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

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: PHOENIX, ARIZONA Date: AUG 15 2006

IN RE: Applicant: [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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico who entered the United States without a lawful admission or parole on or about February 18, 1993. On April 9, 1993, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on April 12, 1993, in the United States District Court, District of Arizona the applicant was convicted pursuant to title 8 U.S.C. § 1325 for knowingly, willfully and unlawfully entering the United States at a time or place not designated by immigration officers. He was sentenced to fifteen days imprisonment and was allowed to return to Mexico voluntarily. On March 19, 1995, the applicant reentered the United States without a lawful admission or parole. Border Patrol agents apprehended him and when questioned about his immigration status he presented an Alien Registration Card (Form I-551) that did not belong to him. On Mach 23, 1995, in the United States District Court, Southern District of California, the applicant was convicted pursuant to title 8 U.S.C. § 1325, and sentenced to fifty days imprisonment. On March 20, 1995, an Order to Show Cause (OSC), for a hearing before an immigration judge was served on him. On May 12, 1995, an immigration judge ordered the applicant deported from the United States pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. Consequently, on the same date the applicant was deported to Mexico. The record reflects that the applicant reentered the United States on an unknown date, but prior to May 17, 1995, the date he was apprehended by immigration agents, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant presented a Form I-551 that did not belong to him. On May 17, 1995, in the United States District Court, Southern District of California, the applicant was convicted pursuant to title 8 U.S.C. § 1325, and sentenced to sixty days imprisonment. The record of proceedings reflects that the applicant departed the United States on July 28, 1995. The record further reflects that he reentered the United States in January 1996 without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act. The applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of 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 remain in the United States and reside with his U.S. citizen spouse and step-child.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See District Director's Decision* dated August 2, 2005.

Section 212(a)(9)(A) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
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> . . . .
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> (ii) Other aliens.- Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law . . . [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 of an 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has; (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief, medical documentation regarding the applicant's spouse, financial documentation, character letters from the applicant's spouse and step-child, an affidavit from the applicant, evidence of non-existence of marriage in Guanajuato, Mexico and other supporting documentation, such as the applicant's marriage certificate and his spouse's naturalization certificate and divorce decree. In his brief, counsel states that the Form I-212 was denied partly because the applicant failed to submit evidence that he was not married in Mexico. Counsel submits a certified letter from the Civil Registrar's office in San Roque de T(Torres), Guanajuato, Mexico, which states that there is no record of a marriage for the applicant. Counsel states that his marriage to a U.S. citizen is a positive factor. In addition, counsel states that the applicant's spouse has medical problems that require regular visits to doctors and if the applicant is not permitted to remain in the United States, she will suffer extreme and unusual hardship. Additionally, counsel states that since the applicant's last entry into the United States, he has been gainfully employed, pays taxes and contributes to the national economy. Further counsel states that the applicant has been rehabilitated from his lifestyle of disregarding the laws, is extremely remorseful of his past misconduct and has not committed any other crimes or offenses since he reentered the United States. Finally, counsel states that the applicant has met the burden of showing extreme hardship and requests that the Form I-212 is granted. In his affidavit, the applicant asks for forgiveness and states that his wife would not be able to pay for their house and his step-child's education. In addition, he states that the mistakes he made were caused by ignorance.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's family member, but it will be just one of the determining factors.

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 be a condonation of the alien's acts and could encourage others to enter without being admitted 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 court 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-Nunoz 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 applicant in the present matter married his U.S. citizen spouse on April 9, 2001, approximately six years after he was deported from the United States and over five years after he illegally reentered the United States. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse and step-child, an approved Form I-130, and the prospect of general hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entries into the United States, his illegal reentry subsequent to his deportation, his attempts to persuade immigration officials of his immigration status by fraud, his employment without authorization and his lengthy presence in the United

States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra,* that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to an U.S. citizen, gained after his deportation and after he illegally reentered the United States, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant 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.