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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

H4

[redacted]

Date: MAR 08 2012 Office: HARTFORD, CT 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,

Michael Hammerschlag

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Hartford, Connecticut, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted and the appeal sustained.

The applicant is a native and citizen of China who, on November 21, 1983, was placed into immigration proceedings for having entered the United States without inspection on November 19, 1983. On April 23, 1986, the immigration judge denied the applicant's applications for asylum, withholding of removal and voluntary departure and ordered the applicant removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On June 28, 1988, the BIA dismissed the applicant's appeal.

In between the applicant's removal order in 1986 and his next entry into the United States, in March 1990, the applicant filed an application for Special Agricultural Worker (SAW). When the applicant entered the United States in March 1990, his SAW application was pending, but he did not apply for permission to reapply for admission to the United States as would have been required given his prior removal.

On September 7, 1993, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The Form I-485 indicates that the applicant last entered the United States on March 22, 1991 again as a SAW applicant and again without the required permission to reapply for admission. The AAO also notes that the record indicates that at the time of this March 1991 entry the applicant's SAW application and all of the appeals connected to it had been denied.

On September 11, 1997, the applicant withdrew the Form I-485. On September 30, 1997, the applicant filed a second Form I-485 based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his lawful permanent resident father, who is now deceased. On the same day, the applicant filed an Application for a Waiver of Grounds of Inadmissibility (Form I-601), based on a finding that the applicant misrepresented himself in an attempt to gain an immigration benefit, and a Form I-212, indicating that he was residing in the United States. On July 1, 1999, the Form I-601 was denied. The applicant then filed an appeal with the AAO. On October 26, 2001, the AAO rejected the appeal and remanded the file for further action stating that the record did not contain any investigative reports or other derogatory information concerning the applicant's fraud or any evidence submitted by the applicant in support of his waiver request. The record does not reflect that a new decision was made in the applicant's waiver case. Then, on January 5, 2009, the applicant's Form I-130 filed by his lawful permanent resident father was automatically revoked due to the father's death in 2004. As a result, the applicant's Form I-485 was denied.

The record indicates that on February 6, 2009, counsel filed a request to reinstate the applicant's revoked Form I-130 in accordance with sections 212(a)(4)(C)(ii) and 213A(f)(5) of the Act. No decision has been made on this request, so the applicant's Form I-130 remains revoked.

The record indicates that 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 reside in the United States with his lawful permanent resident mother and two U.S. citizen children.

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.

In a decision, dated April 9, 2010, the field office director in Hartford, Connecticut determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly.

In a brief filed on appeal and dated May 7, 2010, counsel contended that the field office director failed to properly weigh the equities in the applicant's case. In support of her contentions, counsel submitted a brief, financial documentation and copies of documentation already present in the record.

In a decision, dated January 25, 2011, the AAO found, in regards to the exercise of discretion, that the totality of the circumstances in the applicant's case did not warrant the favorable exercise of discretion.

The adjudication of the Form I-212 is premised on eligibility to apply for admission, either in the form of an immigrant visa application or an I-485 application, which is established by an approved Form I-130, Petition for Alien Relative. Strictly speaking, in the absence of an underlying approved Form I-130, Petition for Alien Relative, the Form I-212 is moot.

Nevertheless, as the AAO has addressed the merits of the applicant's Form I-212 application previously, the AAO will consider the present motion. In regards to the applicant being subject to reinstatement of removal, the AAO found that although the applicant executed the order of removal in 1990, there was still an outstanding order of removal for the applicant because U.S. Immigration and Customs Enforcement (USICE) could reinstate the applicant's prior removal order under section 241(a)(5) of the Act, even though he reentered prior to April 1, 1997, since section 241(a)(5) of the Act has been found to not be impermissibly retroactive. *See Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 126 S. Ct. 2422 (U.S. 2006).

In her motion, dated February 25, 2011, counsel contends that the AAO's finding in regards to the applicant's removal order being eligible for reinstatement is incorrect and that *Fernandez-Vargas* is being incorrectly applied to the applicant's case. Specifically, counsel states that *Fernandez-Vargas* is distinguishable from the applicant's case because the applicant actively tried to legalize his status in the United States.

The AAO affirms its prior finding. On June 22, 2006, the Supreme Court of the United States held in *Fernandez-Vargas* that section 241(a)(5) of the Act applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on the individual.

Although the applicant actively tried to legalize his status, at the time of his 1991 entry the applicant had no reasonable expectation of relief from deportation, as his SAW application had been denied and his father had not yet become a lawful permanent resident. At the time of his March 1991 reentry, the applicant had no reasonable expectation that he would be able to collaterally attack his prior deportation order or that he was entitled to the prior procedural inefficiencies in the administration of immigration laws. The applicant, therefore, had no reasonable expectation of adjustment of status relief under pre-IIRIRA laws. Thus, as applied to the applicant, section 241(a)(5) of the Act does not impose any new duties or new liabilities. Therefore, the AAO finds that section 241(a)(5) of the Act applies to the applicant.

In its January 25, 2011 decision, the AAO also found that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for obtaining admission into the United States by entering as a SAW applicant in 1990 and 1991 without permission to reapply for admission when he was aware that he had been ordered removed from the United States. As such, the AAO found that the applicant required a waiver pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). Further, at the time of the applicant's appeal the district director had found the applicant to be ineligible for a waiver pursuant to section 212(i) of the Act. *See District Director's Decision on Form I-601,* July 1, 1999. As stated above, the applicant then filed an appeal with the AAO. On October 26, 2001, the AAO rejected the I-601 appeal and remanded the file for further action consistent with the AAO's discussion of the record.

On motion counsel contends that the finding of fraud and inadmissibility in the applicant's case under section 212(a)(6)(C)(i) of the Act is incorrect. She states that the applicant failing to apply for

permission to reapply for admission is not fraud and that his entry while his SAW application was pending was not fraud. The AAO finds that the current record does not establish that the applicant's acts in 1990 and 1991 render him inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The Department of State Foreign Affairs Manual (FAM) offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act. Stated in part; (1) a misrepresentation can be made orally or in writing, (2) silence or the failure to volunteer information does not in itself constitute a misrepresentation, (3) the misrepresentation must have been practiced on an official of the U.S. government, generally a consular or immigration officer, (4) a timely retraction will avoid the penalty of the statute. Although not bound by the FAM, we agree that silence or failure to volunteer information does not necessarily constitute a misrepresentation.

There is no evidence that the applicant was asked about any prior deportations upon entering the United States and then did not disclose his 1986 deportation order. It is unclear what was known by the inspecting officer(s) at the time of the applicant's entries in 1990 and 1991, or even the full nature of the applicant's understanding concerning the requirement to obtain permission to reapply. It appears that the applicant had validly issued entry documents. Based on the record before us, we find that there is insufficient evidence to justify a finding of inadmissibility based solely on the applicant's possible failure to volunteer information.

In considering whether the favorable factors in the applicant's case outweigh the unfavorable ones, the AAO previously found the favorable factors in this matter to be: the applicant's lawful permanent resident mother; his two U.S. citizen children; his naturalized U.S. citizen brother; the general hardship to the applicant and his family if he were denied admission to the United States; the absence of a criminal record; and the filing of individual and joint tax returns. The AAO noted that the applicant's mother's adjustment of status to that of a lawful permanent resident, as well as the naturalization of the applicant's brother and the birth of the applicant's children occurred after the applicant was placed into immigration proceedings and were, therefore, "after-acquired equities," to which the AAO accorded diminished weight. Moreover, the AAO found that the record failed to establish that the applicant was currently the beneficiary of any immigrant or nonimmigrant visa petition that would offer him a means of acquiring lawful residence in the United States.

The AAO then found that the unfavorable factors in the applicant's case included the applicant's original unlawful entry into the United States; his failure to comply with a removal order; his fraudulent reentry into the United States in 1990; his inadmissibility under section 212(a)(6)(C)(i) of the Act; his fraudulent reentry into the United States in 1991; his unauthorized and unlawful presence in the United States; and his unauthorized employment in the United States except for a period of employment authorization. The AAO concluded that the totality of the evidence demonstrated that the favorable factors in the present matter are outweighed by the unfavorable factors.

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.

In her motion to reopen, dated February 25, 2011, counsel states that in its decision, the AAO failed to give any weight to the applicant's after-acquired equities when these factors should have been given some weigh in a discretionary analysis. Counsel also states that the applicant's favorable

factors greatly outweigh any negative factors in his case, such that the favorable exercise of discretion should be granted.

After a careful review of the record, the AAO finds that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. The unfavorable factors in the applicant's case do not include any misrepresentations upon entry, but do include an initial unlawful entry into the United States; failure to comply with a removal order; unauthorized and unlawful presence in the United States; and unauthorized employment in the United States except for a period of employment authorization. The AAO does note that the applicant's years of unauthorized employment are mitigated by his years of paying taxes in the United States.

Again, the favorable factors in the applicant's case include: the applicant's lawful permanent resident mother; his two U.S. citizen children; his naturalized U.S. citizen brother; the general hardship to the applicant and his family if he were denied admission to the United States; the absence of any criminal record; evidence of charitable contributions in the United States; and the filing of individual and joint tax returns. The AAO finds that even though these factors are "after-acquired equities," to which the AAO accords diminished weight, we find that the favorable factors are so significant that they outweigh the unfavorable factors in the applicant's case.

However, as stated above, the adjudication of the Form I-212 is premised on basic eligibility to apply for admission, either in the form of an immigrant visa application or an I-485 application, which is established by an approved Form I-130, Petition for Alien Relative. Thus, although we sustain the appeal for the reasons noted above, an approved Form I-212 has no practical effect in the absence of an underlying approved Form I-130, Petition for Alien Relative.

ORDER: The motion is granted and the appeal is sustained.