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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: HARTFORD, CT

Date:

DEC 23 2008

IN RE:

[REDACTED]

APPLICATION:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under sections 212(a)(9)(A)(iii) and 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(A)(iii) and 1182(a)(9)(C)(ii)

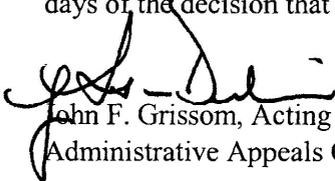
ON BEHALF OF APPLICANT:

[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, Hartford, Connecticut 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 Ecuador who, on October 19, 1988, was placed into immigration proceedings after he had entered the United States without inspection. At the time of his apprehension the applicant was in possession of a fraudulent identification document and social security card number. On February 9, 1989, the immigration judge ordered the applicant removed from the United States *in absentia*. The applicant failed to depart the United States. On January 31, 1990, immigration officers apprehended the applicant. On February 21, 1990, a warrant for the applicant's removal was issued. On February 22, 1990, the applicant was removed from the United States. On April 25, 2001, the applicant married his U.S. citizen spouse, [REDACTED] in East Haven, Connecticut. On April 30, 2001, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On February 12, 2002, the Form I-130 was approved. On March 22, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On September 19, 2003, the applicant filed the Form I-212. On April 24, 2006, the applicant appeared at the U.S. Citizenship and Immigration Services' (USCIS) New Haven, Connecticut Field Office. The applicant testified that he had reentered the United States without a lawful admission or parole and without permission to reapply for admission on March 14, 1994. On May 29, 2008, the Form I-485 was denied¹. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under sections 212(a)(9)(A)(iii) and 212(a)(9)(C)(ii) of the Act, 8 U.S.C. §§ 1182(a)(9)(A)(iii) and 1182(a)(9)(C)(ii) in order to remain in the United States and reside with his U.S. citizen spouse and lawful permanent resident son.

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 December 10, 2007.

On appeal, counsel contends that the field office director's decision was arbitrary, capricious and failed to take into account all of the applicant's favorable factors. Counsel contends that the field office director failed to analyze the legal and factual points of the applicant's case. *See Form I-290B*, dated January 10, 2008. The Form I-290B indicated that counsel would submit a separate brief or evidence on appeal within 30 days. On December 4, 2008, the AAO informed counsel that he had five days in which to submit additional documentation to support the appeal. Counsel responded that he had not forwarded a brief and/or additional evidence to support the appeal. Counsel, however, submitted recently acquired medical documentation, dated October 3, 2008, with his response. Counsel contends that he requested an extension of time in order to prepare and file a brief and/or additional evidence to support the appeal and received no response from the field office director. The AAO notes that the request for extension of time to which counsel refers is attached to the appeal of the Form I-485 and not the Form I-212. Furthermore, the request was made to the field office director and not to this office. Finally, counsel and the applicant were put on notice of a deficiency in

¹ The AAO notes that the applicant filed an appeal of the denial of the Form I-485. Since the AAO does not have jurisdiction over the Form I-485, the appeal has been rejected in a separate proceeding.

the evidence and were given an opportunity to respond to that deficiency. Since counsel and the applicant failed to respond to this opportunity in a timely fashion, the AAO will not accept the medical documentation. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The record is, therefore, considered complete.

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.

....

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.- Any alien who-
 - (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
 - (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters

or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The AAO notes that, while the field office director's denial of the Form I-212 did not find the applicant to be inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), her denial of the Form I-485 incorrectly found the applicant to be inadmissible under this section of the Act. The record in this matter establishes that the applicant was removed from the United States in 1990 and he has testified that he returned to the United States without inspection on March 14, 1994. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have unlawfully reentered the United States or attempted unlawful reentry after April 1, 1997, the effective date of the provision. *See Memorandum by [REDACTED] Acting Executive Associate Commissioner, Office of Programs* dated June 17, 1997. The AAO, therefore, finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because his unlawful reentry into the United States occurred prior to April 1, 1997. 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 record reflects that [REDACTED] is a U.S. citizen by birth. [REDACTED] petitioned for the applicant's son, [REDACTED] who is a native and citizen of Ecuador who became a lawful permanent resident on February 3, 2006. While [REDACTED] claims that she has a now 21-year old daughter and a now 18-year old son who are both U.S. citizens by birth that reside with her and

the applicant, there is no evidence in the record to establish that these children exist. The applicant is in his 50's and [REDACTED]s in her 40's.

On appeal, counsel contends that the field office director erred in citing to and comparing the applicant's case to a case involving different factors than those present in the applicant's case, a case in which the waiver was granted, and a case, which only peripherally discussed the exercise of discretion. While the cases cited by the field office director may differ from the applicant's own case, the field office director correctly cites these precedents, because they set forth factors and findings in regard to the exercise of discretion. These precedents offer incite into what type or combination of factors would and would not warrant a favorable exercise of discretion.

On appeal, counsel contends that the field office director failed to cite to a law, which would warrant her finding that the applicant's ongoing accrual of unlawful presence in the United States is a felony. The AAO finds, however, that the field office director stated that the applicant was present in the United States after his removal in violation of 8 U.S.C. § 1326, which is a felony. The AAO, however, will not use this as a factor to be used in exercising discretion since the applicant has not been charged with or convicted of violating 8 U.S.C. § 1326.

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

The applicant, in his affidavit accompanying the Form I-212, states that he resides with [REDACTED] and her two U.S. citizen children. The applicant states in a subsequent affidavit that his lawful permanent resident son now lives with them also. He goes on to state that [REDACTED] youngest child no longer resides with them because he has had emotional problems and now resides in a group home, where he is receiving the care and attention that he needs. He states that he met [REDACTED] in November 2000 and was immediately attracted to her. He states that he has grown to love Ms. [REDACTED] and her children. He states that he is disappointed in himself for putting this stress on his family. He states that it would sadden him if he were forced to return to Ecuador and he would be very concerned for [REDACTED] emotional and financial future. He states that, with the absence of a few short periods, he has always been gainfully employed in the United States. He states that he has continuously resided in the United States since March 14, 1994. He states that the past seven years of his life have been the happiest and most stressful. He states that he now has the ability to own a home and have a family that shares his goals. He states that [REDACTED] has always stood by him and done whatever is necessary to help him. He states that he regrets reentering the United States prematurely.

in her affidavit, states that she and the applicant reside with her two children. She states that her prior husband took advantage of her, repeatedly striking her and mentally abusing her. She states that he threatened to kill her when she left him after 7½ years of marriage. She states that, even though her ex-husband is required to pay child support, he has never paid it on a regular basis and it was not uncommon for her to work two or three different jobs before she met the applicant. She states that she met the applicant in November 2000. She states that they started living together in December 2000. She states that, outside of having her children, marrying the applicant was one of the few good decisions she has made. She states that the applicant has always been considerate, thoughtful and supportive. She states that, through her relationship with the applicant, she has regained her feeling of self-worth. She states that, for the first time she has been able to enjoy her

children and the joys of a quality relationship. She states that that it would be a hardship to both herself and her children if the applicant has to return to Ecuador.

A certificate of good conduct from the Connecticut State Police indicates that the applicant does not have any criminal record.

The record reflects that the applicant falsely claimed to be a U.S. citizen in applying for a mortgage on the property he owns with [REDACTED]. While this false claim to U.S. citizenship does not render him inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), it is a factor to be considered in exercising discretion.

The record reflects that the applicant has been employed in the United States from 1989 to 1990 and since his reentry in 1994. The applicant paid joint taxes with [REDACTED] in 2001 and 2003. The applicant has been issued employment authorization from June 6, 2002, until June 24, 2004.

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, lawful permanent resident son, the general hardship to the applicant and his family if he were denied admission to the United States, his clear background, his payment of joint taxes, and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, his son's adjustment of status to that of lawful permanent resident 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 illegal entry into the United States; his failure to appear at an immigration hearing; his failure to comply with a removal order; his entry into the United States after having been removed; his extended unlawful presence in the United States; and his extended unauthorized employment in the United States, except for June 6, 2002, until June 24, 2004.

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 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.