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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: SACRAMENTO, CALIFORNIA Date: **SEP 17 2008**
[Redacted] consolidated therein]

IN RE: Applicant: [Redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal 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 application for permission to reapply for admission after removal was denied by the Acting Field Office Director, Sacramento, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico. On May 5, 1993, the applicant's father, a lawful permanent resident of the United States at that time, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On May 25, 1993, the applicant's Form I-130 was approved. In 1994, the applicant entered the United States without inspection. On an unknown date, the applicant departed the United States. On May 24, 1998, the applicant attempted to enter the United States by presenting a Border Crosser Card in someone else's name. On the same day, the applicant was expeditiously removed from the United States.¹ On June 24, 2001, the applicant attempted to enter the United States by concealing himself in a vehicle. On the same day, the applicant was expeditiously removed from the United States.² In June 2001, the applicant reentered the United States without inspection. On January 11, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On September 27, 2006, the District Director, Sacramento, California, denied the applicant's Form I-485. On December 19, 2006, the applicant filed another Form I-485 and an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On July 31, 2007, the Acting Field Office Director denied the applicant's second Form I-485 and his Form I-212. The applicant is inadmissible to the United States under section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). He now 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 with his naturalized United States citizen father, lawful permanent resident mother, and siblings.

The Acting Field Office Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and she denied the applicant's Form I-212 accordingly. *Acting Field Office Director's Decision*, dated July 31, 2007.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(i) Arriving Aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 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.

The AAO notes that the applicant presented himself as that name.

and was expeditiously removed under

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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 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, counsel contends that the applicant is not required to file a waiver because his last removal from the United States occurred "on June 23, 2001, which is more than five years ago." *Counsel's Brief*, page 4, filed December 5, 2007. An applicant does not require permission to reapply for admission *only* if the applicant remained outside the United States for the entire period during which he or she was deemed inadmissible pursuant to section 212(a)(9)(A) of the Act. 8 C.F.R. § 212.2. Furthermore, the AAO finds that the applicant is inadmissible for a period of twenty years because he was removed from the United States on two separate occasions. In the instant case, the applicant has not remained outside the United States for the period of his inadmissibility (until June 24, 2021) and he is, therefore, required to apply for permission to reapply for admission into the United States.

Counsel asserts that the applicant has never been formally charged with misrepresentation. *Counsel's Brief, supra* at 6. However, the record reflects that on May 24, 1998, the applicant was charged with being inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, and was removed under that section of the Act. *See* Notice and Order of Expedited Removal (Form I-860), dated May 24, 1998. Furthermore, a criminal conviction or formal charges for misrepresentation is not a requirement in finding an applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Counsel further asserts that the applicant's attempt to enter the United States on the one occasion with a false or invalid document does not involve misrepresentation under the law and does not render him inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. *Counsel's Brief, supra* at 4. He asserts that the Acting Field Office Director's failure to request the filing of an Application for Waiver of Inadmissibility (Form I-601) by the applicant suggests that he does not need to apply for a waiver of inadmissibility on the grounds of alleged misrepresentation. *Id.* He asserts that the failure to request a Form I-601 represents an implicit recognition that, whatever misrepresentations were made by the applicant, they were retracted in a timely manner. *Id.* Counsel contends that, as dictated by the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *U.S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004), the applicant's presentation of a false lawful permanent resident card does not constitute misrepresentation. He asserts that the applicant admitted the invalidity of the documents as soon as immigration officers questioned him about the documents. *Id.* at 3. Counsel asserts that the cited case finds that even the presentation of a false document at the border, by itself, is not a misrepresentation. *Id.* at 8. However, *U.S. v. Karaouni*, refers to a criminal conviction for making a false claim to United States citizenship and has no bearing on the applicant's case.

The Department of State Foreign Affairs Manual (FAM) offers guidance regarding the interpretation of the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act, stating in part; (1) a misrepresentation can be made orally or in writing, (2) silence or the failure to volunteer information does not in itself constitute a misrepresentation, (3) the misrepresentation must have been practiced on an official of the U.S. government, generally a consular or immigration officer, and (4) a timely retraction will avoid the penalty of the statute. Whether a retraction is timely depends on the circumstances of the particular case.

A timely retraction has been found only in cases where applicants used fraudulent documents *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel*, 18 I&N 33 (BIA 1984). In the instant case, the applicant retracted his claim to being a lawful permanent resident only after having been placed into secondary inspection by immigration officials. Moreover, the applicant provided a false name to the immigration officers who questioned him and did not admit to his true identity at any point during his inspection. He was removed from the United States under this false identity. The applicant's use of a false identity throughout the inspection process undermines any contention that the applicant did not have the requisite intent to deceive and made a timely retraction.

Based on the record, the AAO finds that the applicant did not offer a timely retraction of his misrepresentations to immigration officers. The AAO finds that the applicant, by presenting a fraudulent document at the port of entry in order to obtain admission in 1998, is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for attempting to enter the United State by fraud.

Counsel states that the applicant has "lived [in the United States] continuously since [1994], except for brief periods during his visits and removal to Mexico." *Id.* The AAO notes that the numerous years that the applicant has resided in the United States has been without authorization and that is an unfavorable factor. The applicant states he is employed as a supervisor for a cleaning company, and has "health and dental benefits through this job. [He has] always paid taxes on [his] earnings." *Applicant's Declaration*, dated July 24, 2007. The AAO notes that the applicant has been employed without authorization and that is an

unfavorable factor. Counsel states that all of the applicant's family resides in the United States and he has no family in Mexico. *See Counsel's Brief, supra* at 4-5. The record reflects that the applicant is unmarried. The applicant's father [REDACTED] is a native of Mexico who became a lawful permanent resident in 1990, and on November 19, 2005, he became a citizen of the United States. The applicant's mother, [REDACTED] is a native and citizen of Mexico who became a lawful permanent resident in 1998. The applicant has a 45-year old brother, a 40-year old brother and a 38-year old brother, who are all natives of Mexico who became lawful permanent residents in 1989, 1990 and 1990, respectively, and became United States citizens in 1996, 1997 and 2004, respectively. The applicant has a 43-year old brother and a 41-year old sister who are both natives and citizens of Mexico, who became lawful permanent residents in 1990 and 1999, respectively. The applicant is 32 years old, [REDACTED] is in his 70's and [REDACTED] is in her 60's.

On appeal, counsel asserts that the Acting Field Office Director improperly denied the applicant's Form I-212 because she failed to evaluate or give the proper weight to all the relevant favorable factors and gave undue weight to supposedly unfavorable factors. *Id.* at 2. Counsel asserts that the Acting Field Office Director erred in decrying the lack of evidence of rehabilitation of the applicant when the applicant's Form I-212 and Form I-485 are evidence of intent to conform to and obey immigration laws. *Id.* Counsel asserts that the Acting Field Office Director did not give the applicant's waiver application a meaningful and individualized evaluation, and that the applicant has been unfairly disqualified from becoming a lawful permanent resident for at least twenty years. *Id.* Counsel asserts that the harsh consequences of removal of the applicant to the applicant and his whole family are substantial and outweigh the offense for which the waiver is required. *Id.*

Counsel states that the applicant "was last removed from the U.S. on June 23, 2001, which is more than five years ago.... [The applicant] first came to the U.S. with his parents in 1994, when he was eighteen years old. He has lived here continuously since then, except for brief periods during his visits and removal to Mexico.... [The applicant] has worked hard for years to make his home here; he is following the required bureaucratic process to be lawfully present and employed; and he has no criminal record, has never received public assistance and owes no back taxes. He attends weekly services at the Catholic church with his family. He is a hardworking, reliable employee." *Id.* at 4 - 5. Counsel states that that the applicant first came to the United States in 1994 with his parents and has been attempting to legally immigrate since 1993. *Id.* at 5. He asserts that, at the time the applicant "attempted to enter the U.S. in July 1998, [the applicant] was 22 years old. His parents and siblings - his home - were all in this country.... His extreme remorse for his youthful bad judgment...is evidence of his rehabilitation, particularly in view of his current attempt to immigrate legally and his lack of any other criminal violations." *Id.* He asserts that when the expense of retaining counsel is combined with filing fees and penalty fees, the applicant has made a considerable economic investment in complying with United States immigration law. *Id.*

Counsel asserts that none of the applicant's family is left [REDACTED] the village from which the applicant's family comes. He asserts that the "applicant has been employed in a stable job in a janitorial service for several years and always paid taxes on his earning." *Id.* at 3. Counsel claims that because of the applicant's lack of training he will be without reasonable employment in Mexico. Counsel states that the applicant's "65-year-old mother and ailing 70-year-old father...will need his physical care and support when they can no longer live alone, something sure to occur within the next twenty years." *Id.* at 6.

Counsel claims that the applicant's father has diabetes; however, the AAO notes that no medical documentation was provided regarding the applicant's father's health. *Id.* at 7. The applicant states that in the future, he may need to take care of his parents. *See Applicant's Declaration, supra.* The AAO notes that it has not been established that the applicant's siblings cannot help care for their parents. Counsel asserts that to deny the applicant's Form I-212 would serve no government purpose except to be an example of the government's disregard for family values. *Id.* He asserts that though the applicant's unfavorable factors are not inconsequential, they are violations of civil immigration law and far from sufficiently grave to outweigh the favorable factors. *Id.* He asserts that the applicant's admitted unauthorized employment in the United States is not an impediment as he is eligible to adjust status pursuant to section 245(i) of the Act. *Id.* at 8.

The applicant, in his declaration, states that the village from which his family comes is very poor, with no cars and no middle or high school. He states that his whole family resides in the United States and that his parents and some of his siblings live in Wisconsin, while several siblings and their families are in California. He states that his parents regularly visit the siblings in California. He states that he lives in a house with three of his siblings. He states that his parents currently reside with his brother in Wisconsin but they may need to come and live in California soon. He states that his other siblings have families and complicated lives, so the task of caring for their parents will fall to him and the siblings with whom he resides. He states that his father has Medicare and both of his parents are in fairly good health for their age, although his father has diabetes. He states that it would be stressful for his parents if they had to worry about him attempting to make a life in the terrible economic conditions of Mexico. The applicant states that his removal was a long time ago, and he only used the false document in order to return to the United States where his family was located. He states that he admitted that the document was false as soon as immigration officers confronted him and he has never committed any other kind of immigration violation and has no criminal record.

A recommendation letter from the applicant's employer states that he was employed as a janitor from June 1998 to June 2002, and since June 2002, he has been employed as a janitorial supervisor, and he is a hardworking, skilled and experienced employee. *See letter from [REDACTED], General Manager, dated July 16, 2007.* [REDACTED] states that if the applicant does not remain in the United States "[i]t would be a significant loss for [their] company if [they] had to give up such a trustworthy and proven performer." *Id.*

Counsel submits a copy of a League of Women Voters article entitled *Economic Aspects of Authorized and Unauthorized Immigration*. The article states that "a greater supply of immigrant workers and the resultant cheaper cost of labor increases the return to employers . . . ultimately creating an increased demand for workers . . . taken together they suggest that immigration, in the long run, has had only a small negative effect on the pay of America's least skilled and even that is arguable." It states that the effect of authorized and unauthorized immigrants on public-sector budgets is small. It states that taxes paid to the federal government and added productivity of the macro economy make immigration a net benefit to the country as a whole. It states that, on the whole, immigrants are young, mobile, hard workers who, for a variety of reasons, are willing to work at jobs shunned by native-born workers. It states that new arrivals will spend money in the United States and increase earnings for businesses.

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 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 Seventh 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 United States citizen father, lawful permanent resident mother, three United States citizen siblings, two lawful permanent resident siblings, the general hardship the applicant and his family will suffer, the absence of a criminal record, and the immigrant visa petition approved on his behalf. The AAO notes, however, that the adjustment of status to that of a lawful permanent resident of the applicant's mother and one of his siblings occurred after he was

placed into proceedings. Accordingly, these factors are “after-acquired equities” and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant’s original illegal entry into the United States; his two attempts to enter the United States by fraud; his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act for attempting to enter the United States by fraud; his illegal reentry into the United States after having been removed twice; and his extended unlawful presence and employment in the United States since his reentry.

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.