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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

H4

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Honduras who, in 1982, entered the United States without inspection in the company of his family. On September 5, 1984, the applicant and his family were ordered removed from the United States after being denied asylum and were granted voluntary departure until October 5, 1984. The Board of Immigration Appeals (BIA) dismissed a subsequent appeal on February 12, 1990. When the applicant failed to voluntarily depart the United States, a warrant of deportation was issued in his name on June 25, 1990. On February 21, 1991, the Ninth Circuit Court of Appeals dismissed a petition for review of the BIA decision. The family's motion to reopen their removal proceedings was denied by the BIA on August 17, 1993. The record indicates that the applicant has remained in the United States since his entry in 1982.

The applicant is married to a U.S. citizen and has, at least, one U.S. citizen child. He is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed by his spouse in December 2005. On May 8, 2006, the applicant filed the Form I-212 in relation to his inadmissibility under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks advance 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) prior to departing the United States for consular processing of an immigrant visa based on the approved Form I-130, Petition for Alien Relative, filed by his U.S. citizen spouse

The director concluded that the applicant was inadmissible to the United States pursuant to sections 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without inspection and 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii) as an alien who has been ordered removed and is seeking admission to the United States. The director also determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, accordingly. *See Director's Decision* dated September 29, 2006.

On appeal, counsel contends that the director did not properly balance the social and humane considerations presented in the applicant's favor and failed to give full weight to the circumstances in which the applicant unlawfully entered the United States and was ordered removed. Counsel submits a brief, dated October 24, 2006, and additional documentation, including proof that the applicant's spouse is pregnant with their second child, country conditions information on Honduras, a letter of support from the applicant's mother and court records related to the applicant's March 2004 arrest in California on charges of forgery, driving without a license and driving while under the influence of alcohol/drugs.

The AAO notes that the applicant may also be inadmissible to the United States under section 212(a)(2)(A)(ii)(I) as an alien who has committed a crime involving moral turpitude, and, once he departs the United States for the consular processing of his immigrant visa petition, under section 212(a)(9)(B)(i)(II) as an alien who has been unlawfully present in the United States for one year or more and seeks admission within ten years of his departure. However, in this proceeding, the only issue before the AAO is whether the applicant is eligible for the section 212(a)(9)(A)(iii) exception to the ground of inadmissibility set forth in section 212(a)(9)(A)(iii).

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

- (9) Aliens previously removed
(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 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 aliens 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.

In support of the application for permission to reapply for admission to the United States, the record contains counsel's briefs, dated April 27, 2006 and October 24, 2006; counsel's July 18, 2007 response to the AAO's request for additional evidence; an April 10, 2006 statement from the applicant's spouse, [REDACTED]; [REDACTED]; notarized letters of support from the applicant's mother, sister and father-in-law; materials from the *CIA World Factbook*, World Bank and U.S. Bureau of Labor Statistics related to Honduras; a statement and sonograms from the Department of Obstetrics-Gynecology, Medical Group, Southern California Permanente, Kaiser Permanente that establish [REDACTED] is pregnant with the applicant's second child; and proof of the applicant's employment with Office Depot.

[REDACTED] states that if the applicant is not allowed to remain in the United States, she would not be able to support their household and that it would be devastating for her to watch their daughter grow up without her father. She also asserts that she does not have the finances available to visit the applicant in Honduras and that she would be concerned about her and her daughter's safety in Honduras because of the crime and economic conditions.

In her letter, the applicant's mother contends that it would be unfair to return him to Honduras, a country where he has never lived. She asks that the applicant not be blamed for his unlawful residence as "the ones to really blame in all this are us, his parents, because we decided for him when he was a baby to bring him here without thinking about the consequences." The applicant's sister reiterates her mother's statements, asserting that her brother does not have anyone in Honduras to turn to and begin a new life, and that he is not familiar with Honduras and would have a hard time adjusting to life there. She also states that her sister-in-law would be unable to support their household without the applicant's help. The applicant's father-in-law attests to the

applicant's devotion to his daughter and granddaughter, indicating that his daughter would suffer financially and emotionally if the applicant were removed to Honduras.

The record also contains evidence of a criminal record, which indicates that, on June 22, 2004, the applicant was charged with one count of forgery of seal and handwriting under section 470(b) of the California Penal Code (PC), a misdemeanor pursuant to PC section 17(b)(4); one count of giving false information to a peace officer in violation of PC section 148.9(a); one count of driving under the influence of alcohol/drugs in violation of section 23152(a) of the California Vehicle Code (VC); one count of driving while having a measurable blood alcohol in violation of VC section 23152(b); and one count for unlawfully driving a motor vehicle without a license under VC section 12500(a). On July 21, 2004, the applicant pled guilty to the charges under PC section 470(b) for which he was sentenced to three years summary probation and fined \$200, and [REDACTED] for which he received five years probation and a fine of \$1,700. See *Charge Summary, Plea of Guilty/No Contest-Misdemeanor and Misdemeanor-Traffic Judgment Minutes, Superior Court of California, County of San Diego*, dated June 22, 2004 and July 21, 2004

Based on his criminal record, the applicant appears inadmissible to the United States under section 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude. In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) the Board of Immigration Appeals (BIA) held that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

The fact that the applicant's violation of Section 470(b) of the California Penal Code is a misdemeanor pursuant to California PC section 17(b)(4)¹ is not relevant to the determination of moral turpitude. Neither the seriousness of a criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime involving moral turpitude, the statute in question must involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979).

In the present case, the applicant was convicted of forgery under California PC section 470(b), which states that: "Every person who, with the *intent to defraud*, [emphasis added], counterfeits or forges the seal or handwriting of another is guilty of forgery." In that the applicant pled guilty to a crime where intent is

¹ Section 17(b)(4) of the California Penal Code establishes that one of the circumstances where a crime punishable by imprisonment in state prison or by a fine or imprisonment in the county jail shall be considered a misdemeanor is when a prosecuting attorney files a complaint specifying an offense as a misdemeanor in a court having jurisdiction over misdemeanor offenses.

required for conviction, the AAO finds him to have been convicted of a crime involving moral turpitude and to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. To seek a waiver of his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, the applicant will have to submit the Form I-601, Application for Waiver of Ground of Excludability, at the time he applies for his immigrant visa outside the United States.

On appeal, counsel contends that, despite his forgery conviction, the applicant is eligible for the petty offense exception pursuant to section 212(a)(2)(A)(ii)(II) as he was not sentenced to any term of imprisonment. While the AAO notes counsel's claim, the applicant's eligibility for the petty offense exception is appropriately considered at the time he submits the Form I-601 in support of his visa application.

The AAO now turns to the consideration of the Form I-212 filed by the applicant and its assessment of the positive and negative factors in the record.

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..

The unfavorable factors in this case are the applicant's failure to comply with the 1990 removal order issued to him; his years of unlawful residence and employment in the United States; his convictions under California state law in 2004 and his resulting inadmissibility to the United States under section 212(a)(2)(A)(i)(I).

The favorable equities in the case are the applicant's U.S. citizen wife and U.S. citizen child; the approved Form I-130 benefiting him; the absence of any criminal convictions beyond the misdemeanor convictions previously discussed; the applicant's life-long ties to the United States; and the circumstances surrounding the applicant's unlawful entry into the United States and his failure to depart the United States in 1984 under a grant of voluntary departure or in 1990 following the issuance of a warrant of deportation.

While the AAO acknowledges the applicant's U.S. citizen wife and child, and the Form I-130 benefiting him as positive factors in the present case, it finds these equities to be of minimal weight in its consideration of the Form I-212 filed by the applicant. The court held in *Garcia-Lopez 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 and [REDACTED] were married nearly 15 years after the issuance of the warrant of deportation for the applicant's family and the applicant does not claim that he and [REDACTED] were unaware that the applicant was subject to removal at the time of their marriage.

Accordingly, [REDACTED] the applicant's child and the Form I-130 benefiting him are after-acquired equities and will be accorded less weight in the AAO's assessment of the favorable equities in the present case.

The AAO concludes, however, that the circumstances under which the applicant illegally entered the United States and under which he remained in the United States, ignoring a 1984 grant of voluntary departure and a 1990 warrant of deportation, should be accorded considerable weight in assessing the favorable equities in this matter. The AAO notes counsel's contention that the applicant's unlawful entry and residence in the United States did not result from the applicant's willful intent to violate U.S. immigration law. It further acknowledges the statement submitted by the applicant's mother in which she assumes the blame for bringing the applicant to the United States "without thinking about the consequences."

The record establishes that the applicant entered the United States without inspection in the company of his parents when he was less than one year old. When he failed to depart the United States voluntarily in 1984, he was only two years old and he was only eight years of age when the warrant of deportation was issued by the legacy Immigration and Naturalization Service. Therefore, responsibility for the applicant's failure to comply with U.S. immigration law lies with his parents, not with the applicant who did not turn 21 years of age until 2003.

The applicant has now resided in the United States for virtually all of his 25 years as a result of the choices made for him by his parents. He has never lived in Honduras, his country of birth and citizenship, and based on the letter of support from the applicant's sister, he has no family there. He has life-long ties to the United States and none to Honduras. Culturally and emotionally, the United States is the applicant's home.

Although the applicant's unlawful entry and residence in the United States cannot be condoned, the AAO finds that given the unique circumstances of the present case, the applicant has established that the favorable factors in this matter 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here the applicant has met that burden.

ORDER: The appeal is sustained. The application is approved.