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U.S. Department of Homeland Security
20 Massachusetts Ave. NW Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 16 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Dominican Republic who is inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been removed from the United States and seeking readmission within ten years of that removal. The applicant is the husband and father of U.S. citizens and seeks a waiver of inadmissibility in order to reside in the United States with his family.

The director denied the Form I-212 based on her determination that the positive factors in the applicant's case were outweighed by the negative. In her weighing of the favorable and unfavorable factors, the director specifically noted that the applicant had twice engaged in fraud and the misrepresentation of material facts to gain a benefit under the Act. *Director's Decision,* dated May 9, 2007.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) erred in its assessment of the favorable and unfavorable factors in the applicant's case. She asserts that CIS relied on an incorrect factual basis by failing to address positive evidence presented by the applicant, raising a false accusation of document fraud and suggesting that the applicant had been unhelpful in providing requested evidence. *Form I-290B, Notice of Appeal to the Administrative Appeals Office,* dated June 8, 2007; *Counsel's brief*, dated June 8, 2007.

The record indicates that the applicant entered the United States without inspection on September 22, 1998. He was apprehended by immigration authorities the following day and provided them with a false name and claimed to come from Vera Cruz, Mexico. While the applicant subsequently admitted he was a citizen of the Dominican Republic, he did not inform immigration officers of his true identity. The applicant was placed into proceedings. On October 13, 1998, he was granted voluntary departure until October 20, 1998 and detained. While the applicant remained in detention, the period of voluntary departure expired and, on November 18, 1998, he was removed from the United States under a final order of removal. On November 12, 2000, the applicant entered the United States as a B-1 nonimmigrant, authorized to remain until February 11, 2001. The applicant did not depart the United States when his nonimmigrant admission expired. He married his U.S. citizen spouse, [redacted] on June 16, 2001. On May 21, 2002, he filed the Form I-485, Application to Register Permanent Resident or Adjust Status, concurrently with the Form I-130, Petition for Alien Relative, submitted by Ms. [redacted] The legacy Immigration and Naturalization Services (INS, now CIS) approved the Form I-130 on July 22, 2002; the Form I-485 was denied on May 9, 2007, as was the Form I-212 submitted by the applicant on December 26, 2006.

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 of an 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The AAO notes counsel's contention that the applicant's is not inadmissible under section 212(a)(9)(A) of the Act because his INS detention during the period granted for voluntary departure invalidated his deportation order. Although the record indicates that counsel is correct in stating that the applicant was in INS detention from the time of his apprehension until his removal, the validity of the order that removed the applicant from the United States is not within the jurisdiction of the AAO.[1] In that the record establishes that the applicant was removed from the United States on November 18, 1998 and returned to the United States on November 12, 2000 without receiving permission to reapply for admission, he is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Act. The AAO notes, however, that the Board of Immigration Appeals in *In Re Bozena Zmijewska*, 24 I&N Dec. 87 (BIA 2007) has held that an alien may not be found to have voluntarily failed to depart the United States when that alien, through no fault of his or her own, was unaware of a voluntary departure order or *was physically unable to depart within the time granted.*

In support of the Form I-212, the record includes statements from the applicant, statements from [redacted] U.S. birth certificates for the applicant's stepson and daughter, tax returns filed by the applicant and [redacted] for the years 2003-2005, Employment Authorization Documents (EADs) issued to the applicant, letters from the applicant's employers, a letter from the doctor caring for [redacted] father, and an approved Form I-130 on behalf of the applicant.

In her November 30, 2006 statement, the applicant's spouse indicates that she and the applicant are happily married and that he is a good father to their children. She states that if he had to leave the United States it would

[1] The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

greatly upset the children and that it would be very hard for her to support the children on her own. She reports that it would be difficult for her and the children to move to the Dominican Republic because she would find it hard to obtain employment and would have to leave her family, all of whom live in Massachusetts. Ms. [redacted] also indicates that her father is suffering from lupus and cancer and that she does not think she could live so far away from him when he is sick. An April 18, 2007 letter from the Urology Department at the Massachusetts General Hospital in Boston states that Ms. [redacted]s father has an extensive medical history, extreme swelling in the lower part of his body and is in constant pain following a surgical procedure. Although the letter indicates that patient privacy restrictions allow only general information on patient health concerns to be provided, it also reports that Ms. [redacted]s father has been on disability since 1992.

In his statements, the applicant asserts that, during his time in the United States, he has paid taxes and has not worked without authorization, and that he is very happy with his family. He states that he was unaware that his 1998 departure from the United States was not voluntary and that he was unaware that he was doing anything wrong when he applied for a nonimmigrant visa. As proof of these assertions, the applicant points to the fact that at the time of his adjustment interview, he voluntarily informed the interviewing officer that he had been apprehended in 1998 and had voluntarily departed the United States. While he was in INS detention, the applicant states, he asked an unidentified official if he should purchase an airline ticket to return to the Dominican Republic and was told that he would be informed of what he should do. The applicant asserts that this information was never provided.

In support of the applicant's statements, the record provides copies of the applicant's and [redacted]'s joint tax returns for the years 2003-2005 and EADs covering the period October 13, 2004 through July 1, 2006. A review of the relevant CIS data base shows that the applicant has consistently applied for employment authorization while in the United States.

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-Nunoz 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 cited 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 U.S. citizen spouse and children, the general hardship that would be experienced by his family if the applicant were to be removed from the United States, his payment of taxes, his compliance with employment authorization requirements, the absence of a criminal record, and the approved Form I-130 benefiting him. The applicant's marriage, approved immigrant visa petition, and the birth of his daughter occurred after the applicant was placed into proceedings in 1998. The AAO finds that these factors are "after-acquired equities" and that any favorable weight derived from them must be accorded diminished weight in exercising the Secretary's discretion in this matter.

The AAO notes the multiple unfavorable factors identified by the director in her decision: the applicant's illegal entry into the United States, his use of a false identity and fraudulent documentation at the time of his 1998 apprehension, his failure to comply with a grant of voluntary departure, his removal from the United States, his failure to reveal that he had been removed to the consular officer who conducted his nonimmigrant visa interview in 2000, his reentry into the United States without obtaining permission to reapply for admission, and his overstay of his B-1 visa. The AAO finds, however, that, as discussed below, the negative aspects of the applicant's case are limited to his entry into the United States without inspection in 1998 and his failure to depart the United States when his B-1 nonimmigrant visa expired on February 11, 2001.

The record does not establish that the applicant's failure to comply with the grant of voluntary departure issued by the immigration judge was voluntary. Instead, it indicates that his detention rendered him physically incapable of departing the United States within the time granted. Under these circumstances, the AAO does not find the applicant's failure to comply with the immigration judge's order of voluntary departure to be a negative factor. Further, although the director indicates that the applicant presented a false birth certificate to immigration officers at the time of his apprehension, the record contains a Form I-213, Record of Deportable/Inadmissible Alien, that reports the applicant was undocumented at that time.[2] Accordingly, the AAO will not consider the director's finding that the applicant used "documents not his own" as a negative factor in this matter.

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[2] The record does include a copy of a provisional passport for a [redacted], the identity claimed by the applicant at the time of his apprehension in 1998, issued by the Dominican consulate in Houston, Texas.

The AAO also finds the director to have erred in determining that the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) for having made material misrepresentations to obtain an immigrant benefit, both at the time of his 1998 apprehension and when he was interviewed by a consular officer in connection with his B-1 nonimmigrant visa application. Section 212(a)(6)(C)(i) of the Act states:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Although the applicant claimed an identity other than his own at the time of his 1998 apprehension, a misrepresentation is generally considered to be material only if by it the alien receives a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409(BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961). The applicant was apprehended for having entered the United States without inspection and, although he assumed a false identity at that time, the record does not indicate that this identity was used as a means of avoiding removal or claiming equities under the Act. Neither does the AAO find this misrepresentation to be sufficiently proximate to the applicant's nonimmigrant visa application to be relevant to that application. Accordingly, the AAO does not find the applicant's misrepresentation of his identity at the time of his 1998 apprehension to be a material misrepresentation under section 212(a)(6)(C)(i) of the Act.

The director also concluded that the applicant is subject to section 212(a)(6)(C)(i) of the Act for his failure to inform the consular officer conducting his visa interview of his 1998 removal from the United States. While the AAO notes that this material fact was not provided to the consular officer at the time of the applicant's visa interview, it does not find this omission to constitute the willful misrepresentation of a material fact required for an inadmissibility determination under section 212(a)(6)(C)(i) of the Act. In *Matter of Healy and Goodchild*, 9 I&N Dec. 22, 28-29 (BIA 1979), the Board of Immigration Appeals (BIA) concluded that in determining the willfulness of misrepresentation, "the factual basis of such finding should be subject to close scrutiny," particularly where the misrepresentation "involves a disputed issue with respect to an alien's subjective intent." In the present case, the director found the applicant to have concealed his prior removal when he applied for his B-1 visa to the United States. The applicant contends in various statements included in the record that he believed he had voluntarily departed the United States in 1998 and that he was not questioned about his previous time in the United States at his 2000 consular interview.

The record includes a Form I-294, Warning to Alien Removed or Deported, issued to the applicant on October 13, 1998, which informed him that he had been ordered removed and was prohibited from entering the United States for five years unless he obtained permission to reapply for admission. However, the AAO notes that this warning was issued to the applicant on the same date as the immigration judge's grant of voluntary departure. The concurrent issuance of this notice and the grant of voluntary departure, along with the detention of the applicant throughout the period of voluntary departure, support the applicant's claim to have misunderstood the circumstances of his departure from the United States. Accordingly, the AAO accepts the applicant's claim that he failed to understand the nature of his 1998 departure from the United States and concludes that his failure to inform the consular officer of his prior removal was not the willful misrepresentation of a material fact. Based on this same reasoning, the applicant's failure to apply for permission to reapply for admission prior to seeking a B-1 nonimmigrant visa will not be considered a negative factor in this matter.

While the applicant's entry without inspection in 1998 and his failure to depart the United States following the expiration of the validity of his B-1 visa cannot be condoned, the AAO finds that, given all the circumstances of the present case, these failures are outweighed by the favorable factors previously noted and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.