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FILE:

Office: CALIFORNIA SERVICE CENTER

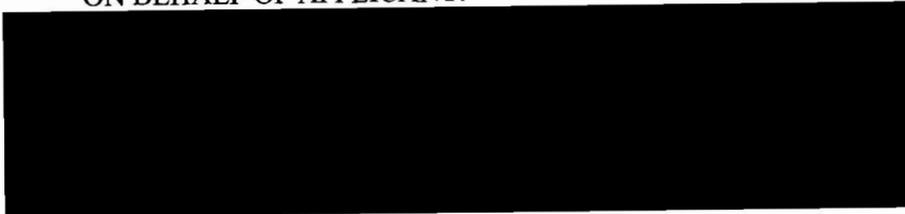
Date: JUL 24 2008

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 the Philippines who, on August 4, 2000, filed an Application for Asylum and Withholding of Removal (Form I-589). The applicant indicated on the Form I-589 that he had entered the United States without inspection on August 29, 1999. On April 18, 2001, the applicant's Form I-589 was referred to the immigration judge and he was placed into immigration proceedings. On June 1, 2001, the immigration judge ordered the applicant removed *in absentia*. On June 9, 2001, a warrant for the applicant's removal was issued. The applicant filed a motion to reopen and a request for stay of removal with the immigration judge. On May 13, 2002, the immigration judge denied the applicant's motion for stay of removal. On June 4, 2002, the applicant's motion to reopen his proceedings was also denied. The applicant filed an appeal of the immigration judge's denial of his motion to reopen and stay of removal with the Board of Immigration Appeals (BIA). On June 7, 2002, the applicant was removed from the United States and returned to the Philippines, where he has since resided. On August 22, 2002, the applicant married his U.S. citizen spouse, [REDACTED]. On November 11, 2002, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On December 2, 2002, the BIA dismissed the applicant's appeal. On December 9, 2003, the Form I-130 was approved. On November 27, 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 June 5, 2007.

On appeal, counsel contends that the director did not properly consider the hardship suffered by the applicant's spouse and cited unfavorable factors that are untrue. *See Form I-290B*, dated July 5, 2007. In support of his contentions, counsel submits a brief, a letter from the applicant's spouse, medical documentation and copies of documentation previously provided or in the record. 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 Ms. [REDACTED] have a five-year old son who is a U.S. citizen by birth. The applicant and [REDACTED] are in their 20's.

On appeal, counsel asserts that the applicant sought the assistance of an individual claiming to work for the legacy Immigration and Naturalization Service (INS) in obtaining employment authorization. Counsel asserts that it was only after the applicant was detained by immigration officials that he learned that a Form I-589 had been filed on his behalf and that he had been ordered removed from the United States. Counsel asserts that the applicant did not receive proper notice of his immigration hearing because he never lived at the address listed on the Form I-589. The applicant, in a declaration, states that he believed the individual through whom he obtained employment authorization was employed by legacy INS. He states that he did not sign the Form I-589 and that he was unaware that such an application had been filed on his behalf. He states that he has never resided at the address listed on the Form I-589 and did not receive notice of his immigration hearing. Counsel submits a photocopy of an envelope addressed to the applicant at [REDACTED] which was returned to the Los Angeles, California District Office as undeliverable due to "no such number." The returned envelope indicates that it was mailed on June 12, 2001. The Notice to Appear (Form I-862) informing the applicant that he had been placed into immigration proceedings indicates that it was sent to the applicant at "[REDACTED]" on April 20, 2001. As such, the returned envelope does not correspond to the notice of the applicant's immigration hearing. Furthermore, the record reflects that the returned envelope was made available to the immigration judge at the time the applicant filed the motion to reopen proceedings. In denying the applicant's motion to reopen and stay of removal, the immigration judge determined that proper notice had been effectuated through mailing to the applicant's last known address and that he had failed to establish that he suffered from ineffectual assistance of an individual claiming to be an officer of legacy INS. As such, the AAO concludes that there was proper notice of the applicant's immigration hearing and that the applicant failed to establish that he did not file the Form I-589 or suffered from ineffective assistance. The AAO notes that the notice of the applicant's immigration hearing informed him that his failure to attend the hearing would result in the order of his removal from the United States. *See Form I-862 Warning*, dated April 18, 2001.

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

On appeal, counsel asserts that the applicant's spouse has not seen the applicant in over three years and that she needs the applicant in the United States for emotional, physical and financial support.

in a letter, states that it has been almost three years since she saw the applicant. She states that she shoulders all the hardships of raising her son. She states that ever since she was pregnant with her son that she has encountered difficulties. She states that six months into the pregnancy, she was hospitalized for a period of two months. She states that she was in and out of the hospital until she gave birth to her son. She states that she is grateful to the applicant's relatives and her friends who have helped her through her ordeal. She states that her son was operated on at five months old because he had fluid on his hips. She states that seeing her son in that situation and alone was terrible. She states that she needs her husband to support her emotionally and physically, but most of all financially. She states that she does not want to depend on the applicant's relatives and friends for her needs. She states that she has recently worked part-time in home care, but that her income is insufficient. She states that her son needs to undergo a series of blood tests in different hospitals because his red blood cell count is irregular. She states that she is afraid of facing this situation alone.

A discharge summary from the California Pacific Medical Center indicates that [REDACTED] was hospitalized for one month in February 2003 because of a reported rupture of the membranes during pregnancy. It states that her examination was normal but there was a potential for slight leakage. It states that no leakage was confirmed at time of release and all of the tests confirmed that the leakage had stopped. Ms. [REDACTED] was discharged with instructions for bed rest. The record does not contain evidence establishing that the applicant's child has any health issues.

Police clearance letters from the Philippines indicate that the applicant does not have a criminal record. An employment letter from [REDACTED] Chief of Staff for Congressman Jesus Crispin C. Remulla, indicates that the applicant has been employed in the Philippines as a driver and personal assistant since July 2004.

The AAO notes that the applicant was previously inadmissible 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 August 29, 1999, the date on which he entered the United States without inspection, and August 4, 2000, the date on which he filed the Form I-589. However, it has now been more than three years since the applicant's last departure from the United States and he is no longer required to obtain a waiver under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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 general hardship to his family members, the absence of a criminal record, and an approved immigrant visa petition. 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 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 attend his immigration hearing; his failure to comply with an order of removal; and his unlawful presence in the United States.

The applicant in the instant case has multiple immigration violations. 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.