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U.S. Citizenship and Immigration Services

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H4

FILE: [redacted] Office: NEWARK, NJ 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 District Director, Newark, New Jersey 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 Haiti who, on October 22, 1998, filed an Application for Asylum and Withholding of Removal (Form I-589). On December 3, 1998, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On September 13, 1999, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture and ordered her removed. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On March 29, 2002, the BIA dismissed the applicant's appeal. On May 7, 2002, a warrant for the applicant's removal was issued. On July 31, 2004, the applicant married [redacted], a naturalized U.S. citizen. On December 8, 2004, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on May 19, 2006. On June 12, 2006, the applicant filed a motion to reopen with the BIA. On June 14, 2002, the applicant was removed from the United States and returned to Haiti, where she has since resided. On July 20, 2006, the BIA denied the applicant's motion to reopen. On November 20, 2006, the applicant filed the Form I-212. 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 spouse and children.

The district director determined that the applicant did not warrant a favorable exercise of discretion. *See District Director's Decision* dated April 18, 2007.

On appeal, counsel contends that the district director failed to consider all of the applicant's favorable factors. Counsel contends that the district director erred in finding certain unfavorable factors in the applicant's case. Counsel also contends that the positive factors outweigh the negative factors in the applicant's case. *See Attachment to Form I-290B,* dated April 30, 2007. In support of his contentions, counsel submits the referenced attachment, copies of the applicant's expired passport, U.S. visa and Canadian visas, 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.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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 Haiti who became a lawful permanent resident in 1975 and a naturalized U.S. citizen in 1996. The applicant and [redacted] have a nine-year old daughter and a seven-year old daughter who are both U.S. citizens by birth. The applicant is in her 40's and [redacted] is in his 60's.

The AAO notes that the district director erred in implying that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i). The record in this matter establishes that the applicant was removed from the United States on June 14, 2006, and there is no evidence in the record to suggest that she has returned to the United States at any time since her removal or accrual of unlawful presence. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant must have unlawfully reentered the United States or attempted unlawful reentry after she has accrued more than one year of unlawful presence or has been removed from the United States. The AAO, therefore, finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act. However, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

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

On appeal, counsel asserts that the district director failed to consider the applicant's two U.S. citizen children as favorable factors. However, the district director noted the children's U.S. birth certificates in his decision. Counsel asserts that the presence of two U.S. citizen children in the United States is the most favorable factor in the applicant's case. Counsel asserts that the two children have remained in the United States and are being raised without the presence of their mother.

On appeal, counsel asserts that the district director erred in finding that the applicant's case was her entry into the United States without inspection is an unfavorable factor. Counsel asserts that the applicant entered the United States with a visa. In support of his contentions, counsel submits copies of the applicant's expired passport, containing a Canadian visa issued on July 10, 1996, a Canadian visa issued on July 14, 1998, and a U.S. visa issued on July 23, 1998. The U.S. visa indicates that it was issued in Port au Prince, Haiti and entry/exit stamps within the passport indicate that the applicant entered the United States on August, 8, 1998, August 13, 1998, October 6, 1998, November 18, 1998 and March 31, 1999. Entry/exit stamps within the passport also indicate that the applicant entered Canada in July 1998. The record reflects that the applicant testified before an asylum officer on November 28, 1998, that she had last left Haiti on December 26, 1997, by boat, had last entered the United States on January 2, 1998, without inspection, and had not previously traveled to the United States prior to January 2, 1998. The applicant, during this interview, also confirmed that she had not returned to Haiti since entering the United States. The record also reflects that the applicant

testified before an immigration judge on September 13, 1999, that she had last left Haiti on December 26, 1997, by boat, and had entered the United States without inspection on January 2, 1998. The AAO therefore finds that the applicant has provided false testimony in regard to the last time she was physically present in Haiti and her travels to and from the United States and Canada to an asylum officer and before an immigration judge. Furthermore, 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 obtaining a visa by fraud at the U.S. Embassy in Haiti after she purportedly fled Haiti and was unable to return and by entering the United States by fraud on November 18, 1998 and March 31, 1999, by presenting her nonimmigrant visa for admission when the applicant's filing of the Form I-589 indicated that she was unable to return to Haiti. The applicant is also inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for accruing unlawful presence from March 29, 2002, the date on which the BIA dismissed her appeal, and June 14, 2006, the date on which she departed the United States, and seeking admission to the United States within ten years of her last departure. In order to seek a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).

On appeal, counsel asserts that the applicant did not receive notice of her required appearance for removal from the United States because the notice was sent to an address in West Palm Beach, Florida. Counsel asserts that the applicant was residing in New Jersey at the time the notice was issued. Counsel concedes that the burden is upon the applicant to notify the court of any change in address, but asserts that there may be notice contained in the record. The record does not contain a notification of change of address from the applicant. The AAO notes that there was discussion of the applicant's West Palm Beach residence before the immigration judge and, at no time, did the applicant inform the court that she had been residing in New Jersey since prior to the birth of her first daughter in June, 1999. Furthermore, the record reflects that the applicant filed the appeal with the BIA, indicating that her residence was located in West Palm Beach, Florida.

Tax records reflect that the applicant and her spouse have filed joint income tax returns in 2004 and 2005.

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 naturalized U.S. citizen spouse, her two U.S. citizen daughters, the general hardship to her family if she were denied admission to the United States, her payment of federal taxes and the approved immigrant visa petition for alien relative. The AAO notes that the applicant's marriage, the births of her two daughters and the filing of the immigrant visa petition benefiting her occurred after the applicant was placed into immigration proceedings. These factors are "after-acquired equities," which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's false testimony before an asylum officer; the applicant's false testimony before an immigration judge; her entries into the United States by fraud in 1998 and 1999; her inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; her unlawful presence in the United States; and her inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The applicant in the instant case has multiple immigration violations. 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.