U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 27 2009
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.

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 Director, California 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 El Salvador who, on March 20, 1987, was placed into immigration proceedings after she had entered the United States without inspection. The immigration judge granted the applicant voluntary departure until June 30, 1987. 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 October 10, 1994, the applicant married her lawful permanent resident spouse, [redacted], in Inglewood, California. On March 17, 1995, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on June 8, 1995.

On January 10, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On October 28, 2003, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Denver, Colorado District Office. The applicant testified that she had departed and last reentered the United States in January 1990, without inspection. On May 3, 2005, the Form I-485 was returned to the applicant because the district office did not have jurisdiction due to her prior removal order. On September 30, 2005, the applicant filed the Form I-212, indicating that she continued to reside in the United States. On April 23, 2007, the applicant filed a motion to reopen with the Board of Immigration Appeals (BIA). On December 20, 2007, the BIA denied the applicant's motion to reopen. The applicant is inadmissible pursuant to 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with her lawful permanent resident spouse, U.S. citizen child and two lawful permanent resident children.

The director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having accrued more than one year of unlawful presence. The director determined that the applicant was ineligible to apply for permission to reapply for admission because she had not remained outside the United States for the required ten years and denied the Form I-212 accordingly. *See Director's Decision,* dated April 7, 2006.

On appeal, counsel contends that the applicant has not departed the United States since the order of voluntary departure, therefore, she is not inadmissible under section 212(a)(9)(C) of the Act. Counsel contends that the applicant is eligible for adjustment of status under section 245(i) of the Act, which waives inadmissibility under section 212(a)(9)(C) of the Act.[1] Counsel contends that the director

[1] The AAO notes that counsel's contention is unpersuasive. Section 245(i) of the Act does not waive inadmissibility under section 212(a)(9)(C) of the Act. The AAO takes note of the preliminary injunction that had been entered against the ability of the Department of Homeland Security (DHS) to follow *Matter of Torres-Garcia. Gonzales v. DHS,* 239 F.R.D. 620 (W.D. Wash. 2006). The Ninth Circuit, however, reversed the district court, and ordered the vacating of that injunction. *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007). In its opinion, the Ninth Circuit held that the Board's decision in *Matter of Torres-Garcia* was entitled to judicial deference. *Gonzales II,* 508 F.3d at 1241-42. The

abused his discretion in relying on incomplete evidence in denying the applicant's Form I-212. *See Attachment to Form I-290B,* dated May 1, 2006. In support of her contentions, counsel submits only the referenced attachment. 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.
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> . . . .
>
> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general.-Any alien who-
>
> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

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Ninth Circuit's mandate was issued on January 23, 2009. On February 6, 2009, the district court denied the plaintiffs' motion for a new preliminary injunction. Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt # 59), *Gonzales v. DHS,* No. C06-1411-MJP (W.D. Wash. Filed February 6, 2006). Thus, as of the date of this decision, there is no judicial prohibition in force that precludes the AAO from applying the rule laid down in *Matter of Torres-Garcia.*

> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.
>
> (ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—
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> (1) the alien's having been battered or subjected to extreme cruelty; and
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> (2) the alien's--
>
> (A) removal;
>
> (B) departure from the United States;
>
> (C) reentry or reentries into the United States; or
>
> (D) attempted reentry into the United States.

Counsel contends that the applicant has not departed the United States since the 1987 order of voluntary departure was issued. The AAO finds counsel's contentions unpersuasive. The applicant testified that she last entered the United States in January 1990 without inspection, indicating that, at some time after her voluntary departure became an order of removal, she departed the United States and illegally reentered the United States. The AAO, however, finds that the director erred in finding the applicant inadmissible pursuant to section 212(a)(9)(C) of the Act. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have unlawfully reentered the United States or attempted unlawful reentry after April 1, 1997, the effective date of the provision. The AAO finds that there is no evidence in the record to establish that the applicant has illegally reentered the United States after April 1, 1997. The applicant, however, is still inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act because she failed to remain outside the United states for a period of ten years, and is required to apply for permission to reapply for admission.

The record reflects that [redacted] is a native and citizen of Mexico, who became a lawful permanent resident in 1990. The applicant and [redacted] have a 14-year old son and a 12-year old son, both of whom are U.S. citizens by birth. The applicant has a 26-year old daughter and a 22-year

old daughter from a prior relationship, who are both natives and citizens of Guatemala who became lawful permanent residents in 2005. The applicant and [redacted] are in their 40's.

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

The applicant's family, in a statement submitted with the Form I-212, request that the applicant be permitted to remain in the United States. They state that they have resided in the United States for half their lives and that they have two children born in the United States. They state that they work honestly and own a house. They request that they be able to remain together and continue to live the American dream.

In 2002, the applicant applied for Temporary Protected Status (TPS). The applicant was granted TPS from January 17, 2003 until September 9, 2003 and from June 17, 2004 until March 9, 2005. The applicant's most recent TPS application was approved on December 3, 2007. All other TPS applications were administratively closed or not granted.

The record reflects that the applicant failed to disclose that she had been in immigration proceedings on at least two applications for TPS (Form I-821) and affirmatively denied having been in immigration proceedings on a Form I-821 submitted on February 3, 2005. The AAO finds that these misrepresentations are material to an application for TPS and render the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). In order to seek a waiver of inadmissibility under section 212(i) of the Act, an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).

The record reflects that the applicant was self-employed in the United States in 2002. The applicant paid joint taxes with [redacted] in 2002. The applicant has been issued employment authorizations from January 17, 2003 until September 9, 2003; March 27, 2004 until March 26, 2005; December 22, 2006 until September 30, 2007; and November 15, 2007 until March 26, 2009.

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 lawful permanent resident spouse, two lawful permanent resident daughters, two U.S. citizen sons, the general hardship to the applicant and her family if she were denied admission to the United States, her otherwise clear background, her payment of joint taxes in 2002, and the approved immigrant visa petition filed on her behalf. The AAO notes that the applicant's marriage, her daughters' adjustment of status to that of lawful permanent residents, the birth of her sons and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords 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; her failure to comply with a removal order; her illegal entry into the United States after having been removed; her extended unlawful presence in the United States; her unauthorized employment in the United States in 2002; her failure to reveal and attempt to conceal her removal order in seeking TPS; and her inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act.

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 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.