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

U.S. Citizenship and Immigration Services

PUBLIC COPY

H4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 06 2008
RELATES)

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 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 Ecuador who, on June 14, 1996, was placed into immigration proceedings. The applicant testified, and her application for suspension of deportation indicates, that she had entered the United States without inspection in 1989 and had not previously resided in the United States. On January 15, 1997, the immigration judge permitted the applicant to withdraw her application for suspension with prejudice and granted her voluntary departure until October 15, 1997. 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 March 4, 2002, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) under the Legal Immigration Family Equity (LIFE) Act. On June 22, 2004, the applicant appeared at Citizenship and Immigration Services' (CIS) New York District Office. The applicant testified that she had entered the United States in 1981 and had briefly departed the United States in 1988 before returning the same year. On March 10, 2003, the applicant filed the Form I-212. On August 8, 2006, the applicant's Form I-485 was denied. 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 in the United States with her three U.S. citizen children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated May 8, 2007.

On appeal, counsel contends that the director did not adequately and fully consider all of the applicant's positive and favorable factors in denying her Form I-212. *See Counsel's Brief,* dated July 6, 2007. In support of her contentions, counsel submits the referenced brief, medical documentation, financial documentation and recommendation letters. The entire record was considered 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.
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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
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> (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 the applicant has a 14-year old son, a nine-year old son and a two-year old son who are all U.S. citizens by birth. The applicant is in her 30's.

On appeal, counsel asserts that the director erred in finding that the applicant's unlawful entry into the United States and her failure to depart the United States after being ordered removed were negative factors to be considered in determining whether she warranted a favorable exercise of discretion. Counsel contends that the applicant's unlawful presence in the United States should not be considered because applicant's for permission to reapply for admission are permitted to apply from within the United States and approval of the Form I-212 is retroactive to the date on which the applicant originally entered the United States. The AAO finds counsel's contentions to be unpersuasive. The applicant's entry into the United States without inspection and her presence and employment in the United States without authorization are negative factors to be considered in the director's and AAO's decision. *See Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973).

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

On appeal, counsel asserts that the applicant has provided evidence of her good moral character and that a denial of the application for permission to reapply for admission will result in hardship to the applicant and her U.S. family. Counsel asserts that the applicant's eldest son has been diagnosed with cerebral cysts, which are under continuous medical supervision. Counsel asserts that the applicant's youngest son was diagnosed at birth with an abnormal left kidney including findings that are consistent with reflux or obstruction with reflux favored, a medical condition that requires continued medical monitoring. Counsel also asserts that the applicant's three children will face extreme financial, educational and medical hardships if they are forced to leave the United States. Counsel asserts that the applicant's children are all U.S. citizens who have not resided elsewhere, have never visited Ecuador, primarily speak English and have only attended school in the United States. Counsel asserts that the current economic and political conditions in Ecuador will render it impossible for the applicant to secure appropriate medical care for the children and it will be extremely difficult for the children to acclimatize to life in Ecuador because they will have no friends or close family members there except the applicant. Counsel asserts that the applicant is a woman of limited education and skills and it will be extremely difficult for her to secure employment sufficient to support herself and her children. Counsel asserts that the applicant has resided in the United States for an extended period of time, is a woman of good moral character, regularly attends Church, is known in her community as a good and honest individual and does not have a criminal record.

Letters of recommendation from the applicant's pastor, friends and colleagues indicate that the applicant is a registered parishioner, mother of three boys, who is an excellent, sincere, responsible, reliable, honest, hard-working person of good moral character.

A letter from [redacted], dated December 18, 2006, indicates that the applicant's eldest son was referred to him for evaluation for cerebral cysts. It states that the problem was first noted three years ago and that an MRI, performed two years ago, revealed some cysts. It states that the applicant failed to follow up on this reported finding. The letter indicates that all of the applicant's eldest son's neurological tests read normal and that an MRI and previous records were ordered with a request for a one-month follow up. The medical records submitted with the June 6, 2007, appeal do not indicate that the results of the MRI or what treatment, if any, the child is receiving from Dr. Grossman.

A letter from [redacted], dated June 16, 2007, indicates that the applicant's eldest son has received orthodontic treatments from March 21, 2005, until May 20, 2007.

A letter from [redacted], indicates that the applicant's eldest son has been seen in his office from September 2, 1997, until the date of the letter, June 21, 2007. The attached medical documentation is hand-written and sometimes illegible, but indicates that the child has been seen in regard to normal childhood ailments such as fever, upper respiratory infections and otitis media.

A transcription of a renal/kidney scan for the applicant's youngest son, dated January 4, 2006, indicates that the scan revealed normal flow in both kidneys with prompt uptake and excretion bilaterally. The scan indicates that there is retention of activity in the left renal collecting system but evidence of good excretion. The scan indicates that the findings regarding the left kidney are consistent with reflux or obstruction with reflux favored and the right kidney is within normal limits. The medical records submitted do not indicate that the child has required or received any further treatment or follow up since. The attached medical documentation indicates that the child was hospitalized for a urinary tract infection in December 2005.

The record reveals that the applicant was granted employment authorization from 2003 until 2007 while her Form I-485 was pending.

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, 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.

As established by the record, the favorable factors in this matter are the applicant's three U.S. citizen children, the general hardship the applicant's children will suffer if the applicant is denied admission, an otherwise clean background and her payment of U.S. taxes from 2002 through 2006. The AAO notes that the birth of the applicant's two youngest children occurred after the applicant was placed into immigration proceedings. The applicant's two youngest children are "after-acquired equities" and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; her failure to comply with an order of voluntary departure that became a final order of removal; her failure to comply with a removal order; her unlawful presence and employment in the United States; and the absence of any immigrant or nonimmigrant visa petition approved on her behalf.

The applicant in the instant case has multiple immigration violations. Moreover, the record fails to establish that she is the beneficiary of any immigrant or nonimmigrant visa petition that would offer her a means of acquiring lawful residence in the United States. The totality of the evidence demonstrates 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.