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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: SAN ANTONIO, TEXAS Date: OCT 23 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]

PUBLIC COPY

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, San Antonio, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Tunisia who entered the United States without a lawful admission or parole on December 13, 1999. On the same date the applicant was apprehended by the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) and a Noticed to Appear (NTA) for a hearing before an immigration judge was served on him. On February 29, 2000, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the immigration court. On July 10, 2000, an immigration judge and denied his request for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). In addition, the immigration judge denied the applicant's request for voluntary departure and the applicant was ordered removed pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i), for having been present in the United States without being admitted or paroled. The applicant filed a timely appeal with the Board of Immigration Appeals (BIA). On October 19, 2000, the applicant was released from custody on a $5,000 bond. On December 18, 2002, the BIA affirmed, without opinion, the immigration judge's decision. On May 23, 2003, a Warrant of Deportation (Form I-205) was issued. Consequently, on May 28, 2003, the applicant was removed from the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and of a Petition for Alien Fiancé (Form I-129F) 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 travel to the United States and reside with his U.S. citizen spouse and 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 February 2, 2005. The District Director previously denied a Form I-212 submitted on March 23, 2004, because it was improperly filed. No appeal was filed following that denial. The Form I-212 that is the basis of this proceeding was filed on March 19, 2004.

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, or
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> (II) departed the United States while an order of removal was outstanding, and 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 aliens 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, and (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 deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief, copies of the applicant's spouse's and child's passports, pictures of the applicant with his family, letters of recommendation from relatives and friends attesting to his good moral character and copies of telephone bills. In his brief, counsel states that the District Director abused his discretion in denying the Form I-212 based on a conclusion that the applicant had filed a frivolous application for asylum. Counsel refers to the decision in *Lin v. Ashcroft*, 83 Fed. Appx. 480, (3rd Cir. 2003) that states that an adverse credibility finding is coextensive with a determination that an application as frivolous. In addition, counsel states that the District Director failed to weigh factors in a manner consistent with case law. Counsel states that the positive factors that should have been taken into consideration are the fact that upon entry into the United States the applicant immediately applied for asylum, he was released from custody after he was able to raise money for an immigration bond, he worked after he was issued employment authorization, and he supported his family. Counsel further states that the applicant surrendered to the Service on the day he was requested to and he remained in custody for three months until his removal order was executed. Finally counsel states that the applicant has no criminal record in the United States.

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 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 July 23, 2002, over two and one half years after he was placed in removal proceedings, and over two years after he was ordered removed from the United States. The applicant's spouse should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of his being deported. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

In his decision the District Director stated that the unfavorable factors in the applicant's case included his illegal entry, his attempt to remain in the United States by filing a Form I-589 with little merit, the fact that he was in the United States approximate three and one half years, none of which was in legal states and most of which was in custody, and the fact that he never received a labor certification pursuant to section 212 (a)(5)(A) of the Act. The District Director concluded that these factors outweighed the fact that the applicant is the spouse and father of U.S. citizens.

The AAO finds that the District Director failed to consider the other favorable factors including the approval of Forms I-130 and I-129F, the prospect of general hardship to his family, the fact that he was issued EADs, the numerous letters of recommendation from family and friends regarding his good moral character and the absence of any criminal record.

The AAO finds that the applicant's application for asylum and subsequent denial of his asylum application are not unfavorable factors. The applicant had the right to file an asylum application, and although it was subsequently denied, he was entitled to exhaust all means available to him by law in an effort to legalize his status in the United States. His appeal conferred on him a status that allowed him to remain in the United States while it was pending. In addition, the fact that the applicant was in Service custody is not an unfavorable factor. The applicant was released from custody when he was able to pay the immigration bond and after he surrendered awaiting his removal. Finally, the AAO does not find that the absence of a labor

certificate on behalf of the applicant is an unfavorable factor. The applicant is married to a U.S. citizen and does not need a labor certificate to be filed on his behalf in order to be eligible for an immigrant visa.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection.

While the applicant's actions cannot be condoned, 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 and the application approved.

ORDER: The appeal is sustained and the application approved.