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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CHICAGO, IL Date: DEC 02 2008
RELATES)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Field Office Director, Chicago, Illinois 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, on October 23, 1981, was admitted to the United States as a B-2 nonimmigrant visitor. The applicant remained in the United States after his nonimmigrant status expired on November 2, 1981. On July 12, 1983, the applicant was placed into immigration proceedings. On August 9, 1983, the immigration judge granted the applicant voluntary departure until November 9, 1983. 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 23, 1983, a warrant for the applicant's removal was issued. On February 27, 1984, the applicant married [redacted]), a U.S. citizen. On November 9, 1984, the applicant filed a Form I-212. On February 20, 1985, the Form I-212 was denied. In 1985, the applicant separated from [redacted]. In February 1986 the applicant departed the United States while an order of removal was outstanding. On March 4, 1986, the applicant reentered the United States by presenting the B-2 nonimmigrant visa he had obtained prior to his original entry in 1981. On February 7, 2001, the applicant was convicted of driving under the influence and was conditionally discharged on April 29, 2002. On January 1, 2002, the applicant was convicted of driving under the influence and was conditionally discharged on October 1, 2003. On May 6, 2003, the applicant divorced [redacted]. On October 19, 2004, the applicant married his current spouse, [redacted]), a naturalized U.S. citizen. On February 18, 2005, 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 on his behalf by [redacted]. On the same day, the applicant filed a second Form I-212. On September 25, 2006, the Form I-130 was approved. The applicant is inadmissible 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 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 with his U.S. citizen spouse and three stepchildren.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision* dated September 7, 2007.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief,* dated November 1, 2007. In support of his contentions, counsel submits the referenced brief, affidavits from the applicant, [redacted], friends and family, and financial documentation. The entire record was reviewed in rendering a decision in this case.

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

> (A) Certain aliens previously removed.-
>
> (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years 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.
>
> (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 on a 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that [redacted] is a native of Mexico who became a lawful permanent resident in 1973 and a naturalized U.S. citizen in 2002. The applicant and [redacted] do not have any children together. Ms. [redacted] has a 31-year old daughter from her prior marriage who is a native of Mexico who became a lawful permanent resident in 1977 and a naturalized U.S. citizen in 2007. [redacted] has a 22-year old son, from her prior marriage who is a U.S. citizen by birth. While [redacted] states that she has a 35-year old son, from her prior marriage who resides in the United States, there is no evidence to establish that he has any status in the United States. The applicant is in his 40's and [redacted] is in her 50's.

The AAO notes that the field office director incorrectly referred to "extreme hardship" in his decision. "Extreme hardship" is not a requirement in establishing that an exercise of discretion is warranted in adjudicating the Form I-212. Any type of hardship suffered by the applicant or his family members is a factor, which should be considered in exercising discretion.

On appeal, counsel contends that the field office director erred in finding the applicant lacked good moral character. He asserts that the applicant has only violated immigration laws and his convictions for driving under the influence occurred more than five years ago. He asserts that, even though the applicant was arrested and charged with domestic battery in 2001, he was not found guilty of the charge. He asserts that the field office director also failed to acknowledge the applicant's reformation and rehabilitation. He asserts that there is no evidence to establish that the applicant would not be able to integrate into society. The AAO finds that the field office director erred in finding that the applicant lacked good moral character and notes that there is some evidence of rehabilitation. However, the applicant's convictions are still factors to be considered in exercising discretion.

On appeal, counsel contends that the field office director erred in failing to consider that the applicant's removal order occurred more than 24-years ago. The AAO finds counsels contention to be unpersuasive. While the applicant's removal occurred many years ago, the applicant deliberately remained in the United States and even reentered the United States after having been ordered removed, despite knowing that he required permission to reapply for admission. The applicant obtained advantages over other aliens who complied with their removal orders. The applicant was unlawfully present and was employed without authorization in the United States. The AAO finds that the period of time that has passed since an applicant's removal should be considered a positive factor when an applicant remained *outside* the United States. The AAO finds that, while the applicant departed the United States while an order of removal was outstanding

more than 20-years ago, the applicant's illegal presence and employment in the United States after his removal are negative factors to be considered in exercising discretion.

The AAO now turns to a consideration of positive and adverse factors in the present case.

Counsel asserts that the field office director erred in failing to acknowledge the applicant's unique family circumstances. He asserts that [redacted] had a long, abusive marriage to her first husband and eventually raised her three children as a single mother after her husband abandoned her. He asserts that [redacted] decided to marry the applicant only after much thought and consideration. He asserts that [redacted] is very happy and has fulfilled her need for a personal relationship with the applicant. He asserts that the applicant has given [redacted] the emotional stability for which she has yearned. He asserts that the applicant has become a very important part of [redacted]'s family. He asserts that the applicant does not have an extensive criminal record. He asserts that the applicant is a man who devotes his life to his family and that he and Ms. [redacted] have been taxpayers for many years. He asserts that the applicant is loved by [redacted] family and is a man who gives his time to those in need. He asserts that the applicant has worked hard and supported his family in the United States. He asserts that [redacted]'s children are extremely important to her. He asserts that [redacted]'s two oldest children live very close to her and her youngest child still resides at home with her and the applicant. He asserts that [redacted]'s lawful permanent resident mother resides with her for half of the year and visits her sibling in Texas for the other half of the year. He asserts that mother is dependent on for financial and emotional support.

Counsel asserts that if the applicant were denied admission it would put [redacted] in an untenable situation. He asserts that the possibility of separation from the applicant has already taken its toll on [redacted]. He asserts that [redacted] has recently asked her doctor to prescribe medication for nerves and sleep disturbance. He asserts that [redacted] does not want to be without her husband, but she also does not want to abandon her family, business and life in the United States. He asserts that the entire family will be affected if the applicant were denied admission. He asserts that [redacted]'s children grew up without a father and relied on for everything. He asserts that [redacted] could not imagine living far away from her children and would feel as if she were abandoning them if she accompanied the applicant to Mexico.

[redacted], in her affidavits, states that she has lived in the United States since 1974. She states that she wants the applicant to remain with her in the United States. She states that they have known each other and been friends since 1999. She states that since they were married she has been a very happy and different person and they do everything together. She states that the applicant is a very special person who is good to her and her family. She states that the applicant gets along well with everyone in her family. She states that it is very hard to find a good husband. She states that the applicant will be a good citizen. She states that if the applicant had to return to Mexico she would be most unhappy. She states that since the applicant's Form I-212 was denied she has been very sad and had to ask her doctor to give her medicine for her nerves and inability to sleep. She states that she is very close to her family. She states that her two oldest children live near her and her youngest child resides with her and the applicant. She states that her lawful permanent resident mother resides with her during the spring and summer and then lives with her sibling in Texas for the rest of the year. She states that all of her siblings live in the United States. She states that she has grandchildren who reside in the United States. She states that this is the second marriage for both her and the applicant and both of them really considered things carefully before entering into their marriage. She states that her first marriage was to a man who was unfaithful, beat her and then abandoned her and the children. She states that the applicant is great to her, her children and extended family and has become a very important part of her family. She states that she cannot imagine living without the applicant. She states that she cannot

imagine moving to Mexico as her whole life is in the United States. She states that her family and business are in the United States and she no longer has a life in Mexico. She states that living in another country would be horrible.

The applicant, in his affidavits, states that he has been in the United States for 26 years and has always worked hard. He states that he is very happy to have found [redacted]. He states that he and [redacted] have known each other since 1999. He states that he and [redacted] considered their marriage very carefully due their prior marriages being difficult. He states that he is the happiest he has ever been and has promised Ms. [redacted] that they will always be together. He states that [redacted] is good for and to him and he will be broken if he has to return to Mexico. He states that they go to church together and go to dinner with Ms. [redacted] family. He states that the family belongs together. He states that [redacted]'s two oldest children live nearby and her youngest child lives with them. He states that [redacted] is very close to her children. He states that [redacted]'s lawful permanent resident mother resides with them during the spring and summer and then lives with one of [redacted]'s siblings in Texas the rest of the year. He states that [redacted] siblings all reside in the United States. He states that [redacted] would suffer a great deal if he was not allowed to remain in the United States and they had to live separately. He states that it would be extremely difficult for [redacted] to leave the United States. He states that [redacted] has been in the United States for many years and owns her own business, a grocery store. He states that [redacted] no longer has anything in Mexico.

The applicant's stepchildren, in their affidavits, state that [redacted] is a different and happy person since she married the applicant. They state that they are a better family with the applicant. They state that they do everything together as a family. They state that the applicant is a very good person and always helps them. They state that their mother will be lost without the applicant. They state that the applicant is a very hard-working, responsible, honest and loving man. They state that the applicant will not be a burden on the United States because their family is in good financial standing and will support him.

[redacted]'s mother, in her affidavits, states that [redacted]'s prior husband sexually and mentally abused [redacted]. She states that her daughter lived a very sad life with her prior husband. She states that, after many years of sadness and loneliness [redacted] met the applicant. She states that her daughter is a different and happy person since she married the applicant. She states that she is glad [redacted] has found the right man who is very kind to all of them. She states that the applicant takes her to church, the doctor and to the store. She states that they go out to dinner together as a family. She states that [redacted] and the applicant are happy together and are always affectionate. She states that the applicant is a good husband and the most important part of a marriage is being together. She states that the applicant helps [redacted] in the grocery store that they have. She states that the applicant is always there when [redacted] needs him. She states that [redacted] would suffer and be devastated by a separation from the applicant.

Affidavits from other family and friends state that [redacted] has been very happy since her marriage to the applicant. They state that the applicant is a good person and he and [redacted] deserve to be together. They state that it is very hard to find a good husband. They state that the applicant is an honest, hard-working man, with good moral character. They state that the applicant is a serious, responsible, dependable and helpful man. They state that the applicant helps [redacted] with everything in the store, house and with the family. They state that [redacted]'s family likes the applicant a lot. They state that it would be very upsetting to see them separated from one another. They state that the family is in good economical standing and will not permit the applicant to become a burden on the United States.

A letter from [redacted], of the Maryville Our Lady of Guadalupe Chapel, states that the applicant has worshipped with the community since July 1998. He states that the applicant helps the church with whatever he is able and his faith has enriched the community. He states that the applicant has given donations to the church. A letter from [redacted] states that the applicant is a good person and that he and his wife should be together. She states that she runs a thrift store and that the applicant helps her with paperwork and other tasks when she calls on him, approximately one or two times per month.

Country conditions reports in the record establish that Mexico's Gross National Income (GNI) per capita in 2006 was $7,870, while the United States GNI for 2006 was $44,970. *See World Development Indicators Database, World Bank,* dated September 14, 2007.

Tax records reflect that the applicant filed tax returns from 2004 through 2006. The record reflects that the applicant has been employed in the United States from 1981 until the present. The applicant was issued employment authorization in the United States from June 1, 2006, until June 2, 2009.

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for entering the United States by fraud on March 4, 1986, by presenting his nonimmigrant visa for admission while he had immigrant intent and without obtaining permission to reapply for admission. The applicant's affidavit, dated August 23, 2005, clearly reflects that the applicant was returning to a permanent residence and employment in the United States. Furthermore, the record reflects that the applicant was aware that he was required to obtain permission to reapply for admission prior to his readmission to the United States, as reflected by his filing of the first Form I-212, and that, despite receiving a denial of the Form I-212, the applicant reentered the United States utilizing a nonimmigrant visa which was, under the Act, invalid due to his prior overstay and removal order. In order to seek a waiver of inadmissibility under section 212(i) of the Act, an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).

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

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, his two U.S. citizen stepchildren, the general hardship to his family if he were denied admission to the United States, his clear background since 2002, his payment of taxes and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, his legal relationship to his stepchildren and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original overstay of his nonimmigrant visa; his failure to comply with an order of voluntary departure; his failure to comply with an order of removal until February 1986; his fraudulent entry into the United states in 1986 after having been removed; his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; his two driving under the influence convictions; his extended unlawful presence in the United States; and his unauthorized employment in the United States except for employment since June 1, 2006.

The applicant in the instant case has multiple immigration violations and criminal convictions. The totality of the evidence demonstrates 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 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.