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U.S. Citizenship  
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HX

FILE:

Office: PHOENIX, AZ

Date: APR 23 2007

IN RE:

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Phoenix, Arizona, 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 dismissed.

The applicant is a native and citizen of Mexico who voluntarily departed from the United States after having entered without inspection on December 17, 1976, and September 21, 1977. On December 7, 1977, immigration officers apprehended the applicant after he had again entered the United States without inspection. On December 7, 1977, the applicant was placed into proceedings. On December 16, 1977, the immigration judge granted the applicant voluntary departure until January 16, 1978. On December 16, 1977, the applicant returned to Mexico. On May 24, 1984, immigration officers apprehended the applicant and placed him into proceedings. On July 6, 1984, the immigration judge ordered the applicant removed from the United States. The applicant was removed from the United States and returned to Mexico on the same day. On November 19, 1994, the applicant married his wife, [REDACTED]. On November 20, 1996, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by [REDACTED]. On April 11, 2002, the applicant appeared at Citizenship and Immigration Services' (CIS) Phoenix, Arizona District Office. The applicant testified that, in September 1984, he had reentered the United States without inspection or permission to reapply for admission. On January 12, 2004, the Form I-130 was approved. On January 21, 2004, the Form I-485 was denied because the applicant had failed to file documentation to prove he was not 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), for seeking admission within ten years of departing the United States after being ordered removed, or to submit evidence of eligibility to benefit from a Form I-212 within the allotted time. On December 20, 2004, the applicant filed a second Form I-485 based on the approved Form I-130. On December 20, 2004, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and 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 children.

The district director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See District Director's Decision* dated March 15, 2006.

On appeal, counsel contends that the director erred in finding that the unfavorable factors outweighed the favorable factors in the applicant's case. Counsel refers to the positive factors outlined in the brief she filed with the Form I-601. *See Form I-290B*, dated April 17, 2006. On Form I-290B counsel indicates she will file a brief and/or additional evidence within 30 days. On March 28, 2007, the AAO informed counsel that she had five days in which to resubmit any documentation she had previously provided in support of the appeal. Counsel did not forward a brief and/or additional evidence to support the appeal. Accordingly, the record is complete. The entire record was reviewed in rendering a decision in this case.

The AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

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

(A) Certain aliens previously removed.-

....

(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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The record of proceedings indicates that the applicant entered the United States without inspection, after having previously being granted voluntary return and voluntary departure on at least three prior occasions. The applicant was ordered removed and was returned to Mexico. However, despite being removed and warned that he would require permission to reapply for admission to enter the United States, the applicant reentered the United States without inspection. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] have a 19-year old son and a 13-year son who are U.S. citizens by birth. The applicant and [REDACTED] are in their 50's.

In the brief supplementing the Form I-212, counsel asserts that the applicant's spouse and children would be harmed if the applicant is denied permission to reapply for admission. She contends that the unusually strong, loving relationship between the applicant and [REDACTED] would suffer tremendously if he were removed. She points to the type-1 diabetes of the applicant's younger son and the fact that his treatment is made possible by his father's health insurance, supporting her statements with a letter from the Phoenix Children's Hospital. The applicant's family, counsel notes, worry that, if the applicant is removed from the United States, they will no longer have health insurance and, thus, access to medical care. Counsel also points to the applicant as the family's principal support. She contends that if [REDACTED] and her children were to move to Mexico with the applicant, they would relocate to a country where they have never lived or visited. She notes that the applicant's children speak only English and that [REDACTED] speaks little Spanish. Health care would, she asserts, also be difficult to obtain in Mexico.

[REDACTED], in her affidavit, contends that the applicant provides for the family in every possible way and that she and her children would be left without financial support and medical insurance since she is currently employed for only nine months of the year and the applicant is the family's main provider.

Counsel asserts that the applicant does not have a negative immigration history. However, as discussed above, the applicant has reentered the United States without inspection on a number of occasions, including after his July 1984 removal under section 241(a)(2) of the Act. On appeal, counsel asserts that the applicant was not aware that he required permission to reapply for admission in order to reenter the United States or that it would be a felony to violate that requirement. However, the record reflects that the applicant was served with the order for removal (Form I-294) prior to his removal, which states in both English and Spanish that permission to reapply for admission is required and the person removed commits a felony when he fails to obtain permission to reapply for admission prior to reentering the United States.

Counsel asserts that the applicant is a person of good moral character, that his arrests occurred more than 20 years ago and that they were "minor incidents." However, the record does not support counsel's claims. Instead, it reflects that the applicant has been arrested for driving under the influence on three occasions, domestic violence assault and threatening domestic violence. While counsel contends that the applicant has provided dispositions for all of his arrests, the record does not contain dispositions for these arrests, which include crimes involving moral turpitude, except for his last arrest for driving under the influence. The AAO notes, however, that a fingerprint-based Federal Bureau of Investigations (FBI) inquiry revealed the applicant had been convicted of or pled guilty to assault in relation to his domestic violence assault charge. On October 31, 2001, the applicant pled guilty to driving under the influence in violation of section 28-1381(A)(1) of the Arizona Revised Statutes (ARS) and failure to yield right-of-way in violation of section 28-772 of the ARS. The applicant was sentenced to ten days in jail, of which eight days were suspended.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 that the above-cited precedent 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.

The favorable factors in this matter are the applicant's U.S. citizen spouse, two U.S. citizen children, the absence of any criminal record since 2001, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's multiple illegal entries into the United States, removal order and illegal reentry after having been removed from the United States and his conviction of or guilty plea to assault in relation to his domestic violence assault charge.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage, birth of his children, and approval of his immigrant petition occurred after the applicant was placed into proceedings. The AAO finds these factors to be "after-acquired equities" and that any favorable weight derived from the applicant's marriage, birth of his children, or his approved immigrant visa petition must be accorded diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

The AAO notes that the record reflects that the applicant may have multiple adult children, who could be favorable factors, who are not after-acquired, in applying for permission to reapply for admission. However, the record contains the U.S. birth certificate of only one of the children and there is no father listed on this document. In order to have these adult children considered as favorable factors in an application for permission to reapply for admission, the applicant would need to provide proof, i.e. U.S. birth certificates, indicating that he is their biological father

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.