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[REDACTED]

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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 30 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 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 the Philippines who, on February 17, 1994, applied for admission to the United States at the Los Angeles International Airport. The applicant presented a B-1/B-2 U.S. nonimmigrant visa. Immigration officers determined that the applicant had been residing in the United States since 1992 and was an intending immigrant. The applicant was found inadmissible as an intending immigrant and was placed into proceedings. On January 17, 1995, the immigration judge permitted the applicant to withdraw her application for admission with an alternate order of removal if she did not depart the United States by March 3, 1995. On June 28, 1995, immigration officers determined that the applicant had failed to leave the United States by March 3, 1995, thereby changing the immigration judge's grant of withdrawal to an order of removal. On October 11, 1995, immigration officers apprehended the applicant in Los Angeles, California. The applicant testified that she had left the United States and returned without inspection on March 17, 1995. On October 11, 1995, the applicant was placed into proceedings. On April 30, 1996, the immigration judge granted the applicant voluntary departure until October 30, 1996. On October 21, 1996, the applicant filed a motion to reopen with the immigration judge. The applicant failed to surrender for removal or depart from the United States, thereby changing the grant of voluntary departure to a final order of removal. On November 14, 1996, the immigration judge denied the applicant's motion to reopen. The applicant appealed the immigration judge's denial of the motion to reopen to the Board of Immigration Appeals (BIA). On May 22, 1997, the applicant was convicted of theft in violation of section 484(a) of the California Penal Code (CPC). The applicant was sentenced to three years of probation and one day in jail. On September 23, 1997, the applicant married her spouse, [REDACTED]. On October 29, 1998, a warrant was issued for the applicant's removal. On December 17, 1998, the BIA dismissed the applicant's appeal of the denial of the motion to reopen. On September 24, 1997, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by [REDACTED]. On April 9, 1999, [REDACTED] filed a second Form I-130, which was approved on September 23, 1999. On June 30, 2000, the applicant filed 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) and she 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 her U.S. citizen spouse and children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated December 8, 2003.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(A) of the Act and that, alternatively, she warrants a favorable exercise of discretion. *See Counsel's Brief*, dated October 28, 2004. In support of her contentions, counsel submits only the referenced brief. 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 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.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act because the warrant of removal was issued in error and the applicant voluntarily departed within the proscribed time frame of the voluntary departure order. The record reflects that the applicant departed the United States and returned to the Philippines without reporting to immigration officers on March 14, 1999. The record reflects that, on November 7, 1996, the immigration judge granted the applicant a stay of removal while a decision on the motion to reopen proceedings was pending. Pursuant to 8 C.F.R. § 1003.6 an order of removal could not be *executed* while an appeal of the denial of the motion reopen was pending before the BIA because the immigration judge had granted a stay of removal. However, the regulations do not prevent immigration officers from issuing a warrant of removal. The applicant's stay of removal merely prevented the execution of the warrant until the appeal was dismissed on December 17, 1998.

Counsel contends that the stay of removal also extended the applicant's order of voluntary departure, which would extend for a period of six months past the dismissal of the appeal to correspond with the immigration judge's original grant of voluntary departure. However, a stay of removal does not extend an order of voluntary departure. Only the district director may extend an order of voluntary departure. 8 C.F.R. § 240.26(f). The record reflects that the applicant did not apply for and the district director did not grant an extension of voluntary departure. Alternatively, the immigration judge or BIA may reinstate voluntary departure in a reopened removal proceeding or the BIA may reinstate voluntary departure that expires during the course of an administrative appeal. See 8 C.F.R. § 240.26(h). The record of proceedings does not reflect that in either the applicant's motion to reopen or appeal of the denial of the motion to reopen, the immigration judge or the BIA ordered a reinstatement of the applicant's voluntary departure. See *Immigration Judge's Decision*, dated November 14, 1996; *BIA's decision*, dated December 17, 1998. By departing the United States after the grant of voluntary departure had expired and become an order of removal, the applicant departed the United States while an order of removal was outstanding. See 8 C.F.R. §

241.7. As discussed below, since the applicant's self-removal she has made at least one entry into the United States by fraud and is currently residing in the United States. 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 native of the Philippines who became a naturalized U.S. citizen in 1980. The applicant and [REDACTED] have an eight-year old son who is a U.S. citizen by birth. The AAO notes that counsel indicates that the applicant has given birth to a second child while in the Philippines. However, the record contains no evidence to establish the birth of this child. The applicant's mother is a native and citizen of the Philippines who became a lawful permanent resident in 1999. The applicant's father is a native of the Philippines who became a lawful permanent resident in 1999 and a naturalized U.S. citizen in 2005. The applicant is in her 30's and [REDACTED] is in his 40's.

On appeal, counsel asserts that the applicant was only 18-years old when she was placed into proceedings in 1995 and conceded removability based on the advice of her first attorney. Counsel asserts that the attorney failed to inform the applicant of the consequences of conceding removability and she obtained the services of a second attorney who filed a motion to reopen with the immigration judge. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record reflects that the immigration judge found that the applicant had failed to meet any of the requirements listed above upon filing the motion to reopen. The AAO also finds that, on appeal, the record does not contain any evidence that responds to any of the listed requirements.

On appeal, counsel asserts that the applicant warrants a favorable exercise of discretion because her husband, children, parents and in-laws all reside in the United States. He asserts that the applicant attended school and graduated from high school in the United States. He asserts that [REDACTED] has described the hardships that he and their first child have suffered due to separation from the applicant. He asserts that [REDACTED] was unable to join the applicant in the Philippines because his son was diagnosed with asthma and had to seek medical care in the Philippines. He asserts that the child's symptoms disappeared upon returning to the United States. He asserts that [REDACTED] is unwilling to risk the health of his son by moving to the Philippines. Counsel asserts that the applicant was a young woman whose "friends" hid items that they had shop-lifted in her bag which resulted in her theft conviction.

The applicant, in her statement, indicates that, in 2003, she was a student in good standing at the American Career College, studying to become a nurse. She states that she believes she can be an asset to the United States and the community because she is a compassionate person who wants to be a member of the health care profession. She incorrectly states that she has never been charged with an offense, felony or misdemeanor. She states that she was married twice before when she was young and idealistic. She states that it did not take long for the two of them to realize the marriage was a mistake and agree to divorce. She

states that she is the mother of two beautiful sons and that motherhood has matured her tremendously. She states that she wants to give her children the kind of life she did not have when she was living in the Philippines.

in his statement, indicates that, in 2000, his son missed the applicant very much. He states that his son had to return to the United States because he developed pneumonia and asthma while in the Philippines. He states that his son is taking medication and breathing treatment for his condition. He states that the hardship he and his son suffer is affecting his business. He states that he owns a restaurant and works part-time for Continental Airlines. He states that it would be difficult for him to leave the United States for a long period of time because he has financial responsibilities and his expenses are much greater because he has to pay for a babysitter, extra help for his restaurant, higher telephone bills and traveling expenses to visit his wife. He states that living with the pressure he has everyday without his wife and rearing his son alone is a difficult task. He states that their home is the United States and he feels that his family should be together.

Counsel asserts that the director's decision focused wholly on the applicant's misdemeanor conviction for theft and that the criticism does not render her inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), because it qualifies for treatment under the misdemeanor exception rule. *See* Section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Counsel also contends that the applicant's moral character should not be judged by her single conviction for theft and that her moral character to this point is beyond reproach. However, the record does not support counsel's claims.

The AAO does not find that the director's decision focused solely on the applicant's conviction for theft. Instead the director stated that he found insufficient positive factors in the evidence submitted with the Form I-212 and Citizenship and Immigration Services' (CIS) records to warrant a favorable exercise of discretion. The AAO notes that the records referenced by the director indicate that in 1995 the applicant filed a Form I-485 simultaneously with a Form I-130 filed on her behalf by . The Biographical Information Sheet (Form G-325) executed by the applicant indicated that she had not been previously married. *See* Form G-325, dated December 14, 1995. The record reflects that the applicant was married to on July 24, 1994. The applicant then married on April 1, 1997, while she was still married to . The applicant divorced on April 16, 1997 and on September 9, 1997. The record also reflects that, on February 7, 1996, filed a letter withdrawing the Form I-130 that he had filed on behalf of the applicant because he had discovered she was still married to another man. He also stated that he and the applicant had never lived together as husband and wife and that the applicant had married him for the sole purpose of obtaining immigration benefits. The record reflects that the applicant obtained a nonimmigrant visa on June 4, 2001, stating on the Application for Nonimmigrant Visa (Form OF-156), that she had not previously applied for a nonimmigrant visa. However, the record reflects that the applicant was previously issued B-1/B-2 nonimmigrant visas and was denied a visa at the U.S. Consulate in Ciudad Juarez, Mexico. The applicant entered the United States with this visa on May 13, 2002. The record reflects that, on August 21, 2005, the applicant filed a second Form I-485 indicating she was residing in the United States. Therefore, while the applicant's criminal record in the United States is minor, she has repeatedly provided false information in order to obtain immigration benefits, undermining counsel's claims regarding her moral character. Moreover, these actions may render the applicant inadmissible to the United States pursuant to section

212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), as an alien who attempted to obtain immigration benefits and obtained a visa by fraud.

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. *Supra*.

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 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, lawful permanent resident mother, U.S. citizen father, the general hardship to the family members, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's extended unauthorized presence in the United States, her marriage to two men at the same time, her failure to comply with an order of voluntary departure, her failure to comply with an order of removal until March 14, 1999, her fraudulent reentry into the United States using a nonimmigrant visa after having been removed, her conviction for theft and her multiple misrepresentations in filing for immigration benefits.

The applicant in the instant case has multiple immigration violations and a criminal conviction. The AAO finds that the applicant's marriage, birth of her children, her parents' adjustment of status to that of lawful permanent residents, her father's naturalization and approval of the immigrant visa petition benefiting her occurred after the applicant was placed into proceedings. The AAO finds these factors to be "after-acquired equities" and therefore accords them 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.

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