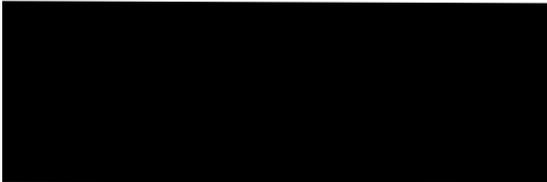


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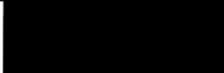
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Office: CALIFORNIA SERVICE CENTER

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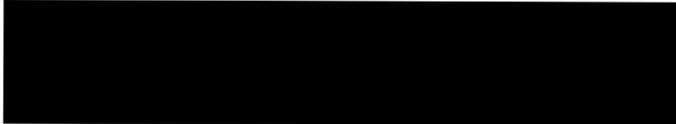
IN RE:



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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 Mexico who, on January 28, 1997, was placed into immigration proceedings. The applicant testified that she entered the United States as a nonimmigrant in 1989. She stated that she was admitted as a nonimmigrant for a period of one week and remained in the United States after her nonimmigrant status expired. She stated that she resided and worked in the United States without authorization. On April 29, 1998, the immigration judge denied the applicant's application for suspension of deportation and granted voluntary departure until August 1, 1998. The applicant appealed to the Board of Immigration Appeals (BIA). On October 12, 2000, the BIA dismissed the applicant's appeal and granted her voluntary departure within 30 days of its order. The applicant failed to voluntarily depart the United States, thereby changing the grant of **voluntary departure to a final order of removal**. On September 27, 2003, the applicant married her spouse, [REDACTED]. On August 18, 2004, a warrant for the applicant's removal was issued. On August 24, 2004, the applicant was removed from the United States and returned to Mexico where she has since resided. On July 26, 2005, the applicant filed the Form I-212. 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). 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 return to the United States and reside with her lawful permanent resident spouse and U.S. citizen daughters.

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 September 15, 2006.

On appeal, counsel contends that the director abused his discretion and his decision was arbitrary and capricious. *See Counsel's Brief*, dated November 9, 2006. In support of his contentions, counsel submits the referenced brief, copies of the applicant's spouse's passport pages and a copy of the oral decision in the applicant's immigration proceedings. 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 and citizen of Mexico who became a lawful permanent resident in 2003. The applicant and [REDACTED] have an eight-year old daughter who is a U.S. citizen by birth. The applicant has a twelve-year old daughter from a prior marriage who is a U.S. citizen by birth. The applicant has an 18-year old daughter from a prior marriage who is a native and citizen of Mexico and does not have any legal status in the United States. The applicant and [REDACTED] are in their 30's.

On appeal, counsel asserts that the director's decision shows no consideration of the applicant's length of residence in the United States and that the director erred in finding that her residence cannot be considered a positive factor. Counsel asserts that it follows that all applicants have, in some way, committed some type of immigration violations, which is not commensurate with the immigration laws of the United States. He asserts that remaining in the United States and accepting unauthorized employment are facts inherent to the applicant's removal order and that precedent decisions do not suggest that the applicant's extended residence in the United States should not be properly considered a positive factor. However, counsel's assertion that the applicant's extended unlawful presence and employment in the United States should not be considered as negative factors because they are part and parcel of an application for permission to reapply for admission is unpersuasive. The Form I-212 is an application to waive the bar imposed against an alien for having been removed or ordered removed from the United States. The applicant's failure to appear at an immigration hearing, failure to comply with a removal order and extended unlawful presence and employment in the United States as a result of her failure to comply with a removal order are separate issues and are appropriately considered in a discretionary analysis. An applicant who complies with an order of removal and thereafter applies for permission to reapply for admission from abroad would not necessarily have such negative factors. Moreover, the applicant's extended unlawful presence and employment in the United States cannot be considered to be positive factors as dictated by *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973).

On appeal, counsel asserts that, while the director's decision correctly cites the law, his decision fails to indicate that the law was applied to the facts in the applicant's case because it does not offer any explanation for the finding that the applicant has insufficient positive factors. Counsel asserts that none of the factors considered by the director are substantial enough to warrant a denial of the applicant's Form I-212. Counsel asserts that the applicant has been outside the United States since August 2004 and has been separated from her husband and daughters during that time. Counsel asserts that the applicant's husband and daughters are suffering emotional and financial hardship given the absence of their wife and mother, respectively. Counsel asserts that the applicant wishes to return to the United States because of her strong and important family ties and that the forced separation of the applicant from her spouse and children will have a severe impact upon the applicant, her family and the familial relationship. Counsel asserts that the applicant is the primary financial and matriarchal support for the family, who provides nurturing, care and love. Counsel asserts that if the applicant is forced to remain in Mexico the family would lose these benefits and extreme hardships will

fall upon the family, possibly affecting the children's mental and emotional development and/or health, education and future. Counsel asserts that the most important factor is the emotional and psychological hardships that the applicant and her family will suffer as a result of separation. Counsel asserts that, other than the applicant's failure to depart the United States, which was occasioned by her lack of legal representation, her inability to read English and thus the decision of the BIA, and her ignorance of U.S. immigration laws, the applicant has no criminal record or other immigration history that would warrant the denial of her application. Counsel asserts that the applicant deeply regrets her actions and pledges to remain outside the United States until proper and legal procedures are undertaken for her return. Counsel asserts that an immigrant visa petition will be filed on behalf of the applicant through which she will be able to immigrate to the United States. Counsel asserts that a favorable adjudication of the applicant's Form I-212 will be in the national interest of the United States.

██████████ in his letter submitted with the Form I-212, states that the applicant's removal has been a burden on his shoulders. He states that the separation of his family has affected him emotionally and financially. He states that he now has to maintain two households. He states that the separation has been devastating and it hurts him to see his daughters' education suffering because they are not fluent in Spanish and have to adapt to a different lifestyle in Mexico. He states that he is stressed because he misses his family and has to frequently travel to Mexico to see them.

The applicant, in her letter submitted with the Form I-212, states that she needs her husband and daughters and it has been an emotional trauma for them to be separated. She states that the children have experienced drastic changes in their education and have had to endure many inconsistencies in school. She states that the children suffer ridicule at the hands of their classmates in Mexico because they do not speak Spanish properly. She states that she is disappointed to see her children struggle to adapt to life in Mexico. She states that she is also experiencing difficulty because she resided in Arizona for 15 years and had adapted to the lifestyle in the United States. She states that she feels very lonely having to educate her daughters without her husband's assistance. She states that the family's separation has caused them economic problems because her husband has to support two households. She states that they do not have enough money to support her husband's two children from a prior relationship.

The applicant's children, in a letter submitted with the Form I-212, state that they feel really sad having to move to Mexico and it has affected them in a lot of ways, especially in school. They state that it is very difficult to change schools because Mexican schools teach in another language and it has affected their grades. They state that leaving their friends and teachers in Arizona saddens them. They state that the separation of their parents has affected them and they need both of their parents together to take care better care of them. They state that their father is only able to visit with them on the weekends because he has to work during the week in order to support the family.

Letters of recommendation from the applicant's former employers state that the applicant is diligent and responsible and they are deeply saddened by her return to Mexico. They state that they have been unable to find a suitable replacement for her. They state that the applicant's children are evidence of the security and love embodied in a stable family life and that the applicant is a loving parent who has made many personal sacrifices for her children. They state that the applicant has a strong work ethic, as well as a strong commitment to family and a willingness to embrace the American way of life.

Letters of recommendation from the presiding elder and co-congregants at the applicant's former church state that she first attended the Sandario Spanish congregation of Jehovah's witnesses in Tucson Arizona in 2002. They state that the applicant is a good and responsible person who is missed. They state that the applicant's return to Mexico has been a financial hardship and detrimental to the applicant's family.

The AAO notes that the evidence submitted with the Form I-212 indicates that the applicant's daughters are living with her in Mexico. However, this evidence was submitted in 2005 and, on appeal, counsel indicates that the applicant's daughters now reside apart from their mother.

In *Matter of Tin, Supra.*, 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.

The favorable factors in this matter are the applicant's lawful permanent resident spouse, two U.S. citizen daughters, the general hardship to family members and an absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her nonimmigrant status; her failure to comply with an order of voluntary departure; her failure to comply with an order of removal; her extended unlawful presence and employment in the United States; and her inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, between November 11, 2000, the expiration date of her 30 days of voluntary departure, and August 24, 2004, the date on which she returned to Mexico, and seeking readmission within ten years of her last departure.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage and the birth of her youngest daughter occurred after the applicant was placed into proceedings and ordered removed. As these factors are "after-acquired equities," the AAO accords them diminished weight in this proceeding. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

The record indicates that the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. To seek a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the applicant will need to file an Application for Waiver of Ground of Inadmissibility (Form I-601) at the time she applies for an immigrant visa.

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.