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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: SAN ANTONIO, TX Date: JAN 02 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, San Antonio, Texas 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 sustained and the application will be approved.

The applicant is a native and citizen of Mexico who, on August 25, 1981, was placed into proceedings after she remained in the United States past her authorized stay. The applicant applied for suspension of deportation before the immigration judge. On January 31, 1984, the immigration judge denied the applicant's application for suspension of deportation and granted her voluntary departure until June 1, 1984. The applicant appealed to the Board of Immigration Appeals (BIA). On January 16, 1986, the BIA dismissed the applicant's appeal and granted her voluntary departure within 30 days of its order. The applicant failed to voluntarily depart the United States, thereby changing the voluntary departure to a final order of deportation. On March 14, 1986, a warrant for the applicant's removal was issued. On April 24, 1986, the applicant was removed from the United States and returned to Mexico. On April 2, 1988, the applicant filed an Application for Temporary Residence Status (Form I-687), which was denied on January 16, 1990. The applicant appealed the denial of the Form I-687 to the AAO. On August 4, 1998, this office dismissed the applicant's appeal of the denial of the Form I-687. On June 21, 1999, the applicant's son, [redacted]), filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on June 28, 2000. On March 20, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On January 3, 2002, the applicant appeared at Citizenship and Immigration Services' (CIS) San Antonio District Office. The applicant testified that she had reentered the United States without a lawful admission or parole and without permission to reapply for admission on May 1, 1986, and has remained in the United States. On March 20, 2001, 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). 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 the United States with her U.S. citizen son.

The district director determined that the applicant is subject to the reinstatement provisions section 241(a)(5) of the Act and that no waiver is available to her under section 212(a)(9)(A)(iii) of the Act. The district director also determined that the applicant was inadmissible pursuant to section 212(a)(6)(A) of the Act, 8 U.S.C. § 1182(a)(6)(A), as an alien present in the United States without inspection or admission and that no waiver is available for the applicant's inadmissibility under section 212(a)(6)(A) of the Act. The district director denied the Form I-212 accordingly. *See District Director's Decision* dated December 30, 2005.

On appeal, counsel contends that section 241(a) of the Act does not bar the applicant from re-admission since she has the right to apply for a *nunc pro tunc* waiver under section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9). Counsel contends that the district director failed to provide a discretionary decision in the applicant's case. *See Form I-290B and Attachment,* dated January 17, 2006. The Form I-290B indicated that counsel would submit a separate brief or evidence on appeal within 30 days. On March 2, 2007, the AAO informed counsel that she had five days in which to submit additional documentation to support the appeal. As of this date, counsel has not responded to this request. The record is, therefore, considered complete.

Section 241(a) of the Act states in pertinent part:

> (5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The regulation at 8 C.F.R. § 241.8 states that:

> (b) *Notice.* If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

A review of the record indicates that the applicant in the present matter was not issued a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required by 8 C.F.R. § 241.8(b). Accordingly, the AAO finds that the applicant's prior removal order has not been reinstated and will determine whether the applicant is eligible for relief pursuant to the filing of the Form I-212.

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

> (A) Certain aliens previously removed.-
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> (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.
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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
>
> (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 reflects that [redacted] is the 29-year old son of the applicant, who is a U.S. citizen by birth. The applicant is in her 50's.

The AAO notes that counsel asserts on appeal that the district director erred in denying the applicant's application for adjustment of status for inadmissibility under section 212(a)(6)(A) of the Act because she is eligible for adjustment of status under section 245(i) of the Act which permits certain immigrants who are unlawfully present in the United States to adjust status prior to reinstatement of a prior removal order. However, the AAO has no authority to review the decision of the district director in regard to section 245(i) of the Act. The only issue before the AAO is whether the applicant, who is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, is eligible for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

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

On appeal, counsel asserts that the applicant was the victim of a lying, thieving attorney who was stealing money from unwitting immigrants in the 1980's. Counsel asserts that, had the applicant not been the victim of this attorney, she would not have been removed from the United States and would have qualified for amnesty. Counsel submits evidence that claimants other than the applicant sued the applicant's former representative for failure to perform services. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The AAO finds that, on appeal, the record does not contain any evidence that responds to any of the listed requirements. Moreover, the applicant returned to the United States after she was physically removed from the United States and personally warned that to re-enter the United States after having been removed without lawful admission would be a crime.

Counsel contends that, since it has been more than ten years since the applicant's 1986 removal, she is no longer inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act. However, the applicant did not remain outside the United States for a period of ten years and immediately reentered the United States without admission or inspection. As such, the applicant is seeking *nunc pro tunc* relief for her reentry prior to the passing of the ten year bar.

Letters of recommendation from the applicant's co-workers, friends and neighbors indicate that she is a hard-working and reliable person who is also a good mother to her son.

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 U.S. citizen son, the absence of any criminal record, letters of recommendation and her approved immigrant visa petition. The AAO notes that the approval of the applicant's immigrant visa petition occurred after the applicant was ordered removed, and is an "after-acquired equity." Any favorable weight derived from it must, therefore, be accorded diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's failure to comply with an order of voluntary departure; her failure to comply with an order of removal; and her illegal entry into the United States after having been removed.

While the applicant has multiple immigration violations that cannot be condoned, the AAO finds that, given all of the circumstances, the applicant has established that the favorable factors in the present case outweigh

the negative and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal is sustained.

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. The applicant has met that burden. Accordingly, the appeal will be sustained and the application will be approved.

ORDER: The appeal is sustained. The application is approved.