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

PUBLIC COPY

HL4

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: **JAN 07 2009**

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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 April 29, 1993, was apprehended by immigration officers at his place of employment. He admitted that he had entered the United States without inspection in April 1992 and had been employed in the United States without authorization. On the same day, the applicant was placed into immigration proceedings and warned of the consequences of his failure to appear for his immigration hearing or inform the immigration court of any changes in his address. On September 1, 1993, the immigration judge ordered the applicant removed *in absentia*. On November 10, 1993, a warrant for the applicant's removal was issued. The applicant failed to appear for removal or to depart the United States. On December 28, 1993, the applicant married [REDACTED], a U.S. citizen. On October 11, 1994, the applicant filed his first Form I-212 in connection with a Petition for Alien Relative (Form I-130) filed on his behalf by Ms. [REDACTED]. On September 24, 1994, the Form I-130 was approved. On May 2, 1996, the applicant divorced Ms. [REDACTED]. On March 10, 1997, the applicant married [REDACTED], a U.S. citizen. On January 14, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Form I-130 filed on his behalf by [REDACTED]. The applicant filed a motion to reopen with the immigration judge. On April 11, 2001, the immigration judge denied the applicant's motion to reopen. On March 27, 2002, the applicant's lawful permanent resident mother, [REDACTED] filed a Form I-130 on behalf of the applicant as the unmarried son of a lawful permanent resident. On May 23, 2002, the applicant withdrew his Form I-485 because he was divorcing [REDACTED]. On June 10, 2004, Grand Morelos filed a Petition for Alien Worker (Form I-140), based on an approved Alien Labor Certification (ALC), on behalf of the applicant. On March 9, 2005, the Form I-140 was approved. On October 25, 2005, the Form I-130 filed by [REDACTED] was approved. On August 18, 2006, the applicant filed a second Form I-212. The director found the applicant inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A) and the applicant 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 lawful permanent resident mother.

The director determined that a favorable exercise of discretion was not warranted and denied the Form I-212 accordingly. *See Director's Decision* dated May 14, 2007.

On appeal, counsel contends that the director failed to adequately review the documentation submitted by the applicant in support of his Form I-212 and the lack of proper review led to the denial of the Form I-212. *See Counsel's Brief*, dated June 14, 2007. In support of the appeal, counsel submits the referenced brief and copies of property records. The entire record was reviewed 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.

The above provision holding aliens inadmissible for a period of ten years applies to exclusion or deportation orders issued both before and after April 1, 1997, the effective date of section 212(a)(9)(A) of the Act. *See Memorandum by [REDACTED], 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 and citizen of Mexico who became a lawful permanent resident in 2002. The applicant has a four-year old son who is a U.S. citizen by birth. While counsel asserts that the applicant has two U.S. citizen children, there is no evidence in the record to establish that a second child exists or that he or she has lawful status in the United States. While counsel states that the applicant is married, the record reflects that the applicant is divorced from [REDACTED] and there is no evidence in the record to establish that he has since married another person.¹ The applicant is in his 30's and [REDACTED] Tajonar is in her 60's.

On appeal, counsel asserts that a full review of the respondent's favorable factors outweighs the negative factors and the director gave little weight to the absence of a criminal record in the applicant's case.

¹ On May 23, 2002, the applicant submitted a signed statement indicating that he did not wish to attend his adjustment of status interview because he was divorced. Tax and property records indicate that the applicant has been a single man since 2002. The Form I-130 approved on his behalf in 2005 indicates that the applicant is the *unmarried* son of a lawful permanent resident. The AAO notes that counsel incorrectly states that the applicant's sister filed a Form I-130 on behalf of the applicant.

On appeal, counsel asserts that the applicant has been in the United States for fifteen years. Counsel asserts that the applicant came to the United States to work, provide for his family and to be a contributing member of society. Counsel asserts that the applicant has paid taxes and that he has built equity and established roots in the United States. Counsel asserts that the applicant is the owner of a Chevy suburban and has purchased multiple properties, at least four of which he still owns. Counsel asserts that the applicant is a hardworking individual who contributes in a positive way. Counsel asserts that the applicant's failure to appear and his apprehension by immigration officers occurred more than 14 years ago and he has since been a productive member of society.

Tax records establish that the applicant has paid federal taxes from 1997 through 2004. The applicant has been employed in the United States since he entered in 1992, but was issued employment authorization only from August 30, 2000 until August 29, 2001.

Property records indicate that the applicant purchased a parcel of land in Middle Smithfield, Pennsylvania in 2002, and a tenement located at [REDACTED] 2003.

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. [REDACTED] 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 lawful permanent resident mother, his U.S. citizen son, the absence of a criminal background, his payment of federal taxes, his ownership of properties in the United States, and the approved immigrant visa petitions filed on his behalf.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry; his failure to appear for an immigration hearing; his failure to comply with an order of removal; his extended unlawful presence in the United States; and his unauthorized employment in the United States.

The applicant's immigration violations 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.