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

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 01 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.

Ellen C. Johnson

Robert P. Wiemann, 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 sustained.

The applicant is a native and citizen of Mexico who, on April 26, 1982, was placed into immigration proceedings after she had entered the United States without inspection. On August 24, 1982, the immigration judge granted the applicant voluntary departure until November 24, 1982. 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 April 26, 1983, a warrant for the applicant's removal was issued. On September 8, 1983, the applicant was removed from the United States and returned to Mexico. On July 22, 1997, the applicant's lawful permanent resident spouse, [redacted]) filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on September 5, 1997. On April 29, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On September 18, 2000, the applicant appeared at Citizenship and Immigration Services' (CIS) New York District Office. The applicant testified that she reentered the United States without a lawful admission or parole and without permission to reapply for admission approximately one month after she was removed from the United States in September 1983. She testified that she had not departed the United States since that reentry. On September 2, 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 reside in the United States with her now naturalized U.S. citizen husband and her lawful permanent resident and U.S. citizen children.

The director determined that the applicant was inadmissible pursuant to section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for entering the United States without being admitted after having been removed. The director determined that the applicant was statutorily ineligible for a waiver pursuant to section 212(a)(9)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(iii) because she had failed to remain outside the United States for a period of ten years prior to applying for permission to reapply for admission. The director denied the Form I-212 accordingly. *See Director's Decision* dated February 9, 2007.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. Counsel contends that the applicant is eligible for permission to reapply for admission to the United States pursuant to section 212(a)(9)(A)(iii) of the Act and that the favorable factors in the applicant's case outweigh the negative factors. *See Counsel's Brief,* dated March 31, 2007. In support of her contentions, counsel submits the referenced brief, copies of relevant law and legal memorandum and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

The record in this matter establishes that the applicant was removed from the United States in September 1983 and she has testified that she returned to the United States within the same month. 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 Paul W. Virtue, 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 her 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.

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

> (A) Certain aliens previously removed.-
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> (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-
>
> (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 is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 1999. The applicant and have a 35-year old son, a 31-year old daughter and a 29-year old son who are natives of Mexico who became lawful permanent residents in 1992 and naturalized U.S. citizens in 1999, 2007 and 2001, respectively. The applicant and [redacted] have a 33-year old son and a 30-year old daughter who are natives and citizens of Mexico who became lawful permanent residents in 1992. The applicant and [redacted]z have a 27-year old daughter, a 26-year old daughter, a 20-year old son and a 17-year old son who are all U.S. citizens by birth. The applicant and Mr. are both in their 50's.

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

On appeal, counsel asserts that the applicant did not comply with the grant of voluntary departure and returned to the United States after having been removed because she had two infants in the United States and their father could not sufficiently care for them due to his long working hours. Counsel states that the applicant has resided in the United States for more than twenty years and lives with her husband and her two youngest children. She states that the applicant has another seven children who reside in the United States and that she is the beneficiary of an approved Form I-130. She states that the applicant has been a good member

of the community, is a loving wife and mother and her admission to the United States would not be contrary to the national welfare, safety and security of the United States.

[redacted], in his affidavit, states that the applicant has resided with him continuously since their marriage in 1971. He states that they have nine children together and have been a couple for over 36 years. He states that he and his children will suffer extreme hardship if the applicant is not admitted to the United States. He states that the thought of the applicant's inability to return to the United States causes great pain to his family. He states that he loves the applicant and she is a wonderful and caring person without whom he cannot imagine living. He states that they are best friends and have grown up together in their marriage. He states that they have shared many dreams, created a life together and built a family. He states that the applicant cares for all of their children and dedicates her time to the family. He states that the applicant is still very much involved in her children's lives. He states that their eldest son is currently serving in Iraq and the applicant sends him care packages. He states that another of their children is a police officer in New York. He states that the applicant has raised their children to be good, smart people. He states that their youngest child would be lost without his mother and the second to youngest child would also be affected by the applicant's absence because he would be unable to concentrate on his higher education. He states that if the applicant were returned to Mexico, the younger children would be unable to continue their education. He states that the economic situation in Mexico is very bad and it would be difficult for someone of his age to find employment and that any money he did earn would be insufficient to support him, the applicant and their children. He states that they have no family or support in Mexico.

The applicant, in her affidavit, states that it was very difficult for her to leave and she was prompted to return to the United States illegally because she had two young daughters in the United States and her husband was working long hours to support the family. She states that her husband was completely unable to care for the children in her absence. She states that she regrets disobeying the law. She states that all nine of her children reside in the United States. She states that they all continue to require her maternal love and guidance.

A psychoemotional assessment and family dynamics evaluation performed by [redacted], Ph.D., a certified psycho-pathologist, in 2005, indicates that the applicant and [redacted] are visibly distressed by the prospect of breaking up the family or having to relocate to Mexico. Dr. [redacted] states that these stresses have triggered a number of symptoms typically associated with anxiety, stress and depression for the applicant, [redacted] and the children. He states that the applicant's second to youngest child, in particular, showed visible signs of personal insecurity, inner tension and anxieties that are advisable for further therapeutic exploration. He states that the family's dynamics have been seriously affected by the potential departure of the applicant and both parents fear the emotional impact, extreme financial and psychological hardship and daily life consequences the radical change may have on their children, grandchildren and themselves. He states that the chances of extreme psychological hardship and major psychoemotional and functional problems are quite elevated and the applicant's deportation should be avoided if it is legally possible. He states that the viability of [redacted] and the children remaining in the United States without the applicant seems quite impossible. [redacted] diagnoses [redacted] with adjustment disorder with mixed anxiety and depressed mood.

U.S. Army Orders indicate that the applicant's eldest son was ordered to active duty for mobilization for Iraqi Freedom on October 21, 2004, for a period of at least 545 days. The record contains evidence establishing the applicant and [redacted] paid federal taxes from 2000 through 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. *Id.*

*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 AAO finds the favorable factors in the present case to include the applicant's U.S. citizen spouse; her two lawful permanent resident children; her seven U.S. citizen children; the general hardship that she and her family will experience; the absence of any criminal record; her payment of U.S. taxes; and the immigrant visa petition approved on her behalf. The AAO notes, however, that the applicant's spouse's and children's adjustments of status to that of lawful permanent residents, their naturalizations, the births of her U.S.-born children and the filing of the immigrant visa petition benefiting her occurred after she was placed into

proceedings. Accordingly, these factors are "after-acquired equities" and the AAO will accord them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States, her failure to comply with an order of voluntary departure, her reentry into the United States after having been removed, and her extended unlawful presence in the United States.

The applicant's original illegal entry into the United States, her failure to comply with an order of voluntary departure, her reentry into the United States after having been removed, and her extended unlawful presence in the United States cannot be condoned. However, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.