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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: **AUG 05 2008**

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) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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 after removal was denied by the 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 Honduras who entered the United States without inspection in April 1997, was ordered removed on June 9, 2005 and was removed from the United States on July 28, 2005. As such, the applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I). The applicant now 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 reside in the United States.

The director determined that the applicant's unfavorable factors outweigh his favorable ones and he denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Director's Decision*, dated June 6, 2007.

On appeal, counsel asserts that the director abused his discretion in weighing the applicant's positive factors against the negative factors. *Form I-290B*, received July 9, 2007.

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

(A) Certain alien 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

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.

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principle that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c), waiver of deportation, discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

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 case include the applicant's U.S. citizen spouse, two U.S. citizen children, approved I-130 Petition, payment of income taxes, and hardship to the applicant and his family based on the applicant's spouse's statement and difficult conditions in Honduras (as evidenced by its inclusion on the list of countries whose nationals receive Temporary Protected Status).

The AAO finds that the unfavorable factors in this case include the applicant's entry without inspection, his October 8, 1998 conviction for contributing to the delinquency of a minor (VA Code. Ann. § 18.2-371), his May 5, 2004 conviction for assault and battery (VA Code. Ann. § 18.2-57), inadmissibility under section 212(a)(9)(B)(i)(II) of the Act for over one year of unlawful presence and subsequent departure from the United States, and inadmissibility under section 212(a)(2)(A)(i)(I) for conviction of a crime involving moral turpitude and periods of unauthorized employment.¹

¹ Counsel contends on appeal that the applicant's conviction of simple assault is not a crime involving moral turpitude. The AAO notes that the applicant's indictment, which is part of the record of conviction, reflects that the victim was a child between the ages of 13 and 15 and there was serious injury in the form of carnal knowledge. As a general rule,

The applicant's actions in this matter cannot be condoned. 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 that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has not established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

simple assault or battery is not deemed to involve moral turpitude for purposes of immigration law, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involves some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). As such, the AAO finds that the applicant was convicted of a crime involving moral turpitude (assault and battery under VA Code. Ann. § 18.2-57) and is therefore inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.