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

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 09 2

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 sustained.

The AAO notes that on appeal, the applicant, through counsel, requested 60-days to submit a brief and/or evidence to the AAO. *Form I-290B*, filed March 16, 2007. On April 29, 2008, in response to a facsimile from the AAO, counsel indicted that he did not file a brief or evidence in support of the appeal as he indicated on the Form I-290B. However, counsel attached previously submitted declarations by the applicant and his wife, and a list of disciplined practitioners. The record is considered complete.

The record establishes that the applicant is a native and citizen of Mexico who initially entered the United States without inspection on December 30, 1989. On April 3, 1998, the applicant filed an Application for Asylum and for Withholding of Deportation (Form I-589). The applicant's asylum application was referred to an immigration judge. On June 11, 1998, a Notice to Appear (NTA) was issued against the applicant. On September 24, 1998, the applicant filed an Application for Suspension of Deportation (Form EOIR-40). On December 15, 1998, an immigration judge granted the applicant voluntary departure until February 14, 1999. On December 16, 1998, the applicant filed an appeal of the immigration judge's decision to the Board of Immigration Appeals (Board). On April 11, 2001, the applicant married [redacted], a lawful permanent resident of the United States, in California. On April 30, 2001, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On April 10, 2002, the Board affirmed the immigration judge's decision and ordered the applicant to voluntarily depart the United States by May 10, 2002. The applicant failed to depart the United States as ordered, and on May 28, 2002, a Warrant for Removal/Deportation (Form I-205) was issued. On or about June 28, 2002, the applicant filed an appeal with the Ninth Circuit Court of Appeals (Ninth Circuit). On November 20, 2002, the applicant's wife became a United States citizen. On December 16, 2002, the Ninth Circuit denied the applicant's appeal. On January 31, 2003, the applicant's Form I-130 was approved. On November 23, 2005, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On November 27, 2005, the applicant voluntarily departed the United States. On January 27, 2006, the director denied the applicant's Form I-212. On April 27, 2006, the applicant filed a second Form I-212. Based on the applicant's order of removal, the applicant is inadmissible to the United States under section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A). Additionally, the applicant is inadmissible to the United States under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for his unlawful presence in the United States. He 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 his United States citizen spouse.

The director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for being ordered removed, and section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for his unlawful presence, and she denied the applicant's Form I-212 accordingly. *Director's Decision*, dated February 20, 2007.

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)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established

> to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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, the applicant, through counsel, contends that the "conclusions of the Director are not totally corectt [sic] or logical." *Form I-290B, supra.* The AAO notes that the director determined that the applicant "was present unlawfully during a period of time exceeding one year" and he was ordered removed under section 240 of the Act. *Director's Decision, supra.* The AAO finds that the director was correct in finding the applicant was unlawfully present in the United States for more than one year, considering that the applicant's appeal to the Ninth Circuit was denied on December 16, 2002, and the applicant did not depart the United States until November 27, 2005. Additionally, the applicant's voluntary departure order by the immigration judge and Board converted to an order of removal when the applicant failed to depart the United States within 30 days of the final order by the Ninth Circuit. Counsel claims that the applicant has "been in the United States since he was an unemancipated minor. He attended school in the United States." *Form I-290B, supra.* The AAO notes that many of the years that the applicant resided in the United States were without authorization and that is an unfavorable factor. Counsel asserts that the applicant "was victimized by his previous attorneys and 'Notario'. He was never aware about the removal order until several years after the removal order was entered after extensive appeals...these factors were not considered in the adjudication of the application for permission to reapply." *Id.* Counsel submitted an Executive Office for Immigration Review list of disciplined practitioners demonstrating that [redacted] was disciplined on July 24, 2003 and [redacted] was disciplined on September 1, 2005. The AAO notes that Monica P. Hagan, Esquire, who worked for The Law Offices of James R. Valinoti, submitted a Notice of Entry of Appearance as Attorney (Form G-28) on behalf of the applicant on or about July 15, 1998, and on or about September 25, 1998, [redacted] filed a Form G-28 on behalf of the applicant.

The applicant's wife states that the applicant's immigration "problem has affected [her] emotionally" and "[she does] not see any advancement in [the applicant's] immigration case and that is what depresses [her]. [She] feel[s] very lonely since his departure." *Declaration by* [redacted] dated April 26, 2006. 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 wife, but it will be just one of the determining factors.

The record of proceedings reveals that on December 15, 1998, an immigration judge granted the applicant voluntary departure. The applicant filed an appeal with the Board, and on April 10, 2002, the Board dismissed the applicant's appeal. On May 28, 2002, a Warrant of Removal/Deportation was issued against the applicant. The applicant filed an appeal with the Ninth Circuit, and on December 16, 2002, the Ninth Circuit denied the applicant's appeal. The applicant voluntarily departed the United States on November 27, 2005. 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 Board denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board 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 Board 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 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 Board'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 family ties to a United States citizen, his wife, general hardship she may experience, approval of a petition for alien relative, and no criminal record. The AAO notes that the applicant's marriage to his wife occurred after commencement of his deportation proceedings 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 failure to abide by an order of removal and periods of unauthorized presence.[1]

While the applicant's actions cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that

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[1] The AAO notes that the applicant's initial entry without inspection would usually be an unfavorable factor; however, the applicant was a minor when he entered the United States with his parents.

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.