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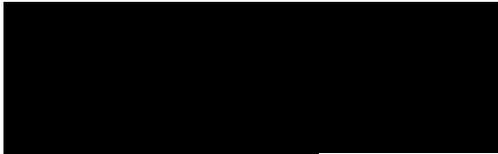
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

H/L



FILE:



Office: NEW ORLEANS, LA

Date: SEP 22 2008

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 District Director, New Orleans, Louisiana, 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 Honduras who, on November 6, 1983, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, which expired on May 5, 1994. On August 22, 1984, the applicant married [REDACTED] a U.S. citizen. On January 14, 1985, immigration officers apprehended the applicant and placed him into immigration proceedings. On January 18, 1985, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed on his behalf by [REDACTED]. The Form I-130 was approved on February 1, 1985. On March 23, 1988, [REDACTED] withdrew the Form I-130 benefiting the applicant indicating that she was divorcing the applicant because he was living with another woman. On the same day, the Form I-130 was revoked and the Form I-485 was denied. On September 22, 1988, the applicant was again placed into immigration proceedings. On October 25, 1988, the immigration judge ordered the applicant removed in absentia. On November 1, 1988, a warrant for the applicant's removal was issued. On January 26, 1989, immigration officers apprehended the applicant and removed him from the United States. On November 30, 1989, [REDACTED] divorced the applicant.

The applicant reentered the United States on February 13, 1990, by presenting a B-2 nonimmigrant visitor visa obtained on January 24, 1990. Despite having received a warning in the Spanish language that he was required to receive permission to reapply for admission prior to reentering the United States, the applicant did not receive such permission prior to his admission. The applicant remained in the United States past his authorized stay, which expired on August 12, 1990. On February 27, 1993, the applicant married his current U.S. citizen spouse, [REDACTED]. On August 31, 1995, the applicant filed a second Form I-485 based on a second Form I-130 filed on his behalf by [REDACTED]. On February 29, 1996, the applicant appeared at the New Orleans District Office. The applicant testified that he had never been removed or arrested by immigration officials before. On December 12, 2002, after a Federal Bureau of Investigations (FBI) Fingerprint check revealed that the applicant had been previously removed from the United States, the Form I-485 was denied. Upon the legacy Immigration and Naturalization Services' (INS) motion, the Form I-485 was reopened and, on December 16, 2002, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A). 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 remain in the United States with his U.S. citizen spouse.

The district director determined that a favorable exercise of discretion was not warranted and denied the Form I-212 accordingly. *See District Director's Decision* dated May 16, 2005.

On appeal, counsel contends that the applicant's spouse would suffer hardship if the applicant is denied permission to reapply for admission to the United States. *See Counsel's Brief*, dated June 13, 2005. In support of the appeal, counsel submits the referenced brief, an affidavit from [REDACTED] country conditions reports, and medical documentation. The entire record was reviewed in rendering a decision in this case.

Section 212(a) 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 provision holding aliens inadmissible for a period of ten years applies to exclusion or deportation orders issued both before and after April 1, 1997, even to those applicants who remained outside the United States for the required one or five years under pre-IIRIRA law. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs, dated March 31, 1997.* The AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), and, therefore, must receive permission to reapply for admission to the United States.

The record reflects that [REDACTED] is a native of Honduras who became a lawful permanent resident in 1963 and a naturalized U.S. citizen in 1981. The applicant and [REDACTED] do not appear to have any children together, although [REDACTED] has an adult daughter from a previous marriage. Counsel and Ms. [REDACTED] immediate family members, such as her mother and siblings reside in the United States. There is, however, no evidence in the record to establish that these individuals have any lawful status in the United States. The applicant is in his 40's and [REDACTED] is in her 60's.

On appeal, counsel asserts that [REDACTED] would suffer hardship if she were forced to join the applicant in Honduras. Counsel asserts that [REDACTED] is a 66-year old U.S. citizen who has lived in the United States for 42 years. Counsel asserts that [REDACTED] entire family, including her mother and siblings reside in the United States, most of them within 20 minutes of her house or work place. Counsel asserts that the applicant's immediate family members were born in the United States and that no member has ever lived outside the United States. Counsel asserts that [REDACTED] has no family members outside the United States. Counsel

asserts that [REDACTED] is extremely close with all of her family, with whom she visits and speaks regularly. Counsel asserts that the exorbitant cost of airfare would make travel between the United States for Ms. [REDACTED] and her daughter financially unaffordable and very rare. Counsel asserts that none of [REDACTED] elderly grandparents would be able to make such a trip due to health and cost concerns. Counsel asserts that the cost of telephone calls between the United States and Honduras would also make contact between Ms. [REDACTED] and her family extremely rare. Counsel asserts that [REDACTED] has no friends or family in Honduras and the cultural differences would make living there a terrible ordeal for her and her daughter. Counsel asserts that Honduras is a highly undesirable country in which to live because of the appalling social, economic and political conditions. Counsel asserts that two thirds of the country lives in poverty and 40 percent of the population lives on less than \$1.00 per day. Counsel asserts that domestic violence is rampant in Honduras. Counsel asserts that the funds expended by the Honduran government on education are insufficient to address educational needs and that only 10 percent of the country's total expenditure is on the health sector. Counsel asserts that the cost of living in Honduras is prohibitively high and the cost of transporting [REDACTED] belongings to Honduras would be enormous. Counsel asserts that [REDACTED] would have to sell her home and property in the United States or hire a property manager. Counsel asserts that it would be virtually impossible for [REDACTED] to obtain similar employment in Honduras to that she currently holds in the United States and any earnings she might save would be rendered valueless upon eventual return to the United States. Counsel asserts that [REDACTED] would also have to return to a more junior position upon her return to the United States. Counsel asserts that, even though [REDACTED] speaks Spanish, it will be unlikely that she will find gainful employment due to the small rural community to which she would move in Honduras. Counsel asserts that the unemployment rate in Honduras is estimated to be nine percent. Counsel asserts that the police forces in Honduras are under-funded, under-trained and understaffed and that corruption is a serious problem. Counsel asserts that there is public frustration at the inability of the security forces inability to control and prevent crime in Honduras. Counsel asserts that the lifestyle and the constant threat of danger under which [REDACTED] would live is **abhorrent and would render [REDACTED] tremendous emotional hardship and mental anguish.** Counsel asserts that the responsibility of raising her child in a country as dangerous as Honduras would have an emotionally traumatic effect on [REDACTED] and she would constantly be anxious and nervous. Counsel asserts that [REDACTED] has suffered from hypertension and is under careful medical observation and is at risk for reoccurrence. Counsel asserts that the cost of treatment would be extremely high and may be unavailable in Honduras. Counsel asserts that [REDACTED] recently fractured her arm and has a history of carpal tunnel syndrome, which required surgery.

[REDACTED] in her affidavit, states that she has been living in the United States since 1963. She states that she has a very serious hypertension history and if she were to go to Honduras she would not survive due to a lack of adequate medical attention. She states that all of her close family members, including her mother, sister and daughter are in the United States. She states that she recently fell at work and suffered a fracture, which required surgery. She states that after the surgery she needs the applicant's support both financially and emotionally. She states that she also has a history of carpal tunnel syndrome. She states that the applicant contributes 95 percent of the household income and his removal to Honduras would have a great impact on the financial stability of the family. She states that due to her age she cannot support herself and is dependent solely on the applicant's income to survive. She states that the psychological impact of the applicant's removal would be great because she and her child would be living in a single-parent home. The AAO notes that the claims made by counsel and [REDACTED] regarding the impact of separation and relocation on Ms. [REDACTED] ability to raise her daughter, [REDACTED]. However, the record establishes that [REDACTED] is no longer a child, as it contains a 1988 divorce decree ending the marriage of [REDACTED] to [REDACTED] and awarding [REDACTED] custody of their minor daughter, [REDACTED]. She states that the

economic conditions in Honduras are so bad that she and her daughter cannot survive there. She states that she could not receive the necessary medical care she requires in Honduras. She states that separation from the applicant will cause her hardship in every aspect of her life as they have been married for more than ten years and he is an ideal husband. She states that, even though he was removed from the United States before, he is a very responsible person and has not violated the immigration laws since they were married.

The country conditions report submitted by counsel states that the Central Bank of Honduras estimates the real economic growth for 2002 to be 2.5 percent; about two-thirds of the country's households live in poverty, and 40 percent of the population lives on less than \$1.00 per day. The report states that violence against women remains widespread with 60 percent of women being victims of domestic violence, and the U.N. Population Fund estimating that 8 of every 10 women suffered from domestic violence. The report states that women are trafficked for sexual exploitation and debt bondage. *See U.S. Department of State, Country Reports on Human Rights Practices, 2003, Honduras.*

Medical records dated December 2004 through May 2005, which include handwritten physician's treatment notes that are sometimes illegible, indicate that [REDACTED] has a history of hyperlipidemia (high cholesterol), diabetes and carpal tunnel syndrome. A pre-operation chest x-ray states that [REDACTED] heart size is normal and lungs are clear, showing an essentially normal chest. A letter from [REDACTED] dated May 24, 2005, states that [REDACTED] was evaluated for injuries sustained in a fall. It states that she was diagnosed with a distal radius fracture with displacement and that she also had a history of carpal tunnel syndrome. It states that she had been treating the carpal tunnel syndrome with a brace. It states that it was recommended that at the time of her surgery to correct the fracture, she undergo a carpal tunnel release. The AAO notes that the record does not indicate how [REDACTED] medical conditions affect her ability to perform her daily responsibilities or whether the injury to her arm, following her surgery, will impair her activities.

Tax records in the record establish that the applicant paid federal taxes in 1994 and from 2001 through 2003. The applicant has been self-employed in the United States since 1990. Immigration records and the applicant's statements to immigration officials reflect that the applicant was also employed in the United States prior to 1990. The applicant was issued employment authorization from July 31, 2002, until July 30, 2005.

During his adjustment of status application the applicant was specifically asked if he had ever been arrested by immigration officials or been removed from the United States. The applicant responded that he had never been arrested or removed. The applicant, therefore, attempted to obtain immigration benefits by making a willful misrepresentation of a material fact or by fraud by concealing his prior removal from the United States and is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

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.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, the general hardship to the applicant and his family members in the event of his removal, his spouses' medical conditions, his payment of federal taxes, the absence of a criminal background and an approved immigrant visa petition. The AAO notes that the applicant's marriage and the filing of the immigrant visa petitions benefiting him occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of his nonimmigrant status on two occasions; his failure to appear for an immigration hearing; his failure to immediately comply with an order of removal; his concealment of his requirement to obtain permission to reenter the United States in obtaining his nonimmigrant visa; his failure to obtain permission to reapply for admission prior to his second entry; his reentry into the United States after having been removed; his unauthorized presence and employment in the United States; his attempt to conceal his prior removal from the United States in filing for adjustment of status; and his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act.

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

The AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act. To seek a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).¹

ORDER: The appeal is dismissed.

¹ The AAO notes that it did not find extreme hardship to be a favorable factor, but only general hardship to be a favorable factor in adjudicating the applicant's Form I-212.