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U.S. Citizenship  
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Services

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FILE:

Office: WASHINGTON, D.C.  
(RELATES)

Date:

JAN 06 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting District Director, Washington, D.C. 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 October 25, 1989, was placed into immigration proceedings after he entered the United States without inspection. On May 30, 1990, the immigration judge ordered the applicant removed *in absentia*. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On February 7, 1991, the BIA dismissed the applicant's appeal. On April 12, 1991, a warrant for the applicant's removal was issued. The applicant failed to depart the United States. In 1999, the applicant applied for Temporary Protected Status (TPS). The applicant was granted TPS on November 22, 1999 and he has extended his TPS yearly since that date. On May 21, 2001, the applicant's employer filed an Immigrant Petition for Alien Worker (Form I-140) on behalf of the applicant, based on an approved Alien Labor Certification (ALC). The Form I-140 was approved on August 22, 2001. On November 19, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-140. On November 4, 2004, 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). 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 U.S. citizen son.

The acting district director determined that the applicant was ineligible for nunc pro tunc permission to reapply for admission. The acting district director also determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Acting District Director's Decision*, dated May 16, 2007.

On appeal, counsel contends that the acting district director's decision is erroneous as a matter of law and is an abuse of discretion. Counsel contends that the acting district director has failed to accord appropriate weight to or to evaluate several relevant factors in the applicant's case. *See Counsel's Brief*, dated June 5, 2007. In support of his contentions, counsel submits only the referenced brief. 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.-

- (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.

While counsel fails to address the issue in his brief, the AAO finds that the acting district director erred in finding that the applicant is ineligible to apply for nunc pro tunc permission to reapply for admission simply because he has not departed the United States. Applicants for permission to reapply for admission may make an application whether they are within or outside the borders of the United States.<sup>1</sup> See 8 C.F.R. § 212.2.

The record reflects that the applicant has a six-year old son who is a U.S. citizen by birth. While the applicant states that he believes the mother of his son is in the United States legally, the record does not contain any evidence to establish her status. The applicant is in his 50's.

On appeal, counsel asserts that the acting district director erred in finding certain incidents, such as the applicant's unlawful residence and unauthorized employment, to be negative factors because they are necessary consequences of the applicant's removal order. The AAO finds this assertion to be unpersuasive. The applicant's failure to appear at an immigration hearing, failure to comply with an order of removal, accrual of unlawful presence and unauthorized employment are separate from the applicant's removal order and are appropriately considered as negative factors in adjudicating permission to reapply for admission. Moreover, the AAO notes that in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), the BIA declined to limit the factors to be considered in the exercise of discretion, indicating that the alien's initial fraud, the basis of his inadmissibility, was appropriately considered in weighing positive and negative factors.

On appeal, counsel asserts that the acting district director erred in finding the applicant's U.S. citizen son to be an "after-acquired equity." Counsel contends that the applicant's son was born in 2002, approximately three years after the applicant received TPS status. Counsel contends that, because the

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<sup>1</sup> The AAO notes that the acting district director was correct in finding that she did not have jurisdiction over the Form I-485. See 8 C.F.R. § 245.2. If the applicant's Form I-212 is approved, he may seek adjustment of his status by filing a motion to reopen with the immigration judge or may seek consular processing of his immigrant visa petition.

applicant was in valid status, the applicant's son is not an "after-acquired equity." The AAO also finds this assertion to be unpersuasive. The 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopez v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam, supra.*, 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 (5<sup>th</sup> 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 those equities acquired by applicants after they have been placed into immigration proceedings, and that these equities are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The AAO notes that the acting district director failed to consider the affidavit of the mother of the applicant's son, which establishes the applicant's relationship with his child.

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

The applicant, in his sworn statement, states that he understood that he was supposed to appear in immigration court and that, even though he later appealed his *in absentia* removal order, he failed to pay close attention to the appeal. He states that he has resided in northern Virginia since 1989. He states that he has never been arrested and has only been cited for traffic violations on two occasions, for which he paid the fines. He states that he has cohabited with the mother of his child, [REDACTED], for six to seven years. He states that while [REDACTED] works and contributes to the household income, he earns more than twice her income. He states that he applied for TPS as soon as it became available to Honduran nationals and he has re-registered in a timely fashion. He states that he has worked for his employer since 1996. He states that he is sorry for his failure to appear at his immigration court hearing. He states that [REDACTED] and his son would be unable to afford the basic necessities without his income and he fears that his child would be left in the care of the general public without his support. He states that after such a long absence from Honduras, he fears he would be unable to find any employment or physically survive there. He states that he has lost contact with his friends and many of his relatives, and would have no one to assist him in Honduras. He states that he also fears for his safety upon returning to Honduras from the United States because he will be viewed as wealthy and may be targeted by criminals.

[REDACTED] in her affidavit, states that she does not work and stays at home with the applicant's son. She states that the applicant works to support the family. She states that she would be devastated if the applicant was not in the United States to care for and support the family. She states that the applicant is a loving and caring father and he takes good care of her and his son. She states that she wants her son to grow up with his father. She states that the applicant also supports family members who reside in Honduras, as well as her other children who also live there. She states that it would be very difficult for her to return to work and support the applicant's child by herself. She states that the applicant would be unable to support her and their child if he was in Honduras.

A letter from [REDACTED], Pastor of the Macedonia Church, states that the applicant is a member of the church and is involved in all of the church's activities and is good to the other members of the congregation.

Country conditions reports in the record state that Honduras suffers from poverty; two-thirds of the country's households live in poverty and 40 percent of the population live on less than \$1.00 per day. They state that Honduras has high levels of crime and violence.

Tax records reflect that the applicant has paid federal taxes from 2002 through 2005. The applicant has been issued employment authorization from 1999 until present.

The record reflects that the applicant failed to disclose his prior removal proceedings on at least two applications for TPS (Form I-821). The AAO that these misrepresentations are material to an application for TPS and render the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). In order to seek a waiver of inadmissibility under section 212(i) of the Act, an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601). A waiver of inadmissibility under section 212(i) of the Act requires a showing of extreme hardship to the applicant's lawful permanent resident or U.S. citizen spouse or parent. The AAO notes that the record does not establish that the applicant has a qualifying relative under which he could establish eligibility for a waiver pursuant to section 212(i) of the Act.

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 son, the general hardship to the applicant and his family members in the event of his removal, the absence of a criminal record, his steady employment since 1996, payment of federal taxes and an approved immigrant visa petition benefiting him. The AAO notes that the birth of the applicant's son and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. The applicant's son and the approved immigrant visa petition are "after-acquired equities" and the AAO, therefore, 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 failure to appear at an immigration hearing; his failure to comply with an order of removal; his unauthorized presence and employment in the United States prior to obtaining TPS in 1999; his concealment of his removal order in applying for TPS; 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 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.