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

U.S. Citizenship and Immigration Services

#4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 24 2007

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:

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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 sustained and the application approved.

The applicant is a native and citizen of Honduras who, on February 14, 1985, was arrested by immigration officers in Houston, Texas. The record reflects that, on February 11, 1985, the applicant had entered the United States without inspection. On February 14, 1985, the applicant was placed into immigration proceedings. The applicant filed an Application for Asylum or Withholding of Removal (Form I-589) in immigration proceedings. On August 1, 1990, the immigration judge denied the applicant's applications for asylum and withholding of removal and granted the applicant voluntary departure for a period of thirty days. The applicant appealed to the Board of Immigration Appeals (BIA). On June 27, 1991, a Petition for Alien Worker (Form I-140) was filed on behalf of the applicant. On September 20, 1991, the BIA dismissed the applicant's appeal and granted him 30 days of voluntary departure. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On December 16, 1991, a warrant of removal was issued informing the applicant that he should present himself for removal from the United States on January 6, 1992. The applicant failed to present himself for removal or to depart the United States. On May 7, 1993, the applicant filed a motion to reopen with the BIA. On July 20, 1993, the BIA denied the applicant's motion to reopen. On August 30, 1993, a warrant of removal was issued informing the applicant that he should present himself for removal from the United States on September 14, 1993. Instead of presenting himself for removal departing the United States, the applicant filed a stay of removal on September 14, 1993. On September 17, 1993, the applicant was granted a stay of removal until his motion to reopen before the BIA was decided. The AAO notes that in support of the application for stay of removal the applicant attached a copy of the May 7, 1993, motion to reopen which had already been denied by the BIA. Therefore, since the applicant was not entitled to a stay of removal because the basis of approval of the stay had already been adjudicated, the stay of removal was void. On December 22, 1995, the approval of the Form I-140 was forwarded by the National Visa Center to the U.S. Consulate in Honduras. On November 10, 1998, the applicant filed the Form I-212. On July 27, 2001, the applicant resubmitted the Form I-212. 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). 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 order to remain in the United States and reside with his U.S. citizen children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the Form I-212 accordingly. *See Director's Decision* dated February 13, 2006.

On appeal, counsel contends that the director failed to consider all the relevant factors because the applicant had established that the favorable factors in his case outweighed the unfavorable factors and favorable discretion was warranted. *See Form I-290B,* dated March 9, 2006. On March 13, 2007, the AAO informed counsel that he had five days in which to resubmit any documentation he had previously provided in support of the appeal. On March 13, 2007, counsel informed the AAO that he had not submitted a brief or documentation in support of the appeal. Accordingly, the record is complete. The entire record was reviewed in rendering a decision in this case.

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 . . .

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 and, when granted voluntary departure, failed to voluntarily depart the United States. The voluntary departure became a final order of removal with which the applicant failed to comply. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and must receive permission to reapply for admission.

The record reflects that on September 3, 1999, the applicant was granted Temporary Protected Status (TPS) as a Honduran national. The applicant's TPS has been extended on a yearly basis until July 5, 2006. On April 14, 2006, the applicant filed an extension of his TPS, which is currently pending. The record reflects that the applicant has a 17-year old daughter and an 11-year old son who are both U.S. citizens by birth. The record reflects that the applicant has an adult sister who is a native and citizen of Honduras who became a lawful permanent resident in 1989. Finally, the record reflects that the applicant has been consistently employed and paid taxes in the United States.

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 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 AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are to be accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The AAO notes that the birth of the applicant's children, adjustment of the applicant's sister's status to that of a lawful permanent resident and approval of the Form I-140 occurred after the applicant was placed into immigration proceedings. Accordingly, these favorable factors are "after-acquired equities" and the AAO accords them diminished weight. However, the AAO finds that the director failed to consider the applicant's U.S. citizen children, lawful permanent resident sister, an approved Form I-140, the absence of any criminal record since entering the United States, the fact that he has filed tax returns as required by law and the hardship to the applicant and his family if they were to return to Honduras, a country determined by the U.S. government to warrant TPS.

The AAO finds that the unfavorable factors in this case include the applicant's initial unlawful entry into the United States, extended unauthorized residence and employment in the United States, failure to depart the United States under an order of voluntary departure and non-compliance with an order of removal.

While the applicant's initial unlawful entry into the United states, extended unauthorized residence and employment in the United States, failure to depart the United States under an order of voluntary departure and non-compliance with an order of removal cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the

unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.