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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: FEB 19 2014 Office: SAN FERNANDO [redacted]

IN RE: Applicant: [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 (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
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Fernando, California, denied the waiver application and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion to reconsider. The motion will be granted and the prior AAO decision will be affirmed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(II), for illegally returning to the United States after being removed. The applicant seeks consent to reapply for admission to the United States as the beneficiary of an approved spousal Petition for Alien Relative (Form I-130).

The field office director concluded that, as the applicant is present in the United States, he is ineligible for consent to reapply and, accordingly, denied the Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). *Decision of the Field Office Director,* October 20, 2012. On appeal, the applicant sought consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act. Although the AAO found inapplicable section 212(a)(9)(C)(i)(II), it held the applicant to be inadmissible under section 212(a)(9)(A), as an alien previously removed from the country, and determined he had provided insufficient evidence to support a favorable exercise of discretion. *Decision of the AAO*, September 30, 2013.

On motion, the applicant asserts the AAO erred in finding the negative factors to outweigh those factors indicating a favorable exercise of the Secretary's discretion, and offers additional documentation of favorable factors. He asserts that his wife and daughters are all U.S. citizens, he has lived together with his family since 1989, he has been continuously employed and otherwise shown good moral character, he demonstrates remorse for his role in his cousin's death, and he expresses regret for fleeing to Mexico rather than report the matter to law enforcement. Newly-provided evidence includes, but is not limited to: the applicant's updated statement; supportive statements; an employment letter; financial documentation, including a property tax bill and joint tax returns; and evidence of family members' immigration status. The record includes the applicant's statements, letters of support, birth certificates, and a brief from previous counsel.

Section 212(a)(9)(A) 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.
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> (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.

The record reflects that the applicant was deported from the United States on April 3, 1987 pursuant to a removal order and re-entered the country later in 1987 without admission or parole. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act as an alien previously removed and thus requires permission to reapply for admission.

The record also reflects that, on September 10, 1986, the applicant was convicted in Washington state court of second degree manslaughter under RCW 9A.32.070(1), and sentenced to serve nine months in jail, but granted probation and deferred sentencing for five years. The AAO previously noted that, at the time of the applicant's conviction, RCW 9A.32.070(1) provided, "[a] person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person." As criminal negligence under this statute does not involve the conscious disregard of a substantial risk that a wrongful act may occur, we found that the applicant's conviction is not for a crime involving moral turpitude, and thus does not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *See Matter of Franklin,* 20 I & N Dec. 867 (BIA 1994); *Matter of Perez-Contreras*, 20 I&N Dec. 615, 619 (BIA 1992).

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:

> 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.

Regarding the equities in this case, the applicant submits documentation showing family ties to the United States, a wife and five children -- ages 14, 23, 25, 28, and 30 -- all of whom reside here and are U.S. citizens. Evidence he is financially assisting his wife includes documentation of their joint income tax filings, while a job letter indicates he has worked for the same U.S. employer for over 25 years. The applicant's claims to have lived in the United States with his family since the late 1980s and not returned to Mexico are supported by the record. He submits letters of support from a neighbor and from the church where he has been involved in ministry. There are no statements from his spouse or any family members, all but one of whom are adults, in support of the application. As the applicant married in 1992, after the commencement and completion of his removal proceedings, the AAO notes that most of the favorable factors discussed above constitute "after-acquired equities," and accords them diminished weight. Nonetheless, we note that he was already a father of two U.S. citizen children before his deportation and subsequent illegal reentry.

The unfavorable factors in this matter are the applicant's entries without inspection in 1981, 1984 or 1985, and 1987 (shortly after he was deported); his arrest for driving while intoxicated in 1983; and his 1986 manslaughter conviction. Regarding the conviction, the applicant claims that, when he and a cousin began playing with a handgun, he removed the bullets; however, despite his belief the gun was unloaded, it discharged and resulted in his relative's death. The record reflects that, rather than report the incident to law enforcement officials, the applicant claims to have fled in panic to California, crossed back into Mexico, and then returned to the United States without inspection a second time. The record further reflects that only when arrested in California for driving a car reported stolen did the applicant, who was subject to a Washington state arrest warrant, report the circumstances of his cousin's death. The conviction for criminally negligent homicide supports the applicant's claim that the shooting was accidental.

The favorable factors in this matter are the applicant's family and long-term ties in the United States, his church involvement, and the passage of time since his criminal convictions and immigration violations. As noted above, the unfavorable factors in this case include the applicant's repeated entry into the United States without inspection, including a reentry after removal, and his criminal record. Despite the passage of time since his immigration and criminal violations, the negative factors outweigh the positive factors. The AAO notes in reaching this conclusion that the applicant has provided a statement regarding remorse for his role in the homicide of his cousin, including a detailed account of the incident explaining his reasons for fleeing, and he has documented his lengthy residence here, history of employment and payment of taxes, and church membership. Considering the totality of the circumstances, the seriousness of the crime for which the applicant was convicted and his conduct immediately following the incident outweigh his family ties and other favorable factors comprising after-acquired equities such that the AAO finds the applicant has not established that a favorable exercise of the Secretary's discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met and, accordingly, the prior decision is affirmed.

ORDER: The motion is granted. The prior AAO decision is affirmed.