U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 17 2006

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Turkey who entered the United States without a lawful admission or parole on or about February 1, 1994. On December 12, 1994, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On November 9, 1995, the applicant was interviewed for asylum status. His application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an immigration judge was served on him on November 24, 1995. On April 18, 1996, the applicant failed to appear for the deportation hearing and he was subsequently ordered deported *in absentia* by an immigration judge, pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. On July 31, 1996, the applicant filed a Motion to Reopen (MTR) his deportation proceedings, which was granted on August 21, 1996. On November 19, 1997, an immigration judge granted the applicant voluntary departure until September 19, 1998, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States on or before September 19, 1998. The applicant's failure to depart the United States on or before September 19, 1998, changed the voluntary departure order to an order of deportation. On October 26, 1998, a Warrant of Removal/Deportation (Form I-205) was issued, and on December 28, 1999, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear at the New York District Office in order to be removed from the United States. The applicant failed to surrender for removal or depart from the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The record of proceeding reflects that on April 27, 2001, the applicant was charged with theft of services and resisting arrest. No dispositions regarding these charges are included in the record of proceeding. The applicant is inadmissible under section 212(a)(9)(A)(ii) of 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 remain in the United States and reside with his U.S. citizen spouse and child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Director's Decision* dated May 3, 2005.

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

> (A) Certain aliens previously removed.-
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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
>
> (II) departed the United States while an order of removal was outstanding, and 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has; (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel states that the applicant's spouse filed a Form I-130 pursuant to the provision of the Legal Immigration Family Equity Act (LIFE Act). In addition, counsel states that even though the petition was granted it seems unfair that the applicant's adjustment of status application was denied at the final interview. Additionally, counsel alleges that the applicant's first attorney, who was subsequently disbarred, took advantage of the applicant's poor English skills at the time to induce him to file a Form I-589. Counsel further states that during his deportation proceedings, the applicant was unrepresented because his second attorney failed to appear and only a paralegal was present. Furthermore, counsel states that the decision contains erroneous facts, inaccuracies and draws wrong conclusions. Counsel refers to the Director's decision in which it is stated as a favorable factor the fact that the applicant filed tax returns for the years 2001 and 2002, while under the unfavorable factors it is stated that the applicant failed to file tax returns for all the years he has been in the United States. Finally, on the Form I-290B counsel states that he will be submitting a brief and/or evidence to the AAO within 30 days.

On September 22, 2006, the AAO forwarded a fax to counsel informing him that this office had not received a brief or evidence related to this matter and unless counsel responded within five business days the appeal may be summarily dismissed. Counsel has not responded to the AAO's fax of September 22, 2006. The appeal was filed on June 8, 2005, and to this date, approximately one and one half years later no documentation has been received by the AAO. Therefore, the AAO will adjudicate the appeal based on the documentation within the record of proceedings.

The AAO agrees with counsel in that the Director erroneously stated as an unfavorable factor that the applicant did not file tax returns for all the years that he has been present in the United States. The record of proceeding reflects that the applicant filed tax returns for the years 2001 and 2002. The AAO finds this error harmless since it did not affect the outcome of the decision.

Counsel's statement that because of the applicant's poor English skills an attorney was able to persuade him to file a Form I-589 is not persuasive. The applicant signed the Form I-589 and it was his responsibility to review the application and make sure that he knew what he was applying for.

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 be a condonation of the alien's acts and could encourage others to enter without being admitted and 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 court 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-Nunoz 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 considering discretionary weight. 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 applicant, in the present matter, married his U.S. citizen spouse on August 31, 1998, approximately three years after he was placed in deportation proceedings. The applicant's spouse should reasonably have been aware at the time of their marriage of the applicant's immigration violations and the possibility of his being deported. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse and child, and an approved Form I-130.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his failure to depart the United States after he was granted voluntary departure and after his voluntary departure order became a final order of deportation, his failure to inform the Service of his change of address as required pursuant to section 241(a)(3)(A) of the Act, his unauthorized employment and his lengthy presence in the United States without authorization. The Commissioner stated in *Matter of Lee, supra,* that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after he was placed in deportation proceedings can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility 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.