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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 0 2 2008

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) 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 application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record establishes that the applicant is a native and citizen of Mexico who initially entered the United States without inspection on February 1, 1988. On March 12, 1998, the applicant filed an Application for Asylum and for Withholding of Deportation (Form I-589). The applicant's Form I-589 was denied and referred to an immigration judge. On May 22, 1997, a Notice to Appear (NTA) was issued against the applicant. On December 8, 1997, an immigration judge granted the applicant voluntary departure. On January 5, 1998, the applicant filed an appeal with the Board of Immigration Appeals (BIA). On May 30, 1998, a Warrant of Removal/Deportation was issued. On January 29, 1999, the BIA dismissed the applicant's appeal. The applicant failed to depart the United States as ordered. On March 13, 1999, the applicant married [redacted]., a United States citizen, in Nevada. On July 27, 1999, the applicant's husband filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On December 14, 1999, the applicant's Form I-130 was approved. On July 23, 2001, the applicant filed an Application for Waiver of Grounds of Excludability (Form I-601). On September 6, 2003, the applicant's son, [redacted], was born in California. Based on the applicant's previous order of removal, the applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), and section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). She now 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 with her United States citizen spouse and United States citizen son.

The director determined that the "proper jurisdiction for this case lies with the American Consul having jurisdiction over the alien's place of residence once she leaves the United States. Thus, this application is denied for lack of jurisdiction." *Director's Decision*, dated March 13, 2007. The AAO finds that the director improperly denied the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) for lack of jurisdiction. The AAO finds that the Form I-212 was properly filed before the California Service Center. The AAO notes that the applicant needs to file her Form I-212 with the "district director having jurisdiction over the place where the deportation or removal proceedings were held", which was in Los Angeles, California. *See* 8 C.F.R. § 212.2(g)(1). Additionally, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered deported under section 240 or any other provision of law, and section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without admission or parole.[1]

---

[1] The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

Section 212(a)(6). Illegal entrants and immigration violators.-

(A) Aliens present without admission or parole.-

(i) In general.- An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General [now, Secretary, Department of Homeland Security], is inadmissible.

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

---

Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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, the applicant, through counsel, states that she was "the victim of a notario fraud, [the applicant] was advised by this notario to apply for Political Asylum to be able to receive an Employment Authorization from INS." *Appeal Brief*, filed April 12, 2007. The AAO notes that even if the applicant was a victim of a notario, she still failed to abide by an order of removal and this is an unfavorable factor. Counsel claims that the applicant "has a high likelihood of success in her case based on the pending [redacted] litigation." *Id.* The AAO notes that there is no evidence in the record that the applicant is a member of the [redacted] class action; and furthermore, she has not been found to be inadmissible pursuant to section 212(a)(9)(C) of the Act, which is the basis of the pending [redacted] litigation. Counsel claims that the applicant's husband "will suffer severe emotional anguish" if the applicant is removed from the United States. *Id.* "Additionally, the economic well-being of the child will suffer as it will be difficult for [the applicant's husband] to sustain two households...[T]he removal of [the applicant] will create an undue hardship for [the applicant's husband] and his child who depend on the income of [the applicant], since her income is larger then [sic] [the applicant's husband." *Id.* The applicant's husband states that "without [the applicant's] income it would be hard to sustain the household if she were to be deported from the United States. [He] need[s] [the applicant] here with [him] together as a family. It would be so devastated [sic] for [him] as well as [his] son if she were to leave [them], not only emotionally but economically." *Declaration of* [redacted] dated April 5, 2007. The AAO notes that even if the applicant is the primary wage-earner in the household, she has been working without authorization and that is an unfavorable factor. Additionally, the AAO notes that unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's husband and son, but it will be just one of the determining factors.

The record of proceeding reveals that on February 1, 1988, the applicant entered the United States without inspection. On December 8, 1997, an immigration judge granted the applicant voluntary departure. On January 5, 1998, the applicant filed an appeal with the BIA. On May 30, 1998, a Form I-205 was issued. On January 29, 1999, the BIA dismissed the applicant's appeal. The applicant failed to depart the United States as ordered. Based on the applicant's previous order of removal, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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.*

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS,* 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a BIA denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the BIA's denial rested on discretionary grounds, and that the BIA had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the BIA had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer,* 772 F.2d 353, 357 (7th Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an Order to Show Cause (OSC) had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS,* 627 F.2d 1004, 1006 (9th Cir. 1980), the Ninth Circuit Court of Appeals (Ninth Circuit) reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS,* 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds). In *Wang,* the alien sought discretionary relief and a finding of extreme hardship through a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang,* that "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country."

In *Ghassan v. INS,* 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c) waiver of deportation discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the BIA's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle

that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

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 hardship to a spouse and for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's United States citizen husband and son, general hardship they may experience, a history of paying taxes, letters of recommendations, no criminal record, and the approval of a petition for alien relative. The AAO notes that the applicant's marriage to her husband occurred after her order of removal and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection, her failure to abide by an order of removal, and periods of unauthorized presence and employment.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

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