsel submits the referenced brief, affidavits from [REDACTED] and her siblings, a psychological report, and employment, educational and financial documentation. 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 in this matter establishes that the applicant departed the United States in 1994 while he had an outstanding order of removal and he has testified that he returned to the United States within two weeks, in approximately August 1994. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have unlawfully reentered the United States or attempted unlawful reentry after April 1, 1997, the effective date of the provision. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs* dated June 17, 1997. The AAO, therefore, finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because his unlawful reentry into the United States occurred prior to April 1, 1997. However, 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 [REDACTED] is a native of Mexico who became a lawful permanent resident in 2006. The applicant and [REDACTED] have a ten-year old daughter, a nine-year old son and a three-year old son who are all U.S. citizens by birth. The applicant has a 43-year old sister who is a native of Mexico who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 1996. While Ms. [REDACTED] states that most of the applicant's family resides in the United States, there is no evidence to establish that they have any status in the United States. The applicant and [REDACTED] are in their 30's.

On appeal, counsel asserts that the applicant's conviction is based on incidents that occurred when the applicant was only seventeen years of age and therefore a juvenile. The record reflects that, after the applicant filed a motion to reopen his Form I-485 and Form I-601, the field office director concluded that the applicant was not required to obtain a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), for his juvenile conviction. *See Field Office Decision*, dated May 16, 2008. The AAO finds that, while the applicant is

inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, the applicant is eligible for the exception under section 212(a)(2)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(I), since the crime was committed while the applicant was under the age of 18 years old and it has been more than five years since the commission of the crime. However, the applicant's conviction and his failure to report under a bench warrant for more than 15 years are factors to be considered in exercising discretion.

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

Counsel asserts that, besides his 1992 shoplifting arrest, the applicant has a clean criminal record. He asserts that the applicant has established himself as an excellent family man. He asserts that [REDACTED] and the applicant have had a very close bond for many years and she would suffer hardship if the applicant were refused admission. He asserts that [REDACTED] and the applicant met in California, are deeply in love and depend on each other for emotional and financial stability. He asserts that [REDACTED] earns less than \$400 per week and is not able to support herself and the children without the applicant's presence and considering the family's expenses. He asserts that, if the applicant remains in Mexico, it will be financially impossible for the family to maintain two households and it will be prohibitively expensive for [REDACTED] and the children to visit the applicant in Mexico. He asserts that the applicant's earning potential in the United States is three times that of [REDACTED], but the applicant does not have any job opportunities in Mexico. He asserts that the applicant's two older children attend elementary school and have received awards for their attendance, conduct and academic progress. He asserts that [REDACTED] the applicant and their family are worried that the applicant's absence will be detrimental to the children's education and that the children have already begun to feel their father's absence.

Counsel asserts that it would not be feasible for [REDACTED] and the children to join the applicant in Mexico. He asserts that the children have grown up in the United States and have had no contact with Mexico. He asserts that [REDACTED]'s extended family all reside in the United States and Ms. [REDACTED] has resided in the United States since she was a young girl. He asserts that all of the applicant's family, except for one sister, resides in the United States. He asserts that the family would lose everything if they were forced to move to Mexico, including their home, family, friends and assets.

[REDACTED], in her affidavit, states that she has been in a relationship with the applicant since 1996, and they have been married since 2004. She states that if the applicant were denied admission her life will be extremely difficult financially, emotionally and family wise. She states that she and the applicant have a very close family. She states that she and the children are dependent on the applicant for comfort and support. She states that she currently earns \$396 per week and it is a third of the income the applicant earned in the United States. She states that she will be forced to take a second job to make ends meet. She states that she will be unable to meet her mortgage payments and the family's expenses will increase, such as telephone bills, childcare costs and assisting the applicant in maintaining a second household in Mexico. She states that if the applicant remains in Mexico she will suffer his absence. She states that the applicant has become a substantial part of her life and she and her friends would miss him. She states that she and the applicant are deeply in love and being separated would hurt their relationship. She states that just the prospect of the applicant's departure makes her anxious and depressed. She states that it will be impossible for her and the applicant to continue to work together to raise their children if the children have to travel between the United States and Mexico. She states that her children cannot have a quality education if they have to travel to see their father.

She states that her mother considers the applicant to be her son and the applicant is very close to the rest of her extended family.

states that the family would lose everything if they moved to Mexico. She states that they would lose their home and cars. She states that she is not aware of any job opportunities for her in Mexico. She states that she has resided in the United States since she was young and it is now her country and home, which she could not leave. She states that she is worried about her children spending some of their childhood in Mexico. She states that the children would have fewer opportunities than in the United States. She states that the children would not have a quality education in Mexico. She states that all of her family resides in the United States and that all of the applicant's family, except for one sister, resides in the United States as well.

A psychological report written by a clinical psychologist, and based on one interview with and her children, states that reported that she is focused on her fears of the psychological impact of the applicant's removal on the children. reported that that her daughter has been impacted the most because she is more aware of the situation and she has been crying, not sleeping, is fearful, anxious, misses her father, and has experienced a loss of appetite. reported that her eldest son is fearful and anxious and her youngest son is irritable, cries more and is acting out. identified that she was suffering from anxiety, poor concentration, distractability, concerns about child rearing, depression, loss of appetite, emptiness, a sense of failure, low energy, financial problems, grief, loss, headaches, irritability, nervous tension, sleep disturbance, stress, mood swings, and low frustration tolerance. diagnoses with adjustment disorder with depression and anxiety, noting that scored in the mild range of depression and the severe range of anxiety. concludes that is experiencing significant psychological distress, which is an expected response to the applicant's situation. states that other individuals placed in such a circumstance would also likely experience significant anxiety, depression and stress. In that findings are based on a single interview with and her children, the AAO does not find them to reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional. As a result, the evaluation's conclusions must be considered speculative and of diminished value to a finding of hardship. The AAO notes that there is no evidence that continues to require treatment for depression and anxiety.

Documentation establishes that the applicant's two oldest children are enrolled in school, have done well in school and have received various awards and recognitions for attendance, good citizenship, honor roll and principal's list.

Two of siblings state, in their affidavits, that they have known the applicant for a long time and he is like a brother to them. They state that the applicant's removal from the United States will be extremely hard on , the children and the rest of the family. They state that the applicant and have an extremely close family. They state that and the children are dependent on the applicant for comfort and support. They state that faces terrible financial difficulties. They state that has already had to leave her home because she has been unable to meet the mortgage payments. They state that does not earn sufficient income and will have to live with her family and probably be forced to obtain additional employment. They state that her expenses will increase, including the costs of childcare. They state that they fear may lose her job. They state that family resides in the

United States. They state that the children are extremely attached to the applicant and is very close to her husband. They state that [REDACTED]'s oldest child has had some medical problems in the past and is now very anxious about the applicant's situation. They state that they have noticed that Ms. [REDACTED] is becoming depressed and anxious over the applicant's situation. They state that the applicant is a very important member of the family and that he is closer to [REDACTED] family than to his own family. They state that [REDACTED] could not move to Mexico. They state that Ms. [REDACTED] has resided in the United States from a young age, she does not know Mexico and her children have never been to Mexico. They state that [REDACTED] two youngest children do not read or write Spanish. They state that the family would lose everything if they relocated to Mexico. They state that the family would be forced to start from scratch.

Tax records reflect that the applicant filed tax returns in 2005 and 2006. The record reflects that the applicant was employed in the United States from 1995, until the date on which he was removed. The applicant was issued employment authorization in the United States from January 17, 2002, until March 23, 2007.

The record reflects that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for accruing more than one year of unlawful presence and seeking admission within ten years of his last departure.<sup>1</sup> An applicant may seek a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), by filing a Form I-601.

Finally, counsel asserts that the applicant was ordered removed *in absentia* without proper notice and that the signature on the certified mail return receipt for the notice to appear is not the applicant's signature. The record reflects that the notice was forwarded to the address listed on the applicant's Form I-589 and that the applicant or his mother did not submit any change of address for the application. Furthermore, whether the applicant was properly served and placed into immigration proceedings is a matter that should be raised before the immigration judge through a motion to reopen proceedings.

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

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<sup>1</sup> The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions, and March 29, 2001, the date on which he filed his first Form I-485. The applicant also accrued unlawful presence from May 7, 2004, the date on which his first Form I-485 was denied, and October 15, 2006, the date on which he filed the second Form I-485. Finally, the applicant accrued unlawful presence from March 30, 2007, until August 14, 2007, the date on which he was removed from the United States.

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. *Supra*.

*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.

As established by the record, the favorable factors in this matter are the applicant's lawful permanent resident spouse, his three U.S. citizen children, his U.S. citizen sister, the general hardship to his family if he were denied admission to the United States, his clear background except for his juvenile conviction, the young age at which he committed the acts that led to his conviction, the young age at which he originally entered the United States, his payment of taxes and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, birth of his children and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords 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 appear for an immigration hearing; his failure to comply with an order of removal; his attempt to enter the United States in 1994; his illegal reentry into the United States after having been ordered removed; his conviction for trespassing to injure property; his failure to resolve his criminal charges for more than 15 years; his extended unlawful presence in the United States; his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act; and his unauthorized employment in the United States except for January 17, 2002, until March 23, 2007.

The applicant in the instant case has multiple immigration violations and a criminal conviction. The totality of the evidence demonstrates 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.