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

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 29 2007

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: Self-represented

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 Acting Director, Vermont 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 Colombia who, on December 15, 1994, filed a Request for Asylum in the United States (Form I-589). On April 19, 1995, the applicant appeared at the Newark Asylum Office and testified that she had entered the United States on January 24, 1994. She stated that she had been admitted to the United States as a visitor. However, the record does not contain evidence to establish that the applicant legally entered the United States. On April 21, 1995, the applicant's Form I-589 was referred to the immigration judge and she was placed into immigration proceedings. On November 29, 1995, the applicant withdrew her applications for asylum and withholding of removal and the immigration judge granted her voluntary departure until May 29, 1996. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On January 12, 1998, a warrant for the applicant's removal was issued. On April 8, 2002, the applicant married her spouse, [redacted] On September 22, 2003, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on October 1, 2004. On September 4, 2003, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien having been ordered removed from the United States. She 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 her U.S. citizen spouse and U.S. citizen daughter.

The acting director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Acting Director's Decision* dated December 19, 2005.

On appeal, the applicant contends that the proceedings against her should be terminated. *See Applicant's Brief,* submitted January 19, 2006. In support of her contentions, the applicant submits only the referenced brief and family photographs. 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.

The applicant failed to comply with an order of voluntary departure that became a final order of removal on May 29, 1996. The applicant has also failed to comply with the order of removal. 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 [redacted] is a U.S. citizen by birth. The applicant and [redacted] do not have any children together. The applicant has a twelve-year old daughter who is a U.S. citizen by birth. The applicant is in her 30's and [redacted] is in his 40's. The applicant was employed in the United States without authorization from 1998 until 2001.

On appeal, the applicant asserts that she has filed a motion to terminate removal proceedings. On appeal, the applicant asserts the she is an applicant for relief under section 212(c) of the Act. These issues are appropriately raised before an immigration judge upon filing a motion to reopen proceedings. Motions to terminate proceedings and applications for 212(c) relief are not within the appellate jurisdiction of the AAO and will not be addressed in this decision.

On appeal, the applicant notes that the acting director has referenced her March 6, 1997, conviction for shoplifting. She asserts that the director is aware that such a conviction no longer exists and records pertaining to that conviction are irrelevant to the decision and should be stripped from the record. However, the applicant has failed to submit evidence to support her assertion that her conviction for shoplifting has been vacated. The applicant also asserts that shoplifting is a minor offense that does not involve a serious violence against a person.

On appeal, the applicant asserts that she gave birth to her daughter prior to the date on which her voluntary departure expired and that, her daughter needed medical care that was not, at the time, readily found in Colombia.

On appeal, the applicant asserts that she has several favorable factors and proceeds to list negative responses to questions 1 through 4 of Part 3C of the Application to Register Permanent Residence or Adjust Status (Form I-485). The AAO notes that, whether the applicant has committed any of the offences listed is only relevant as to whether she is inadmissible under an alternative section of the Act and cannot be found to be favorable factors in an application for permission to reapply for admission.

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. *Id.*

Matter of Lee, Supra. 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 U.S. citizen spouse, the applicant's U.S. citizen daughter and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her authorized stay in the United States; her failure to comply with an order of voluntary departure; her failure to comply with a removal order; her 1997 shoplifting conviction; and her extended unlawful residence in the United States and her unauthorized employment.

The applicant in the instant case has multiple immigration violations. While the AAO notes the applicant's marriage and the approval of the immigrant visa petition benefiting the applicant, both events occurred after the applicant was placed into proceedings and ordered removed. Accordingly, these factors are "after-

acquired equities" and the AAO will accord them 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.

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