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

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H4

[REDACTED]

FILE:

Office: VERMONT SERVICE CENTER

Date:

DEC 22 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)(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 Director, Vermont 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 Peru who, on June 18, 1992, appeared at the New Orleans International Airport. The applicant presented an altered Peruvian passport bearing the name "[REDACTED]" On June 19, 1992, the applicant was placed into immigration proceedings. On October 6, 1992, the applicant pled guilty to and was convicted of willful use of an altered passport in violation of 18 U.S.C. § 1543. The applicant was sentenced to three years of probation. A condition of the applicant's sentencing was that she could not enter the United States without prior permission by the Attorney General. On October 7, 1992, the immigration judge ordered the applicant removed. On October 9, 1992, the applicant was removed from the United States and returned to Peru. On December 19, 1997, the applicant's mother, [REDACTED], filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, as the unmarried daughter of a lawful permanent resident, which was approved on March 26, 1998. On October 5, 2001, [REDACTED] became a naturalized U.S. citizen. On January 28, 2002, the applicant filed a Form I-212. On October 15, 2003, the Form I-212 was denied. On November 17, 2003, the applicant filed an appeal of the denial of the Form I-212 with this office. On September 23, 2004, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On January 30, 2006, the applicant withdrew the appeal. On February 21, 2006, the applicant filed a second Form I-212. In her affidavit, the applicant testified that she reentered the United States without inspection in 1994. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 reside in the United States with her U.S. citizen mother, three U.S. citizen children, and three U.S. citizen siblings.

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 May 15, 2007.

On appeal, counsel contends that the director erred in finding few favorable factors in the applicant's case. Counsel also contends that the director erred in finding certain unfavorable factors in the applicant's case. *See Counsel's Brief*, dated July 12, 2007. In support of her contentions, counsel submits the referenced brief, a police clearance letter, and copies of documentation previously provided. 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 Peru who became a lawful permanent resident in 1996 and a naturalized U.S. citizen in 2001. The applicant's father, [REDACTED], is a native and citizen of Peru who became a lawful permanent resident in 1996. The applicant has a 16-year old daughter, an eleven-year old daughter and a seven-year old daughter who are all U.S. citizens by birth. The applicant has a 41-year old brother, a 39-year old brother and a 32-year old sister who are all natives of Peru who became lawful permanent residents in 1994, November 10, 1992, and 1997, and naturalized U.S. citizens in 1999, 1996 and 2003, respectively. The applicant is in her 40's.

On appeal, counsel contends that the director erred in finding the applicant's unlawful presence, unauthorized employment and entry without inspection to be negative factors to be considered in the applicant's case because these bars to adjustment of status are excused under section 245(i) of the Act. The AAO finds counsel's contentions to be unpersuasive. While section 245(i) of the Act permits an alien who would otherwise be ineligible to adjust status due to unlawful presence, unauthorized employment and entry without inspection, it does not excuse the applicant's actions and does not erase them as negative factors to be considered in determining whether the applicant warrants a favorable exercise of discretion.

On appeal, counsel contends that the director erred in finding the applicant to be an aggravated felon under the Act for illegally reentering the United States after having been removed. The AAO finds that the director correctly stated that an individual who has illegally reentered the United States after having been removed can be found to be an aggravated felon; however, the applicant has not been convicted of this violation and is, therefore, not an aggravated felon.¹

On appeal, counsel contends that the director erred in finding the applicant's failure to report her change of address to be a negative factor. Counsel asserts that the applicant's address has always been with her parents. since her reentry in 1994. However, [REDACTED] states that the applicant resided with the father of her children for a period of thirteen years before moving in with her and [REDACTED]. However, the AAO finds

¹ The AAO notes that the applicant was convicted of an offense in violation of 18 U.S.C. § 1543, an offense, which can render an applicant an aggravated felon. However, the applicant was not sentenced to imprisonment and section 101(a)(43)(P) of the Act requires an alien to have been sentenced to at least 12 months in jail.

that whether the applicant failed to report changes of address should not be considered a factor in exercising discretion.²

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

Counsel contends that the director erred in finding that the applicant's only positive factor was her three U.S. citizen children. Counsel asserts that the applicant's mother and her siblings are naturalized U.S. citizens. Counsel asserts that the applicant's father is a lawful permanent resident. Counsel asserts that the applicant has always worked to support her three U.S. citizen children and has always filed taxes.

The applicant, in her affidavit accompanying the Form I-212, states that she and her children have lived with her parents since she fled a physically abusive relationship with the children's father. She states that the children visit their father on a weekly basis, their father is a changed person and they parent their children together. She states that she works full-time. She states that she returned to the United States without inspection in 1994. She states that she believed she could reenter the United States after one year of being removed. She states that she entered the United States to rejoin her mother who had been caring for her oldest daughter. She states that her mother and children are her life. She states that her mother is her emotional support who encourages her to better herself and work hard. She states that her mother cares for her children while she works and they are a happy family. She states that their lives are free from violence and they care for one another. She states that her mother will suffer emotionally and psychologically and she does not know who would care for her children in the United States if she were denied admission. She states that her children are assimilated to life in the United States. She states that the children attend school and have many goals and dreams, which would be destroyed if she relocated them to Peru. She states that she does not have anyone in Peru and has resided in the United States for more than eleven years. She states that she takes responsibility for using fraudulent documents to attempt to enter the United States and she believes that her punishment was her separation from her family and her daughter after she was removed and prior to her reentry.

[REDACTED], in her affidavit accompanying the Form I-212, states that the applicant is a hardworking person and dedicated mother. She states that the applicant resided with the father of her children for thirteen years until she fled the physically abusive relationship and moved in with her and her husband. She states that the applicant works full-time while she cares for the applicant's children. She states that the applicant pays her to care for the children. She states that she and the applicant are very close and support each other emotionally. She states that they are a happy family whose lives are free of violence. She states that she would suffer emotionally and psychologically if the applicant was not permitted to remain in the United States. She states that she cannot imagine how the applicant's children would suffer if the applicant were forced to return to Peru. She states that there is no family left in Peru.

A letter from [REDACTED], Pastor of the [REDACTED] states that the applicant, in 2006, is a registered parishioner who has been active and financially-contributing member for one year. He states that the applicant is a sincere, genuine individual whom he counts as a positive element of the parish. A letter from [REDACTED], Assistant Pastor, [REDACTED] states that the applicant, in 2002, has been a parishioner of the church for approximately three years.

² The AAO notes, however, that in the case where an applicant asserts that he did not receive notices, his failure to report changes of address does not excuse his failure to comply with those notices that were undeliverable or delivered to an old address.

A letter from [REDACTED], Principal of SS. Cyril and Methodist School, states that the applicant's two oldest children attend the school and are very good students who are happy and wish to remain at the school.

A letter from [REDACTED], ESL Program Director at Capital Community College, dated January 12, 2006, states that the applicant has been a student for more than one year. She states that the applicant is a diligent student determined to improve her English language skills while progressing towards a professional degree. She states that the applicant has a gentle and sincere manner and the character and talent to achieve whatever she sets her mind to.

Counsel asserts that the director erred in finding the applicant had been convicted of fraud. Counsel also asserts that the applicant has consistently volunteered her detention and use of a photo-switched passport. The applicant, in her affidavit, states that she immediately told immigration officers her true name when questioned about the passport. 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 attempting to enter the United States by fraud on June 18, 1992, by presenting an altered/counterfeit passport. The record reflects that the applicant pled guilty to and was convicted of knowingly using or attempting to use a false, forged, counterfeited, mutilated, and altered passport or instrument purported to be a passport, in violation of 18 U.S.C. § 1543. A Forensic Document Laboratory Report states that the applicant presented a passport whose pages 1 through 4 were counterfeit. 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).

A letter from the State of Connecticut's Department of Public Safety, indicates that the applicant does not have a record with the Connecticut State Police Bureau of Identification.

There are no tax records in the record to establish that the applicant has paid taxes. The record reflects that the applicant has been employed in the United States for an extended period of time. The applicant has only been issued work authorization from March 31, 2005, until May 9, 2007.

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 mother, her lawful permanent resident father, her three U.S. citizen children, her three U.S. citizen siblings, the general hardship to her family if she were denied admission to the United States, her clear background since her 1992 conviction, and the approved immigrant visa petition filed on her behalf. The AAO notes that the birth of the applicant's children, the applicant's mothers, fathers and siblings' adjustment of status to that of a lawful permanent residents and naturalizations, 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 attempt to enter the United States by fraud in 1992, her conviction for willful use of an altered passport, her inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; her illegal entry into the United States after having been removed; her violation of her terms of probation by reentering the United States without permission; her continued denial of her hinderance of an official investigation in 1992; her extended unauthorized and unlawful presence in the United States; and her extended unauthorized employment in the United States except for March 31, 2005, until May 9, 2007.

The applicant in the instant case has multiple immigration violations and a criminal conviction. 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 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.