(b)(6)

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]

Date: JUL 23 2013 Office: PHOENIX FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal pursuant to 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Phoenix, Arizona, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and the matter is now on appeal with the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Italy who was found to be 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) as an alien who has been ordered removed and who seeks admission within 10 years (or at any time if the alien has been convicted of an aggravated felony) of his removal. 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) in conjunction with his application for a nonimmigrant visa.[1]

On January 24, 2012, the Field Office Director denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) concluding that the applicant did not merit a favorable exercise of discretion.

On appeal, the applicant states that he has been rehabilitated and that his father is need of his assistance in the United States due to his worsening health condition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
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> (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.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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

[1] An applicant for a non-immigrant visa may seek permission to reapply for admission after deportation or removal through filing Form I-212 in limited circumstances as set forth in 8 C.F.R. § 212.2(b). In most circumstances such permission for non-immigrants is sought pursuant to section 212(d)(3) of the Act. *See* 8 C.F.R. § 212.2(b).

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.

The record reflects that the applicant was ordered removed by the Immigration Judge in Arizona, on March 25, 2005, the applicant's appeal was dismissed by the Board of Immigration Appeals on July 27, 2005, and the applicant's appeal to the Ninth Circuit Court of Appeals was dismissed on January 23, 2006. The applicant was physically removed from the United States on June 14, 2006. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

The record further reflects that the applicant is seeking a non-immigrant visitor's visa to enter the United States. The applicant states that he wishes to enter the United States to care for his parents who he states are seriously ill.

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 or Removal:

> 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 regards to the positive equities in the applicant's case, the record indicates that the applicant is a 51-year-old native of Italy who had long-term residence in the United States beginning on March 25, 1970 and lasting through his removal on June 14, 2006. A letter from Dr. MD, MS dated February 7, 2012 stating that the applicant's father has chronic Hepatitis C, cirrhosis (stage 4 liver disease), hepatic encephalopathy, and esophageal varices. Dr. states that the applicant's father's condition is stable, but that he visits the clinic to meet with the doctor on a regular basis. Another letter in the record, dated March 4, 2011 from Dr. states that the applicant's father has been diagnosed with an enlarged prostate and is on medication to control his symptoms. In regards to the applicant's mother's health, the record contains a letter dated Febaruary 22, 2011 from Dr. stating that the applicant's mother suffers from high cholesterol, high blood pressure, gout, hypertensive heart and kidney disease, prediabetes, osteopenia, and disc disease of her lumbar spine. The letter also indicates that the applicant's mother "is clinically stable, functioning well, and has a good prognosis," as well as indicates that the applicant's mother drives to her appointments. There is no indication in the letters from these medical professionals that the applicant's father or mother is unable to travel, as stated by the applicant on his I-212 application. The applicant's father states in a letter in the record that although the applicant previously struggled with drug addiction, he has not used drugs since his removal to Italy. The applicant's father also states that the applicant has not had any problems with law enforcement since his removal. The applicant also states that he "has been completely rehabilitated from his past life." The AAO notes that the record contains documentation in Italian from the , however, that documentation was not translated into English and cannot be taken into consideration on appeal. 8 C.F.R. § 103.2(b)(3) states:

> (3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

There is no other recent documentation in the record of the applicant's rehabilitation. The AAO notes the documentation in the record of the applicant's training in automotive technology during his detention in , Arizona, but there is no record that the applicant has obtained gainful employment

or continues to seek training or education. Although the applicant's and his father's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). 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 applicant's father also states that due to his medical conditions he cannot drive himself to his medical appointments and he must count on his son-in-law to take off from work to transport him and his wife. He states that his son-in-law suffers from hardship taking time off work and that he wishes for the applicant to return to the United States to care for him and his wife. He also states that he wishes to see the applicant again before he no longer has the opportunity. The applicant's father also states that the applicant depends on his father for assistance in Italy as he has no family ties there and is not like the other natives who have resided most of their lives in that country.

In regards to the negative equities in the applicant's case, the record illustrates that the applicant is a former lawful permanent resident of the United States who was removed from the United States on June 14, 2006 and lost his lawful permanent resident status pursuant to section 237(a)(2)(B)(i) of the Act, which involves a conviction for a violation of a law relating to a controlled substance. The AAO also notes that the applicant was previously placed in removal proceedings for violating a law relating to a controlled substance and was granted relief by the Immigration Judge on March 30, 1995 pursuant to the now repealed section 212(c) of the Act. The record indicates that the applicant was arrested and convicted of crimes on eight occasions between April 29, 1981 and July 10, 2003 in California, including numerous convictions involving violations of laws pertaining to controlled substances, violations of laws involving fraud and forgery, and a conviction for assault by means of force likely to produce great bodily injury. The applicant submitted documentation to illustrate that two of his most recent convictions have been expunged pursuant to California Penal Code Section 1203.4 by the Superior Court of California, The U.S. Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises, has deferred to determination of the Board of Immigration Appeals (BIA) regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings.

Under the statutory definition of "conviction" at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to reduce, expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *See Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. See also *Matter of RodriguezRuiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). In *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a

court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). In this case, there is no evidence in the record to suggest that the applicant's convictions were expunged because of an underlying procedural defect in the merits of the case. Additionally, the record does not reflect that the applicant's conviction. As the present case arises in the Ninth Circuit, the decision reached in *Lujan - Armendariz V. INS*, 222 F.3d 728 (9th Cir. 2000) is the controlling precedent. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002). Therefore, the expunged convictions remain valid for immigration purposes. Moreover, even were the applicant to establish that all or some of his convictions were no longer convictions for immigration purposes, the applicant's arrest record would remain an adverse factor to be considered in the exercise of discretion. *See generally Matter of Guerra,* 24 I&N Dec. 37, 40-41 (BIA 2006); *Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996); *Matter of Arai,* 13 I&N Dec. 494, 496 (BIA 1970).

The AAO finds that the applicant has not demonstrated reformation or rehabilitation. The independent documentation submitted in support of his rehabilitation was either from many years ago or was in Italian and not translated to English. Moreover, the AAO notes that a lack of a recent criminal record, although relevant, does not in and of itself support a finding of rehabilitation in all circumstances. In this case, the applicant had a history of substance abuse and other criminal conduct, but has not submitted independent documentation that he no longer would be a risk to society. The AAO notes the applicant's elderly parent's medical conditions and desire to see their son, but the record does not establish that they are unable to visit the applicant in Italy or in a third location. Additionally, the AAO finds that the applicant's significant criminal history outweighs the positive factors in his case. *Matter of Edwards,* 20 I&N Dec. 191, 195-96 (BIA 1990) (when negative factors become more serious, respondent must introduce additional offsetting favorable equities, which may include unusual or outstanding equities).

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.