identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: PHOENIX, AZ Date: JUL 06 2009

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, Arizona 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 Mexico who, on September 2, 1994, pled guilty to and was convicted of aggravated assault in violation of Illinois State Statutes. The applicant was sentenced to two years probation and ninety days in jail. On September 16, 1994, the applicant was placed into immigration proceedings for entering the United States without inspection in March 1990. On September 30, 1994, the immigration judge ordered the applicant removed. On October 14, 1994, the applicant was removed from the United States and returned to Mexico.

On May 11, 1996, the applicant married his then lawful permanent resident spouse, [redacted], in Bismarck, Illinois. On September 30, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by [redacted] The Form I-485 indicates that the applicant reentered the United States without inspection in November 1994. On November 13, 1998, the applicant filed a Form I-212, indicating that he continued to reside in the United States. On November 2, 2000, the Form I-130 was approved. On November 8, 2000, the Form I-212 and the Form I-485 were both denied. On June 20, 2003, the applicant filed a second Form I-485 and Form I-212, along with an Application for Waiver of Grounds of Inadmissibility (Form I-601). On July 21, 2003, the Form I-212 was denied. The applicant appealed the denial to this office. On August 9, 2004, the AAO dismissed the applicant's appeal. On September 24, 2004, the Form I-485 was denied. On September 29, 2005, the applicant filed a second Form I-601. On October 3, 2005, the applicant filed a third Form I-485. On March 23, 2006, the Form I-601 was denied. On April 4, 2006, the Form I-485 was denied. On August 1, 2007, the applicant filed another Form I-485 and Form I-212. On December 2, 2008, the 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). 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 now naturalized U.S. citizen spouse and three U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated October 17, 2008.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Form I-290B,* dated November 17, 2008. In support of her contentions, counsel submits only the referenced Form I-290B. On the Form I-290B, counsel indicates that she will forward additional evidence and/or a brief within thirty days. The regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B require the affected party to submit the brief or evidence directly to the AAO, not to the Phoenix District Office or any other federal office. The record does not contain the brief and/or evidence that counsel indicated would be submitted to the AAO. Even if counsel were to submit evidence that a brief was filed with an office other than the AAO, the AAO would not consider the brief on appeal because counsel failed to follow the regulations or the instructions for the proper filing location. Accordingly the record is 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.-

(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.

(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 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 [redacted] is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 1997. The applicant and [redacted] have a thirteen-year-old son, an eleven-year-old daughter, and an eight-year-old daughter who are all U.S. citizens by birth. The applicant and [redacted] are in their 30s.

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

Counsel, on appeal, contends that the applicant's criminal offense occurred in 1994, that this was an isolated incident and that it was committed at a very young age. Counsel states that the applicant has significant family ties and has become a wonderful husband and father. Counsel states that the applicant works and has a house, as well as files taxes and strives to be a role model amongst his family members and those who know him. Counsel states that the applicant's positive factors outweigh the incident that occurred in 1994.

[redacted], in an affidavit accompanying the Form I-212, states that she has five siblings and both of her parents who reside in Illinois. She states that she began living with the applicant in June 1995. She states that she has been employed for most of her life and that she has helped the applicant to support the household and family. She states that she could not support herself and her children by herself. She states that she desperately needs the applicant's financial support. She states that if the

applicant were removed from the United States she would be forced to depend on government public funds. She states that she has four children who are all U.S. citizens. She states that her eldest child loves the applicant as if he were her real father since they have resided with him since she was three months old.[1] She states that her children love the applicant and that they wait for him to arrive home from work so that they can play together and share their school experiences with him. She states that the applicant has a special bond with the children and that removing him from the United States would not only affect them but would also destroy the applicant. She states that the applicant is a hard-working man, who lives and works for his family. She states that she depends on the applicant emotionally and psychologically. She states that they moved away from Illinois in order to get away from legal problems and to start a new life. She states that it appears that she and her children are still being punished for the applicant's mistake. She states that the applicant was wrongfully accused and was advised by his attorney to plea bargain, but that, as a result he continues to pay for it.[2] She states that, while she followed her husband to Arizona in order to begin a new life, she does not think that she could follow the applicant to Mexico. She states that the applicant has only one isolated event that has caused him to be removed and has resulted in all his legal problems. She states that since this event the applicant has been an honest, hard-working man who has not had any legal problems.

The applicant, in an affidavit accompanying the Form I-212, states that everything he has is in Arizona. He states that his wife and children are all that he has ever desired. He states that his home, job and family are all in Arizona. He states that his spouse is dependent on him emotionally and economically. He states that he is an honest and hard-working person. He states that he works hard to support his family and has become accustomed to life in the United States. He states that he would be destroyed if he were ordered to leave his spouse and children. He states that he believes he will suffer tremendously if he is separated from his wife and family. He states that his spouse would suffer extremely if he was sent back to Mexico. He states that he had very little opportunity in his country because there was no method of survival.

The record reflects that the applicant has been employed in the United States since at least December 1991. The applicant has been issued employment authorization from December 1, 2000 until November 30, 2001, August 11, 2003 until August 10, 2005, March 7, 2006 until March 6, 2007, and November 5, 2007 until November 4, 2008. The record contains documentation establishing that the applicant filed joint federal taxes from 2000 through 2005.

The AAO notes that the applicant has been convicted of aggravated assault, a crime involving moral turpitude. *Matter of Chavez-Calderon*, 20 I. & N. Dec. 744 (BIA 1993). Specifically, the applicant pled guilty to having, without lawful authority, and knowingly, engaged in conduct which placed the victim (a thirteen-year-old minor) in reasonable apprehension of receiving bodily harm by placing her into his vehicle while on a public street. The AAO notes that the applicant is required to show not just an extreme hardship to a qualifying relative but exceptional and extremely unusual hardship to a qualifying relative in order to seek a waiver of his conviction for aggravated assault because the conviction is one which involves violence. *See 8 C.F.R. § 212.7(d).*

---

[1] The AAO notes that the record does not contain evidence of the birth of this child; however, the AAO will consider the applicant's stepchild as a positive factor.

[2] Matter of Khalik, 17 I&N Dec. 518 (BIA 1980), held that the Service cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. A record of conviction constitutes a conviction for immigration purposes. The applicant can only appeal such a conviction within the court system.

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 U.S. citizen spouse, the applicant's three U.S. citizen children, the applicant's U.S. citizen stepchild, the general hardship to the applicant and his family members if he were denied admission to the United States, filing of joint federal taxes and the approved immigrant visa petition filed on his behalf. The AAO

notes that the applicant's marriage, the official establishment of the stepchild relationship, the birth of the applicant's U.S. citizen children and the filing of the immigrant visa petition benefiting him 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; his conviction for aggravated assault; his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. §1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, specifically a conviction involving violence; his illegal entry into the United States after having been removed; his unauthorized and unlawful presence in the United States; and his unauthorized employment in the United States except for periods of employment authorization.

The applicant in the instant case has multiple immigration violations and a serious criminal conviction. 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.