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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H4

Date: JUN 07 2011 Office: SAN ANTONIO, TX FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Antonio, Texas, 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 August 15, 2000, was placed into immigration proceedings for having entered the United States without inspection on March 1, 1985. On January 24, 2002, the immigration judge denied the applicant's application for cancellation of removal and granted her voluntary departure until March 25, 2002. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On January 14, 2003, the BIA dismissed the applicant's appeal and granted her 30 days of voluntary departure. 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 November 24, 2003, the applicant married her U.S. citizen spouse. On January 24, 2004, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On February 2, 2004, the applicant's spouse filed a second Form I-130 which was approved on September 27, 2004. On November 28, 2005, the first Form I-130 was denied. On September 16, 2008, the applicant was apprehended at her residence. On the same day, the applicant was placed on an order of supervision. On December 5, 2008, the applicant's spouse filed a third Form I-130, which was approved on February 10, 2009. On October 15, 2009, the applicant was removed from the United States and returned to Mexico.

On August 5, 2010, the applicant filed the Form I-212, indicating that she resided in the United States. 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 Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with her U.S. citizen spouse and four 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 27, 2010.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Letter,* undated. In support of his contentions, counsel submits the referenced letter and copies of documentation already in the record. 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 of an 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.

. . . .

(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

(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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

> The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a *connection between*—
>
> (I) the alien's battering or subjection to extreme cruelty; and
>
> (II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

On appeal, counsel contends that: the applicant has not shown a total disregard for the laws of the United States because she complied with the reporting requirements after she was placed on an order of supervision; the director erred in finding that there is no pending application and a lack of favorable factors; the applicant is pursuing consular processing of her immigrant visa and paid fees on December 1, 2009; and the director disregarded an abundance of evidence favorable to the applicant.

The record reflects that the applicant's spouse is a U.S. citizen by birth. The applicant and her spouse have a 7-year-old daughter who is a U.S. citizen by birth. The applicant has a 23-year-old son, a 21-year-old son, and a 19-year-old daughter from prior relationships who are all U.S. citizen by birth. The applicant is in her 40's and her spouse is in his 50's.

A letter from the applicant's spouse indicates that it is difficult for him to care for his child without the presence of the applicant. The AAO notes that, while the applicant's spouse claims that the applicant has been gone since October 2009, the applicant indicated a United States address on the Form I-212.

Psychological documentation in the record indicates that the applicant's spouse was diagnosed with adjustment disorder with mixed anxiety and depressed mood, acute. The AAO notes that the psychological report was based on a single interview and that, despite being interviewed by another licensed counselor and being diagnosed with major depressive disorder, single episode, severe in 2008, there is no evidence in the record to establish that the applicant's spouse received any further treatment outside of the two separate interviews with different licensed counselors. As a result, the psychological reports findings are speculative, diminishing the evaluation's value. Additionally, there is no evidence that the applicant's spouse continues to receive or require any treatment.

The AAO notes that there is no evidence in the record to establish that the applicant's spouse suffers from any illnesses or psychological problems or that he would be unable to receive appropriate treatment in the absence of the applicant or in Mexico. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record reflects that the applicant was employed in the United States at least from March 1985 until January 9, 2002. The applicant has never been granted employment authorization.

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 accruing more than one year of unlawful presence, from April 1, 1997, the date on which unlawful presence provisions were enacted, until January 24, 2002, the date on which she was granted voluntary departure, and from February 13, 2003, the date on which voluntary departure expired, until September 16, 2008, the date on which she was placed on an order of supervision, and is seeking admission within ten years of her last departure. An applicant may file an Application for Waiver of Grounds of Inadmissibility (Form I-601) in order to seek a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The record reflects that the applicant has failed to file a Form I-601.

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 U.S. citizen spouse; her three adult U.S. citizen children; her minor U.S. citizen child; the general hardship to the applicant and her family if she were denied admission to the United States; the absence of a criminal record and the approved immigrant visa petition filed on her behalf. The AAO notes that the applicant's marriage, the birth of her youngest child and the filing of the immigrant visa petition benefiting her 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 unlawful entry into the United States; her failure to comply with voluntary departure; her failure to comply with a removal order; her unlawful reentry into the United States after having been removed; her inadmissibility under section 212(a)(9)(C) of the Act; her unauthorized and unlawful presence in the United States; her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act; and her unauthorized employment in the United States.

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.

Beyond the decision of the field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(9)(C)(i)(II) of the Act for illegally reentering the United States after having been removed and does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) of the Act.[1] Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.

ORDER: The appeal is dismissed.

it asks for the applicant's street and number, city or town, and country of present residence.