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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

H4

[redacted]

OCT 2 0 2009

FILE: [redacted] Office: ATLANTA, GA Date:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Atlanta, Georgia, 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 Colombia, who on August 31, 2000, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay which expired on March 1, 2001. On August 26, 2002, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On October 10, 2002, the applicant's Form I-589 was referred to the immigration judge and the applicant was placed into immigration proceedings. On September 24, 2003, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture and ordered the applicant removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On June 23, 2005, the BIA dismissed the applicant's appeal and affirmed the immigration judge's findings. On July 17, 2006, a warrant for the applicant's removal was issued. On August 12, 2006, the applicant was removed from the United States and returned to Colombia.

On November 21, 2008, [redacted] filed a Petition for Nonimmigrant Worker (Form I-129), which was approved on December 1, 2008. On December 29, 2008, the applicant filed the Form I-212.[1] 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). 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 return to the United States as a nonimmigrant worker to run his business and raise his U.S. citizen children.

The field office 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), and is not eligible to apply for permission to reapply for admission. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated March 27, 2009.

On appeal, counsel contends that the applicant is not inadmissible under section 212(a)(9)(C) of the Act. Counsel contends that the applicant's equities for returning are large and numerous. *See Form I-290B,* dated April 28, 2009. In support of his contentions, counsel submits only the referenced Form I-290B. On the Form I-290B, counsel indicates that he 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 Atlanta, Georgia field 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

---

[1] The AAO notes that counsel incorrectly completed the Form I-212 to reflect that the applicant resided at the address of counsel. The applicant and business records in the United States are inconsistent as to whether the applicant does indeed reside in the United States or abroad; however, the AAO will accept that the applicant is currently abroad and will forward all correspondence to his business in the United States, [redacted] If it is later confirmed that the applicant illegally reentered the United States *at any time* after his 2006 removal, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007).

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.

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.

Counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act. The AAO notes that the Form I-212 reflects that the applicant resides in the United States after having been removed; however, as discussed above, counsel made the grave error of incorrectly completing the Form I-212 to reflect the applicant was in the United States when the applicant is abroad. The AAO, therefore, finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act. However, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

The record reflects that the applicant and his spouse are natives and citizens of Colombia. The applicant and his spouse have a ten-year-old son and an eight-year-old son who are both U.S. citizens by birth. The applicant and his spouse are in their 30s.

On appeal, counsel states that the applicant has an approved nonimmigrant visa in order to return to the United States and run his company, which employees a large number of individuals (50 to 100). He states that the applicant has two U.S. citizen children and various properties in the United States.

He states that the applicant may obtain an additional nonimmigrant waiver from the U.S. Consulate to waive his unlawful presence bar.

The record reflects that the applicant filed personal taxes in 2005. The record reflects that the applicant was issued employment authorization from May 12, 2003 to May 12, 2004 and from November 16, 2004 to November 15, 2005.

Business records indicated that the applicant is the registered agent of [redacted], an entity which was created on October 15, 2007. The record reflects that federal taxes were filed for [redacted] from 2005 through 2007.

Letters of recommendation from the individuals in the House of Representatives and the State Senate state that the applicant and his spouse have two young children who are U.S. citizens and that they own a business located in Lilburn, Georgia. They state that the applicant deserves the opportunity to return to the United States. They state that the applicant has shown strong family values, work ethics and deep faith beliefs. They state that the applicant has a successful business which provides jobs to over 300 workers in the southeastern United States. They state that the applicant is an active member in the Hispanic community working as a volunteer for many different activities. They state that the business needs the applicant and it is very important that he return to the United States immediately because his business is very labor-intensive. They state that the business is losing workers because they believe the applicant will not return to the United States, which will increase the unemployment rate and reduce the amount of income tax that the company will pay.

The record reflects that on June 6, 2002, the applicant was arrested for theft by shoplifting. The record does not contain a conviction record or other documentation reflecting the outcome of these charges.

The applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued more than one year of unlawful presence, from March 1, 2001, the date on which his nonimmigrant status expired, and August 26, 2002, the date on which he applied for asylum, and is seeking admission within ten years of his last departure from the United States. An applicant may file an Application for Advance Permission to Enter as Nonimmigrant (Form I-192) to apply for a waiver of the 212(a)(9)(B)(i)(II) inadmissibility grounds pursuant to section 212(d)(3) of the Act, 8 U.S.C. § 1182(d)(3). The AAO notes that the applicant's past actions and his statement that he wishes to return to the United States in order to raise his U.S. citizen children do not reflect nonimmigrant intent. If an applicant seeks admission as an immigrant he or she may seek a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and must file an Application for Waiver of Ground of Inadmissibility (Form I-601). The AAO notes that the applicant does not appear to have a qualifying relative in order to qualify for a waiver under section 212(a)(9)(B)(v) 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 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 a discretionary determination. 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 legal decisions 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 two U.S. citizen children, the general hardship to the applicant, his business and his employees if he were denied admission to the United States, his filing of taxes and the approved nonimmigrant visa petition filed on his behalf. The AAO notes that the births of the applicant's children, the creation of the applicant's business and the filing of the nonimmigrant 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 overstay of his nonimmigrant status; his arrest for theft by shoplifting; his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act; and his unlawful presence in the United States.

The applicant in the instant case has multiple immigration violations and possibly a 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.