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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: AUG 29 2012 Office: HOUSTON [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.

Thank you,

Michael Shumway

for Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Houston, 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 sustained. The Form I-212 will be approved.

The record reflects that the applicant is a native and citizen of India who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed; section 212(a)(9)(B)(i)(II) of Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year; and 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 crimes involving moral turpitude. The applicant 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).

The field office director stated that U.S. Citizenship and Immigration Service (USCIS) records indicated that the applicant, who entered the United States on May 11, 1997 with authorization to remain until June 10, 1997, accrued unlawful presence from June 10, 1997 until October 24, 2002, when the applicant was placed in removal proceedings; and from December 21, 2005, when the applicant's petition for review was denied by the Circuit Court of Appeals, until April 25, 2007, at which time the applicant was removed from the United States. The field office director concluded thus that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence, and 212(a)(9)(A)(ii) of the Act for having been previously removed from the United States. In addition, the field office director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude, indecent exposure and selling alcohol to a minor. The field office director denied the Form I-212, stating that the applicant was required to have filed the Application for Waiver of Grounds of Inadmissibility (Form I-601) in conjunction with the Form I-212.

On appeal, counsel asserts that the U.S. Consulate General in Chennai mistakenly informed the applicant not to file both the Form I-601 and the Form I-212. Counsel argues that the applicant was not convicted of a crime involving moral turpitude because the sale to minors (alcohol) offense is not a crime involving moral turpitude, and the submitted letter from [redacted] Country, Texas, establishes that the applicant was not convicted of indecent exposure.

We agree with counsel that the Form I-212 and Form I-601 should have been accepted and adjudicated together. In view of the mistaken instructions regarding the filing of the Form I-212 and Form I-601, the AAO will adjudicate the merits of the Form I-212 and also address the field office director's finding of inadmissibility.

The AAO will first address the finding of inadmissibility under section 212(a)(9) of the Act, which 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.

USCIS records reflect that on May 11, 1997, the applicant was admitted into the United States as a nonimmigrant alien in transit with authorization to remain in the United States until June 10, 1997. On October 24, 2002, the applicant was served with a Notice to Appear and placed in removal proceedings. On June 30, 2003, the immigration judge denied the continuance of the applicant's removal proceedings, and granted the applicant's application for voluntary departure until August 29, 2003, with an alternate order of removal to India. On July 11, 2003, the applicant filed an appeal of the immigration judge's decision, which was dismissed on November 16, 2004. On December 16, 2004, the applicant filed a petition for review with the Fifth Circuit Court of Appeals, which was denied on December 21, 2005. On April 23, 2007, the applicant was removed from the United States to India. Accordingly, in view of the records before the AAO, the field office director was correct in finding the applicant barred from the United States for ten years pursuant to section 212(a)(9)(A)(ii) of the Act.

The AAO will now address the finding of inadmissibility for unlawful presence, which is under section 212(a)(9)(B) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
> >
> > . . . .

USCIS records reflect that the applicant entered the United States as a nonimmigrant alien in transit with authorization to remain in the United States until June 10, 1997. The applicant began to accrue unlawful presence from June 10, 1997 until July 11, 2003 (when the appeal with the Board of Immigration Appeals (Board) was filed); and from November 16, 2004 (when the appeal was dismissed), until December 16, 2004, when the applicant filed a petition for review with the Fifth Circuit Court of Appeals; and from December 21, 2005 (when the petition for review was denied) until April 23, 2007, when the applicant was removed from the United States to India. Thus, the applicant accrued more than one year of unlawful presence, rendering the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

As to the field office director's finding of inadmissibility for having been convicted of crimes involving moral turpitude, section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that the applicant was not convicted of indecent exposure. The letter from [redacted] County, Texas, dated November 7,

2002, states that [redacted] declined to pursue charges of indecent exposure against the applicant. Thus, this crime does not render the applicant inadmissible under section 212(a)(2)(A) of the Act.

Counsel argues that the applicant's conviction for selling alcohol to a minor was not a crime involving moral turpitude. The record of conviction states that on September 6, 2006, the applicant was convicted of selling alcohol to a minor in violation of section 106.03 of the Texas Alcoholic Beverage Code. The judge imposed a one-year deferred adjudication, and ordered the applicant to pay a fine and perform community service.

The Board held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

Section 106.03 of the Texas Alcoholic Beverage Code states:

> (a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor.

> (b) A person who sells a minor an alcoholic beverage does not commit an offense if the minor falsely represents himself to be 21 years old or older by displaying an apparently valid proof of identification that contains a physical description and photograph consistent with the minor's appearance, purports to establish that the minor is 21 years of age or older, and was issued by a governmental agency. The proof of identification may include a driver's license or identification card issued by the Department of Public Safety, a passport, or a military identification card.
>
> . . . .
>
> (c) An offense under this section is a Class A misdemeanor.

Negligent conduct is an element of the offense as defined by section 106.03 of the Texas Alcoholic Beverage Code. In *Matter of Perez-Contreras,* the Board concluded that a conviction for third degree assault under Washington law, where the alien had caused injury to the victim "with criminal negligence," was not a crime involving moral turpitude. 20 I&N Dec. 615, 618-620 (BIA 1992). The Board reasoned that moral turpitude was not inherent in the statute because the crime did not have as an element knowing or intentional conduct or conscious disregard of a substantial and unjustifiable risk. *Id.* at 619. In view of the plain language of section 106.03 of the Texas Alcoholic Beverage Code, the proscribed conduct, selling an alcoholic beverage to a minor, does not involve moral turpitude because it requires only criminal negligence. Accordingly, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In sum, the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act as an alien previously removed and section 212(a)(9)(B)(i)(II) of Act for having been unlawfully present in the United States for more than one year.

As to the Form I-212, 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 United States. 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. 17 I&N Dec. 275 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 Seventh 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 to unfavorable factors in the instant case, they are the applicant's removal from the United States due to his having overstayed his visa. The applicant was unlawfully present in the United States for approximately seven years, and had worked illegally for many years. The applicant failed to depart from the United States in accordance with the terms of the voluntary departure order, and he was convicted of selling alcohol to a minor on September 6, 2006.

In regard to the submitted evidence of hardship, the record reflects that the applicant married his U.S. citizen spouse on January 4, 2006 while he was in removal proceedings. The applicant has three young U.S. citizen children who were born on December 27, 2001, September 28, 2004, and October 17, 2005, and the two oldest are the applicant's stepchildren. The applicant's wife stated in the letter dated July 22, 2010, that her first husband was murdered in their house on November 27, 2003, and after his death she had the responsibility of taking care of her two young children and managing the family's convenience store. The applicant's wife declared that the applicant, who had worked for her first husband, was a good father to her children and made her feel safe. She stated that since the applicant's deportation she has been emotionally distraught and decided to send her second oldest child to live with the applicant in India and have a babysitter take care of her youngest child. In the letter dated June 14, 2010, [redacted] stated that on January 31, 2007 she saw the applicant's wife, who was under stress from the death of her first husband and deportation of the

applicant. [redacted] stated that the applicant's wife asserted that her second husband helped her deal with stress, the family business, and the debt accumulated after the death of her first husband. [redacted] stated that the applicant's wife was taking a sleeping medication, and she was increasing the dosage of her antidepressant. In the letter dated May 11, 2010, [redacted] diagnosed the applicant's wife with attention deficit disorder, due to the applicant's wife's difficulty in focusing mentally, staying on tasks, and completing work; and gave her medicine to control the condition.

The letter dated May 13, 2010 from [redacted], a speech-language pathologist, stated that the applicant's oldest son, [redacted] had progressively become more delayed due to the lack of receptive and expressive language therapy and individual attention to his needs. [redacted] stated that [redacted] was currently 5-6 years delayed, and had Attention Deficit Hyperactivity Disorder (ADHD) and severe developmental delays. [redacted] stated that the applicant's wife worked and needed the assistance in taking Salman to therapy. [redacted] asserted that Salman needed two parents to meet his needs, and without therapy the applicant's stepson will never finish regular educational academics and likely will not finish high school. The letter by [redacted] dated May 18, 2010 stated that Salman takes medicine for ADHD.

The discharge summary from The Methodist Hospital in Texas reflects that on March 14, 2008 a doctor diagnosed the applicant's wife with anxiety disorder and major depressive disorder. The applicant voluntarily admitted herself to the hospital for acute stabilization, and was at risk for suicide. The doctor stated that since the death of the applicant's wife's first husband in 2003, the applicant's wife had psychiatric symptoms of depression, anxiety, panic attacks, and symptoms suggesting post-traumatic stress disorder. The doctor stated that the applicant's wife did not have insurance and had limited finances. The mental health screening reflected that the applicant's wife worried about finances and felt her job was overwhelming. It also reflected that the applicant's wife had previously come to the emergency room and was prescribed an anti-anxiety medication and referred to a psychiatrist, and that she lacked family support, and lived with her three children and parents.

Other evidence includes medical records revealing that the applicant's father-in-law has serious health problems including uncontrolled type 2 diabetes mellitus, acute and chronic renal failure, and suspected diastolic heart failure. The record contains the certificate of death of the applicant's wife's first husband and a newspaper article about his murder, and a letter from the applicant's sister-in-law dated May 17, 2010 in which she asserted that with the applicant's help her sister was able to be a stay-at-home mother.

The favorable factors in the instant matter are demonstrated by medical records, letters pertaining to Salman, and the letter by the applicant's wife's in which she stated that she and her children are emotionally dependent on the applicant. There is evidence of hardship if the Form I-212 application is denied. We observe that the record is not clear as to the severity of the financial hardship of the applicant's wife as the applicant has not provided any evidence of his wife's household expenses and we do not know the extent of her financial obligations. The applicant has been married for six years to his wife.

In applying the principles set forth in this discussion and weighing all factors present, we find that a favorable exercise of discretion is warranted in this case. 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. Here the applicant has met that burden.

However, this decision is based on present circumstances and applies only to the applicant's Form I-212 application. The applicant remains inadmissible to the United States under section 212(a)(9)(B)(i)(II) of Act for having been unlawfully present in the United States for more than one year. In general, a Form I-212 may be denied as a matter of discretion for an an alien who is mandatorily inadmissible to the United States under another section of the Act. *See Matter of Martinez-Torres,* 10 I&N Dec. 776 (reg. Comm. 1964). We have adjudicated the Form I-212 on the merits in this case because of the unusual circumstances regarding the applicant's attempt to file a Form I-601. Nevertheless, in order for the applicant to benefit from the approved Form I-212, the applicant must file and have approved a Form I-601.

ORDER: The appeal is sustained as pertaining to, and only to, the applicant's Form I-212 application, which is approved.