U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 09 2006

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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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 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 Mexico who, on January 6, 1991, entered the United States without inspection. On January 7, 1991, the applicant was apprehended by immigration officers and was placed into deportation proceedings. On February 20, 1992, the applicant failed to appear at his immigration court hearing and was ordered deported from the United States, in absentia. On March 20, 1992, a warrant of deportation was issued. The applicant failed to surrender himself for deportation. On December 31, 1996, the applicant's mother filed an Application for Asylum or Withholding of Removal (Form I-589), on which the applicant was listed as a dependent. On February 7, 1997, the applicant was issued an Order to Show Cause (OSC) since the Form I-589 was referred to an immigration judge. On June 24, 1998, an immigration judge granted the applicant voluntary departure until August 15, 1998. The applicant failed to voluntarily depart the United State, thereby changing the voluntary departure to a final order of deportation. On May 6, 1999, the applicant filed an appeal to the Board of Immigration Appeals (BIA), which they dismissed. On July 3, 2002, the applicant filed a Motion to Reopen before the BIA. On October 20, 2002, the BIA dismissed the applicant's Motion to Reopen. On November 20, 2003, the applicant filed an appeal to the 9th Circuit Court of Appeals (9th Circuit). On March 18, 2003, the 9th Circuit dismissed the applicant's appeal. The applicant has failed to surrender himself for deportation or to depart the United States. On January 2, 2004, 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 remain in the United States and reside with his U.S. citizen spouse and child.

The director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for being an alien who has been ordered removed from the United States. The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The director then denied the Form I-212 accordingly. *See Director's Decision,* dated March 22, 2005.

On appeal, the applicant contends that he warrants a favorable exercise of discretion because he has a U.S. citizen spouse and a U.S. citizen child who requires treatment for asthma in the United States.

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

> (A) Certain aliens previously removed.-
>
> (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 of proceedings indicates that the applicant entered the United States without inspection and, when subsequently placed into deportation proceedings, failed to appear at his immigration hearing. The applicant was ordered deported from the United States and failed to comply with the order. Subsequently the applicant was again placed in deportation proceedings and granted voluntary departure until August 15, 1998. The applicant failed to comply with voluntary departure and the order of deportation became final on August 15, 1998. The AAO notes that all of the applicant's appeals have been dismissed. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and, therefore, must receive permission to reapply for admission.

On January 21, 1999, the applicant's U.S. citizen son, [redacted] was born in Glendora, California. On November 19, 2002, the applicant married his spouse, [redacted] a native of Mexico who, in 1994 became a lawful permanent resident of the United States. On December 19, 2003, [redacted] became a naturalized citizen of the United States. On January 13, 2004, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant.

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 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 deported 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-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 AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's marriage to a U.S. citizen, birth of a U.S. citizen son who may have medical conditions, and a pending immigrant petition for alien relative. The AAO notes, however, that the record contains no evidence that the applicant's son has asthma. The medical documentation submitted by the applicant indicates that, in 2002, the applicant's son was treated for a "partial seizure disorder" during which the child "can see a ghost." There is no indication that the applicant's son is currently suffering from any medical conditions, is undergoing any medical treatment or that he has asthma.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States, failure to appear for an immigration hearing, non-compliance with a 1992 order of deportation, non-compliance with a 1998 order of deportation and accumulated unlawful presence in the United States.

The applicant in the instant case has multiple immigration violations. Moreover, the AAO finds that the birth of the applicant's son, the applicant's marriage and the pending immigrant petition occurred after *two* deportation orders were issued against the applicant in 1992 and 1998. The AAO finds that these factors are "after-acquired equities" and that any favorable weight derived from the applicant's marriage or son is accorded diminished weight. The AAO notes further that the evidence in the record fails to establish that the applicant's son has any ongoing medical conditions for which he requires treatment. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and 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 that 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.