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U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: PROVIDENCE, RI Date: APR 27 2009

IN RE:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Providence, Rhode Island 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 China who, on October 10, 2001, appeared at the Los Angeles International Airport. The applicant did not present valid documentation to enter the United States. However, airline officials had confiscated fraudulent documentation from the applicant because they feared that he would destroy the documentation prior to arrival in the United States. The documentation confiscated consisted of a Chinese passport containing an I-551 lawful permanent resident stamp bearing the name '[redacted]." The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to obtain admission to the United States by fraud and for being an immigrant without valid documentation. The applicant was placed into secondary inspection, at which time he indicated a fear of returning to his home country. The applicant was scheduled for a credible fear interview. On October 24, 2001, the applicant was placed into immigration proceedings pursuant to credible fear interview procedures. On June 10, 2002, the immigration judge denied the applicant's asylum, withholding of removal application and convention against torture applications, making a finding that the applicant only sought entry into the United States in order to join his family members, who had already been present for several years, and had testified falsely. The immigration judge then ordered the applicant removed from the United States.

The applicant filed an appeal with the Board of Immigration Appeals (BIA). On April 23, 2003, the applicant married his lawful permanent resident spouse, [redacted]). On May 21, 2003, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On November 6, 2003, the BIA dismissed the appeal. On December 15, 2005, the applicant filed a motion to reopen with the BIA. On March 9, 2006, the BIA denied the applicant's motion to reopen. On April 27, 2006, a warrant for the applicant's removal was issued. On October 4, 2006, the applicant filed the Form I-212. On September 28, 2007, the Form I-130 was approved. On May 11, 2008, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). He 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 his lawful permanent resident spouse and two U.S. citizen children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated December 17, 2007.

On appeal, counsel contends that the field office director abused her discretion in denying the Form I-212. *See Counsel's Brief,* dated January 26, 2008. In support of his contentions, counsel submits the referenced brief and a copy of the visa bulletin notice. The entire record was considered in rendering a decision in this case.

On March 5, 2009, the AAO issued a notice to the applicant and counsel informing the parties that it was this office's intent to dismiss the applicant's appeal based upon evidence establishing further unfavorable factors in the applicant's case, such as the applicant's use of fraudulent documents to travel to the United States, his intent to destroy the fraudulent documents and his lack of compliance with and respect for U.S. laws and law enforcement personnel. *See AAO's NOID,* dated March 5, 2009. The applicant and counsel were granted fifteen days to provide evidence to overcome, fully and persuasively, these findings. The applicant and counsel failed to respond to the AAO's NOID, therefore, the record is considered complete. 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.-
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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
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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.
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> (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 is a native and citizen of China who became a lawful permanent resident in 2003. The applicant and [redacted] have a five-year old son and a three-year old daughter who are both U.S. citizens by birth. The applicant and [redacted] are in their 20's.

On appeal, counsel contends that the field office director's decision implied that the applicant was eligible for relief once his visa number became available. Counsel states that the applicant's visa number is now current. Counsel's contention is unpersuasive. The AAO finds that the field office

director not only referred to the unavailability of a visa number to the applicant, but to other factors, such as his failure to comply with the removal order, in denying the Form I-212

On appeal, counsel states that the removal of the applicant from the United States will result in extreme and unusual hardship and refers to BIA case law in regard to cancellation or suspension of removal. However, a section 212(a)(9)(A)(iii) waiver, or permission to reapply for admission, is one that requires a balancing of the favorable and unfavorable factors in an applicant's case. While hardship to family members may be a factor to be considered in determining whether an applicant warrants a favorable exercise of discretion, a finding of extreme and unusual hardship is not required.[1]

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

Counsel asserts that the removal of the applicant would serve no interest and presents a tremendous hardship to his family. He asserts that the applicant and [redacted] have raised their children in the United States and the family is entirely dependent on the applicant.

In the Form EOIR-40, the applicant states that he currently stays home to care for the children while [redacted] works to support the family. He states that [redacted] needs him to care for the children. He states that, if he returns to China with his children he will be violating the "one-child" policy. He states that he will have no way in which to support his family in China.

The record reflects that the applicant has been employed in the United States, in a restaurant owned by his family, from May 2003 until at least April 28, 2008, the date on which his employment verification letter was signed. The applicant was granted employment authorization from February 24, 2006 until February 24, 2007; August 9, 2007 until August 8, 2008; and October 21, 2008 until October 20, 2009. The record reflects that the applicant's spouse has filed taxes, in 2006 and 2007, but without the applicant.

While the applicant filed a Form I-485, only the proper filing of an *affirmative* application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay. Since the applicant filed his Form I-485 after his appeal had been dismissed and the order of removal had become final and he has failed to depart the United States, the applicant's Form I-485 was not affirmatively filed. Accordingly, the applicant has been unlawfully present in the Untied States since November 6, 2003.

The record reflects that the immigration judge, in rendering his decision to remove the applicant from the United States, found that the applicant did not seek to enter the United States in order to apply for asylum, but as a means to join his family who were residing in the United States. He stated that he was not satisfied that the applicant was truthful and that, while the applicant's reasons for

[1] The AAO notes that, on September 7, 2007, the applicant filed an Application for Suspension of Deportation (Form EOIR-40). A Form EOIR-40 should be filed before the immigration judge during removal proceedings. Since the applicant is no longer in removal proceedings and removal proceedings have not been reopened, the Form EOIR-40 was inappropriately filed with U.S. Citizenship and Immigration Services (USCIS), who do not have jurisdiction over such an application.

wanting to remain in the United States were understandable, it did not provide an excuse for the applicant to testify falsely.

The record also reflects that, on April 27, 2006, while immigration officers attempted to apprehend the applicant, he attempted to evade and flee from those immigration officers. First, the applicant attempted to abscond through a side door. Once immigration officers managed to apprehended the applicant and confirm his identity, the applicant became combative when handcuffed. Then, while the applicant's family members and co-workers attempted to prevent the immigration officials from departing with the applicant in custody, the applicant attempted to escape from the vehicle. The immigration officers required the assistance of local police in intervening and controlling the applicant's family members and co-workers until they were able to again secure the applicant in the vehicle and depart. The behavior by the applicant, in attempting to evade and flee from immigration officials, reflects the applicant's lack of compliance with and respect for U.S. laws and law enforcement personnel.

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. 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 those equities acquired by applicants after they have been placed into immigration proceedings, and that these 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 lawful permanent resident spouse, his two U.S. citizenship children, the general hardship to the applicant and his family in the event of his removal, his employment since 2003, and an approved immigrant visa petition benefiting him. The AAO notes that the applicant's marriage, the birth of his children and the filing of the immigrant visa petition benefiting him occurred after the applicant was placed into immigration proceedings. These factors are "after-acquired equities," which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's use of fraudulent documents to fly to the United States and his intent to destroy that documentation; the immigration judge's finding of false testimony; his failure to comply with an order of removal; his unauthorized presence in the United States after the appeals process had concluded; unlawful employment in the United States except for valid periods of employment authorization; and his attempt to evade and flee from immigration officers.

The applicant in the instant case has multiple immigration violations. 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 he 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.