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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

H4

**PUBLIC COPY**

[REDACTED]

FILE:

Office: HARLINGEN, TX

Date: **JUL 24 2008**

[REDACTED]; AND  
[REDACTED] (RELATE)

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Harlingen, Texas 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.

The applicant is a native and citizen of Mexico who, on February 5, 1991, was placed into immigration proceedings after he had entered the United States as a nonimmigrant with the intent to remain indefinitely in the United States. On February 21, 1991, the applicant pled guilty to and was convicted of possession of identity documents not lawfully issued with the intent to defraud the U.S. government in violation of 18 U.S.C. § 1028(a)(4)(b)(3). The applicant was sentenced to two years of probation. On February 28, 1991, the immigration judge ordered the applicant removed from the United States. On March 1, 1991, a warrant for the applicant's removal was issued. On March 2, 1991, the applicant was removed from the United States and returned to Mexico. The applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission on an unknown date, but prior to July 10, 1992, the date on which he appeared at the legacy Immigration and Naturalization Services' Harlingen District Office to file an Application for Temporary Resident Status Pursuant to Section 245A of the Immigration and Nationality Act (INA) (Form I-687). On June 12, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), *amended by* LIFE Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000). On February 24, 2005, the applicant filed the Form I-212. On April 12, 2006, the applicant's Form I-485 was denied. 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 stepfather and his U.S. citizen children.

The district director determined that the applicant is subject to the reinstatement provisions under section 241(a)(5) of the Act and that no waiver is available to him under section 212(a)(9)(A)(iii) of the Act. The district director also 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 also determined that the applicant was statutorily ineligible for a waiver pursuant to section 212(a)(9)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(iii) because he had failed to remain outside the United States for a period of ten years prior to applying for permission to reapply for admission. The district director denied the Form I-212 accordingly. *See District Director's Decision* dated April 7, 2006.

On appeal, counsel contends that section 241(a)(5) of the Act does not bar the applicant from re-admission since he has the right to apply for a *nunc pro tunc* waiver under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9). Counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. Counsel contends that the applicant is eligible for permission to reapply for admission to the United States pursuant to section 212(a)(9)(A)(iii) of the Act and that the favorable factors in the applicant's case outweigh the negative factors. *See Counsel's Brief*, dated May 12, 2006. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 241(a) of the Act states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The regulation at 8 C.F.R. § 241.8 states that:

(b) *Notice.* If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

A review of the record indicates that the applicant in the present matter was not issued a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required by 8 C.F.R. § 241.8(b). Accordingly, the AAO finds that the applicant's prior removal order has not been reinstated and that he is not precluded from applying for relief by section 241(a)(5) 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 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.

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, on June 21, 1997, the applicant married his spouse, [REDACTED], who is a native and citizen of Mexico. The applicant and [REDACTED] have a 17-year old son and a 13-year old daughter who are both U.S. citizens by birth. The applicant's mother, [REDACTED], is a native and citizen of Mexico who may be a lawful permanent resident. The record reflects that, on October 28, 1986, [REDACTED] married her U.S. citizen spouse, [REDACTED]. However, the record does not establish that [REDACTED] has any legal status in the United States. The applicant and counsel state that the applicant has three siblings who are natives and citizens of Mexico who have become lawful permanent residents. However, the record does not establish that these individuals are the applicant's siblings or that they have any legal status in 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 was involved in a non-violent crime over a decade ago and has, since his removal from the United States, had no significant police contact. She asserts that the applicant has extensive family ties in the United States, including his U.S. citizen stepfather, lawful permanent resident siblings and his U.S. citizen children.

A sworn declaration from [REDACTED] and [REDACTED] states that the applicant and his family reside with them. They state that the applicant has always been a responsible and hard working person who has provided for his family. They state that the applicant's children are excellent students and have been treated for allergies and asthma by [REDACTED]. They state that doctors have also treated the applicant's son for hyperactivity. They state that if the applicant is returned to Mexico their world will fall apart because he is the provider for the family. They state that the applicant's children cannot live in a country they do not know because they are accustomed to the education, teachers, friends, and environment in the United States. They state that the language will be a difficult barrier for the children. They state that it will be harder for the applicant's son because he is reaching his teenage years and that it will be a disaster for the children to face such difficult changes.

A sworn declaration from the applicant's brother, [REDACTED] states that the applicant's wife has dedicated herself to raising the family while the applicant provides financial support for the family. He states that the applicant has been continuously employed since 1981 and is dedicated to his work. He states that the applicant is the sole provider for the family and is a caring and responsible family man.

A letter from [REDACTED] a pediatrician, states that the applicant's children have been his patients since birth. He states that the children are currently healthy and their immunizations are up to date. A letter from the applicant's pastor states that the applicant and his spouse reside with [REDACTED] and are active members of the Our Lady of Good Counsel parish. A letter from [REDACTED], director of religious education/youth director at Our Lady of Good Counsel, states that the applicant's son is an active member of the parish community. She states that the applicant's son has helped with numerous activities, such as altar service, church lock-ins, retreats, formation classes and church fund-raisers. She states that the applicant's son's participation in the community serves as a role model to teenagers with problems. A second letter from [REDACTED] states that the applicant's daughter is also an active member of Our Lady of Good Counsel's community. She states that the applicant's daughter activities include religious education formation, children's mass, Christmas plays, lector and choir.

Letters of support from friends and neighbors state that English is the first language of the applicant's children and they will have difficulty with the Spanish language, especially the applicant's son. They state that the applicant's son suffers from allergies and hyperactivity for which he would be unable to obtain the same level of care in Mexico. They state that it would be difficult for the children to leave their friends and adjust to a new school environment in Mexico. They state that it is very difficult to obtain work in Mexico and the applicant would be unable to support his family. They state that the family would suffer a great inconvenience if they had to start over in Mexico and it would cause emotional instability. They state that the applicant is dedicated to his work and is the sole provider for his family. They state that the applicant is a caring and responsible family man. They state that they believe it is important for the applicant to remain in the United States because he is a strong and positive influence on his children, as well as the community. They state that the applicant's children are at an impressionable age and they need him.

Documentation in the record establishes that the applicant filed federal taxes in 2002.

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. *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.

The AAO finds the favorable factors in the present case to include the applicant's two U.S. citizen children; his U.S. citizen stepfather; the general hardship he and his family will experience; the absence of any criminal record since 1991; and his payment of U.S. taxes in 2002. The AAO notes, however, that the birth of the applicant's second child occurred after he was placed into proceedings. Accordingly, this factor is an "after-acquired equity" and the AAO accords it diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's entry into the United States as a nonimmigrant with the intent to remain indefinitely in the United States, his conviction for possession of identity documents not lawfully issued with the intent to defraud the U.S. government, his reentry into the United States after having been removed, and his extended unlawful presence and employment in the United States.

The applicant's overstay of his nonimmigrant status, his conviction, his reentry into the United States after having been removed, and his extended unlawful presence and employment in the United States 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.

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.

**ORDER:** The appeal is sustained.