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

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[redacted]

FILE: [redacted] Office: CLEVELAND, OH Date: DEC 14 2007

[redacted]

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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Cleveland, Ohio, 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 China who, on September 1, 1991, was arrested by immigration officers as part of a group of individuals being smuggled into the United States. On September 9, 1991, the applicant was placed into proceedings. On October 25, 1991, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589) with the immigration court. On November 15, 1991, the applicant was released from immigration custody and was paroled into the United States for the sole purpose of attending exclusion proceedings. On January 14, 1992, the immigration judge ordered the applicant excluded/removed *in absentia*. The applicant filed a motion to reopen proceedings before the immigration judge. On July 6, 1992, the immigration judge denied the applicant's motion to reopen proceedings. Despite being ordered excluded/removed from the United States, the applicant failed to present himself for removal or to depart the United States. On December 8, 1997, the applicant's spouse, [redacted]), and their daughter entered the United States. In June, 1999, the applicant filed a motion to reopen proceedings before the immigration judge. The motion to reopen was granted and the applicant's proceedings were consolidated with Ms. [redacted]'s proceedings. On November 30, 1999, the immigration judge denied the applicant's and Ms. [redacted]'s applications for asylum, withholding of removal, convention against torture and voluntary departure. The applicant was ordered removed. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On December 3, 2001, the applicant's employer filed a Petition for Alien Worker (Form I-140), based on a labor certification, which was approved on January 22, 2002. On January 11, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-140. On February 14, 2003, the BIA dismissed the applicant's appeal. The applicant appeared for an adjustment of status interview, during which he testified that he had repaid his brother-in-law for smuggling his wife and daughter into the United States. On June 20, 2005, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) for seeking admission after being ordered removed. The applicant 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 adjust his status to that of lawful permanent resident and reside in the United States with his spouse and daughter.

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 November 15, 2005.

On appeal, counsel contends that the applicant has never been removed or ordered removed from the United States and is not subject to the requirement of permission to reapply for admission. Counsel further contends that the applicant warrants a favorable exercise of discretion in seeking adjustment of status. *See Counsel's Brief,* dated December 9, 2005. In support of the appeal, counsel submits the referenced brief and copies of documentation previously provided. The entire record was reviewed 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 Attorney General [now Secretary of Homeland Security] has consented to the alien's reapplying for admission.

On appeal, counsel contends that because the applicant was in exclusion proceedings and was never removed from the United States he does not need permission to reapply for admission. Counsel asserts that there is a legal distinction between exclusion and removal orders or proceedings that is significant. The AAO notes, however, that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), eliminated the distinction between exclusion and deportation proceedings. In analyzing whether an applicant who was placed into removal proceedings prior to enactment of IIRIRA is inadmissible pursuant to section 212(a)(9)(A) of the Act, the Department of State has issued the following guidance:

> New 212(a)(9)(A)(i) and (ii) roughly correspond to former 212(a)(6)(A) and (6)(B), relating to aliens previously excluded/deported. The main change from the previous law is that the periods of inadmissibility have been substantially lengthened:
>
> Arriving aliens denied admission and removed (excluded), who were previously ineligible for one year, are now generally ineligible for either: five years, if the removal order was issued on/after April 1, 1997, or ten years, if the removal (exclusion) order was issued prior to 4/1/97; aliens ordered removed after having been admitted or after having entered without inspection, who were previously ineligible for five years, are now generally ineligible for ten years . . .

INA Section (Class Code)	Applies to:
212(a)(9)(A)(ii) (92A or 92B or 92C) other aliens previously ordered removed	whether the order was issued before, on, or after 4/1/97

Department of State Cable (R 040134Z APR 98), P.L. 104-208 Update No. 36: 212(a)(9)(A)-(C), 212(a)(6)(A) and (B), (April 4, 1998), Ref: 96-State-239978, 97-State-62429, 97-State-235245, 98-State-51296.

Counsel also contends that, because the applicant has not been physically removed from or departed the United States, he is not subject to section 212(a)(9)(A) of the Act and does not need to apply for permission to reapply for admission. However, section 212(a)(9)(A)(ii) of the Act provides that any alien who has been ordered removed under any provision of the law is inadmissible, whether or not that applicant has been physically removed. The record of proceedings indicates that the applicant has been ordered removed from the United States and has failed to comply with the order of removal. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

The record reflects that the applicant's spouse is a native and citizen of China. The applicant and Ms. [redacted] have a 21-year old son and a 15-year old daughter who are both natives and citizens of China. The record does not indicate that the applicant's spouse and children have any legal status in the United States. The applicant is in his 40's.

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

On appeal, counsel asserts that the applicant has resided in the United States for more than 14 years and has been gainfully employed as a Chinese cook. Counsel asserts that the applicant has diligently provided for his wife and daughter in the United States and he has been a law-abiding individual who has never been arrested, prosecuted for, or convicted of any crimes. Counsel asserts that removal of the applicant will not be in the public interest nor advance any significant enforcement objectives. Counsel asserts that the applicant will likely face coercive sterilization upon return to China because he has violated China's one-child policy in the past.

The applicant, in an affidavit, states that if he is removed from the United States he will not be able to live without his wife and daughter. He states that if his family returns to China with him, he or his wife will be sterilized and further persecuted by the Chinese authorities for violation of family planning laws. He states that he will be unable to provide for his family, in particular his daughter, upon returning to China. He states that, if returned to China, his daughter's life, dreams and educational opportunities will be shattered. He states that his daughter has grown up in the United States and does not speak Chinese very well and will not be able to adjust to life and school in China. He states that his daughter will be deeply affected psychologically. He states that his wife's brother's family is in the United States and the two families are close. He states it will be almost impossible for the families to maintain their close friendship if his family is returned to China. He states that he will be unable to find employment to support his family in China. He states that he has been law-abiding, has worked hard and wants to contribute to the United States, the country in which he has resided for more than fourteen years.

A letter from the applicant's daughter's elementary school principal indicates that she has a wonderful personality and has been very involved in many activities at the school, including making the honor roll. He states that the applicant's daughter has worked with the staff and students in learning parts of the Chinese language. A letter from an aide at the applicant's daughter's elementary school indicates that she knows three different languages and has adapted well to life in the United States. She states that the applicant's daughter has adapted so well that she believes the applicant's daughter's return to China would not only be very difficult but not in her best interest. Letters of recommendation from colleagues, friends and family members indicate that the applicant is a hard-working, respectful and honest person.

With regard to the applicant's claim that he would be at risk in China as a result of his violation of China's family planning policy, the record reflects that an immigration judge has found the applicant would not suffer persecution upon returning to China, as evidenced by the denials of the applicant's asylum, withholding of removal and convention against torture applications in 1992 and 1999. Further, the record also reflects that the applicant has provided inconsistent information to Citizenship and Immigration Services (CIS) in seeking immigration benefits under the Act. The record indicates that, on October 26, 1992, the applicant filed an Application for Employment Authorization (Form I-765), as a Chinese national eligible for Deferred Enforcement Departure (DED), indicating that he had entered the United States on January 17, 1990. In support of this application, the applicant filed an affidavit swearing that he entered the United States prior to April 11, 1990, as was required for a grant of DED employment authorization. The statements on the Form I-765 and in support of the Form I-765 directly contradict the record, which establishes that the applicant was apprehended attempting to enter the United States on September 1, 1991. The record reflects that the applicant has filed at least two Forms I-589 in addition to the Form I-589 he filed with the immigration court in 1991 and since his original removal order was issued in 1992. On September 28, 1992, the applicant filed a Form I-589 under the A-number [redacted]. On March 17, 1993, the applicant filed a Form I-589 under the A-number [redacted], in which he affirmatively represented that he had not previously filed an application for asylum. While the applicant indicated in the 1991 Form I-589 that his wife was expecting their third child at the time she was forced to undergo an abortion, he provided information in his 1993 Form I-589 and in the affidavit he submitted in support of his 1999 motion that his wife was expecting their second child at the time she was forced to undergo an abortion. The applicant also provided differing dates for his wife's abortion. In his 1992 Form I-589 he states that it occurred in 1990; in the 1993 Form I-589 he indicated that the abortion took place in April 1991. In an affidavit and Form I-589 supporting his June 1999 motion to reopen, the applicant stated that officials forced his wife to undergo an abortion in 1988.

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 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.

The favorable factors in this matter are the applicant's approved immigrant petition for alien worker and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's failure to comply with an order of removal in 1992; his involvement in the smuggling of his wife and child into the United States; his misrepresentation of his date of entry in an attempt to obtain employment authorization and DED in 1992; his concealment of prior asylum applications in 1993; the inconsistent statements in his asylum applications; his failure to comply with an order of removal in 2003; and his unlawful presence and employment in the United States.

The applicant in the instant case has multiple immigration violations. The AAO finds that the immigrant visa petition benefiting him was filed and approved after the applicant was placed into proceedings. The AAO finds this factor to be "after-acquired equity" and therefore accords it diminished weight. 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.

The AAO notes that the record indicates that the applicant may be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), based on his 1992 attempt to obtain immigration benefits by misrepresenting a material fact. To seek a waiver of inadmissibility under section

212(i) of the Act, 8 U.S.C. § 1182(i), the applicant may need to file an Application for Waiver of Ground of Inadmissibility (Form I-601).

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.