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U.S. Citizenship and Immigration Services

1-14

[redacted]

FILE: [redacted] Office: PHOENIX, AZ Date: MAY 27 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, Arizona 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 and the application approved.

The applicant is a native and citizen of Mexico who, on September 16, 1986, was admitted to the United States as a nonimmigrant visitor with authorization to stay in the United States for a period of six months. The applicant remained in the United States past his authorized stay. On February 4, 1991, the applicant pled guilty to making a false statement on an application in violation of 18 U.S.C. § 1542, after he made an application for a U.S. passport under the name [redacted]" The applicant was sentenced to 2 years of probation. On June 23, 1992, the applicant was placed into immigration proceedings. On September 27, 1994, the immigration judge ordered the applicant removed from the United States. On January 9, 1995, the applicant was removed from the United States and returned to Mexico. On April 11, 1995, 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 August 9, 1995. On April 2, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based the approved Form I-130. On February 6, 2006, the applicant filed the Form I-212. On February 7, 2006, the applicant appeared at Citizenship and Immigration Services' (CIS) Phoenix, Arizona, District Office. The applicant testified that, on September 29, 1995, he had reentered the United States without a lawful admission or parole and without permission to reapply for admission. 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). He 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 his naturalized U.S. citizen spouse and children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated April 20, 2006.

On appeal, counsel contends that the district director erred in finding the unfavorable factors in the applicant's case outweighed the favorable factors. *See Form I-290B,* dated May 1, 2006. In support of her contentions, counsel submits a brief, family letters, recommendation letters, medical documentation and country condition reports. The entire record was considered in rendering a decision in this case.

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-
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> (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 the applicant was married to [redacted] at the time he originally entered the United States in 1986 and that they were divorced in 1990. The applicant remarried [redacted] on September 22, 1994. [redacted] is a native of Mexico who became a lawful permanent resident in 1994 and a naturalized U.S. citizen in 2000. The applicant and [redacted] have a 34-year old daughter, a 31-year old daughter and a 25-year old son who are all natives of Mexico who became lawful permanent residents in 1994 and naturalized U.S. citizens in 2000. The applicant and Ms. [redacted] are 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 has substantial family responsibilities, which include acting as a father and caretaker to his granddaughter and being a source of emotional and financial support to [redacted] and his immediate and extended family. She asserts that the applicant and his family are active Church members. She asserts that the applicant has an excellent work ethic, good moral character and provides value to society. She asserts that both the applicant and [redacted] suffer from severe medical conditions. She asserts that the applicant has had surgery to remove a pituitary tumor and continues to receive medical checkups and treatment. She asserts that the applicant suffers from diabetes and hypertension and that receiving medical treatment in Mexico for these severe medical conditions would be difficult. She asserts that [redacted] also suffers from severe medical conditions and the applicant's removal from the United States would aggravate her condition because she would undergo severe emotional distress. She asserts that for the applicant and [redacted] to be separated at their age would be detrimental to both individuals' medical conditions.

Counsel asserts that the applicant has not shown a callous disregard towards immigration violations because he did not reenter the United States until after the Form I-130 benefiting him was approved. She asserts that such a reentry is not a material immigration violation because applicants for permission to reapply for admission are permitted to apply from within the United States. The AAO finds counsel's contentions to be unpersuasive. The approved Form I-130 did not permit the applicant to reenter the United States and his presence and employment in the United States without authorization are negative factors appropriately considered in the exercise of discretion. The AAO notes that the applicant was authorized to engage in employment in the United States by virtue of employment authorization cards issued to him from 1993 until 1995, 2000 until 2003 and 2007 until the date of this decision.

Counsel asserts that the applicant's favorable family equities did not accrue during a period of time in which the family had a tenuous immigration status because his family relationships existed at the time he and his family entered the United States with nonimmigrant visas. However the Ninth Circuit Court of Appeals, in *Carnalla-Munoz v. INS,* 627 F.2d 1004 (9th Cir. 1980), held that a child who had become a lawful permanent resident after the applicant had been placed into immigration proceedings is an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam,* 22 I&N Dec. 408 (BIA 1998), and need not be accorded great weight by the district director in considering discretionary weight. 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. 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. Accordingly, the AAO finds that the district director did not err in finding that equities gained after commencement of proceedings, the applicant's remarriage, the adjustment of status of his family members to that of lawful permanent residents, their naturalization or the hardship endured by such U.S. citizen family members, should be accorded diminished weight.

[redacted], in her letter, states that the applicant is a good person, husband, father, grandfather and friend. She states that they have both befriended many great people in their community. She states that without the applicant she cannot go on and would be heartbroken if separated from him. She states that if the applicant left the United States it would leave them in a financially and emotionally difficult bind. She states that her health would suffer if he left and that her health has deteriorated since the applicant's application was denied. She states that she suffers from high blood pressure and depression and that her depression is becoming worse due to the thought of her separation from the applicant. She states that the applicant has a good job that entitles him to health benefits, which he would not have in Mexico. She states that the applicant's health requires him to seek regular medical treatment and to take medication. She states that she would suffer financially and her home would be taken away from her. She states that she would also be unable to continue to economically help her mother, who lives with her sister in El Paso, Texas. She states that her sister has mental issues and cannot care for herself or her mother.

The applicant's children, in their letters, state that the applicant is a good person, caring father, brother, husband and friend. They state that the applicant is an important role model in their lives and continues to be a very important part of their lives. They state that it would be devastating if their family were to lose the applicant, the backbone of their family. They state that the family would have financial difficulties and lose his guidance and leadership.

Letters of recommendation from the applicant's co-workers, friends and other family members indicate that he is a hard-worker, good friend, outstanding father, trustworthy person and that the United States would benefit from his presence.

Medical documentation indicates that the applicant underwent surgery to remove a pituitary tumor in 1997. An undated handwritten statement from [redacted] indicates that the applicant has been his patient since 1997 and that he suffers from a number of medical problems, including a brain tumor, which requires

close observation, diabetes and hypertension. [redacted] states that the applicant is very sick and that he should remain in the United States to receive proper care. [redacted] additionally comments are illegible.

A letter written by [redacted] indicates that [redacted] has hypertension, a history of depression, a history of breast nodules and urinary stress incontinence and that she is on medication for hypertension and many require surgery for her urinary stress incontinence.

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.*

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, three U.S. citizen adult children, the hardship that family members would suffer if the applicant is denied admission, steady employment in the United States with authorization, payment of federal taxes, numerous letters of recommendation and an approved immigrant visa petition for alien relative

The AAO finds that the unfavorable factors in this case include the applicant's unauthorized stay in the United States after expiration of his lawful nonimmigrant status; his conviction for false statement in an application and his resulting inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act, *See Matter of B-*, 7 I&N Dec. 342 (BIA 1956); *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980); *Matter of Correa-Garces*, 20 I&N Dec. 451 (BIA 1992): his reentry into the United States after having been removed; and his unauthorized presence and employment in the United States prior to removal proceedings and after his reentry into the United States prior to filing for adjustment of status.

The applicant's immigration violations and his conviction for false statement in an application 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 and the application approved.

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

ORDER: The appeal is sustained and the application approved.