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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship
and Immigration
Services

H4

JUL 06 2009

FILE:

Office: VERMONT SERVICE CENTER

Date:

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting 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 dismissed.

The applicant is a native and citizen of Trinidad who, on March 8, 1980, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, which expired on September 30, 1980; however the applicant was permitted to change his status to a student on December 11, 1981. The applicant's student status expired on May 30, 1982. On October 17, 1983, the applicant was placed into immigration proceedings for overstaying his status, under the name [REDACTED]" and date of birth January 13, 1949. On December 15, 1983, the immigration judge granted the applicant's voluntary departure until March 18, 1984. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

The applicant subsequently departed the United States on an unknown date, but prior to June 22, 1984, the date on which he was issued a nonimmigrant visa in Port of Spain, Trinidad and Tobago, under the name "[REDACTED]" and date of birth November 13, 1949. The applicant failed to obtain permission to reapply for admission in obtaining his nonimmigrant visa. On June 29, 1984, the applicant was admitted to the United States as a nonimmigrant. The applicant overstayed his status, which expired on December 28, 1984. On January 22, 1985, the applicant was again placed into immigration proceedings for overstaying his nonimmigrant status, under the name '[REDACTED]' and date of birth November 13, 1949. On March 24, 1986, the immigration judge granted the applicant voluntary departure until April 24, 1986, *in absentia*. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On February 3, 1988, the applicant pled guilty to felony rape in violation of Georgia State Law. The applicant was sentenced to sixty years in jail, which was commuted to time served plus probation. On July 21, 1989, a warrant for the applicant's removal was issued. On July 27, 1989, the applicant was removed from the United States and returned to Trinidad.

On November 17, 1989, the applicant was issued a nonimmigrant visa under the name [REDACTED] and date of birth November 13, 1949. The applicant failed to obtain permission to reapply for admission and a waiver for his conviction in obtaining the nonimmigrant visa. On December 3, 1989, the applicant was admitted to the United States as a nonimmigrant. The applicant remained in the United States past his authorized stay, which expired on January 2, 1990.

On January 26, 2004, the applicant's naturalized U.S. citizen mother filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on December 9, 2005. On April 8, 2006, the applicant married his U.S. citizen spouse, [REDACTED].¹ On December 26, 2006, [REDACTED] filed a Form I-130 on behalf of the applicant. On July 17, 2006, the applicant filed the Form I-212, indicating that he continued to reside in the United States. The applicant is inadmissible indefinitely under section 212(a)(9)(A)(ii) of the Immigration and

¹ The AAO notes that the applicant has failed to provide evidence of his marriage or his spouse's U.S. citizenship; however, for purposes of adjudicating this application, the AAO will view [REDACTED] as a positive factor in the applicant's case.

Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), as an aggravated felon. 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 spouse, two U.S. citizen children and one U.S. citizen stepchild.

The acting director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Acting Director's Decision* dated July 9, 2008.

On appeal, counsel contends that the applicant is deserving of a positive grant of discretion. *See Counsel's Brief*, received February 13, 2009. In support of her contentions, counsel submits the referenced brief, letters of recommendation, letters from the applicant's family and medical documentation. The entire record was reviewed in rendering a decision in this case.

Section 101(43) of the Act states in pertinent part:

(43) The term "aggravated felony" means-

(A) murder, *rape*, or sexual abuse of a minor (emphasis added)

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

(1) Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if—

....

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that —

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

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. [Emphasis added]

The AAO notes of that the record does not contain a birth certificate or other documentation to establish that [REDACTED] is a citizen of the United States; however, for purposes of adjudicating the application before it, the AAO will accept that the applicant's spouse is a citizen of the United States. [REDACTED]'s age is unknown to this office. The AAO also notes that the record does not contain birth certificates or other documentation to establish the relationship between the applicant and his children; however, for purposes of adjudicating the application before it, the AAO will accept that the applicant has a nineteen-year-old son and a sixteen-year-old son from prior

relationships who are both U.S. citizens by birth, and that [REDACTED] has an approximately 12-year-old son from a prior relationship, who is a U.S. citizen by birth. The applicant's mother is a native of Trinidad who became a lawful permanent resident in 1990 and a naturalized U.S. citizen in 1999. The AAO again notes that the record does not contain birth certificates or other documentation to establish the relationship between the applicant and his siblings; however, for purposes of adjudicating the application before it, the AAO will accept that the applicant has three siblings, that the applicant's sister is a native of Trinidad who became a lawful permanent resident in 1974 and a naturalized U.S. citizen in 1989, and the applicant's brothers are natives of Trinidad who became lawful permanent residents in 1998 and naturalized U.S. citizens in 2008 and 2009. The applicant is in his 50s and his mother is in her 80s.

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

Counsel, on appeal, admits that the applicant did not timely leave the United States in response to his first order of voluntary departure. Counsel states that the applicant returned to the United States at the end of 1989 and has been residing in the United States for the past twenty years. Counsel states that the applicant married [REDACTED] on April 8, 2006. Counsel contends that the applicant is deserving of a positive grant of discretion. Counsel states that the applicant's family is in the United States, including his mother, four siblings, his wife and two U.S. citizen children.² Counsel states that the applicant's sister suffers from kidney failure and receives dialysis treatment frequently. Counsel states that the applicant's sister is now disabled and suffers tremendously. Counsel states that the applicant has always been involved in his sister's treatment and provides a lot of emotional support. Counsel states that the applicant has become very active in community events and church related activities. Counsel states that the applicant and his spouse are both very talented musically and have donated their time to many activities, locally and around the country. Counsel states that the applicant is very active in the Eagle Heights Church and participates in the Children's Ministry, Worship Arts and Television Ministry. Counsel states that the applicant is a supportive father and loving husband. Counsel states that the applicant is a father figure to his spouse's son. Counsel states that the applicant's youngest U.S. citizen son resides with him and would be devastated if the applicant was not permitted to remain in the United States.

[REDACTED] in a letter accompanying the appeal, describes the applicant as honest, trusting, unselfish, kind, thoughtful, giving, patient, committed, friend to many, and a loving brother, husband and father. She states that she has experienced abuse during her prior relationship and as a result of that abuse was left a single mother of a three-year-old child. She states that during her struggle as a single mother she became a Christian in 1998. She states that the applicant started out as a mentor to her child when he was four-years-old. She states that the applicant grew up without his father and could relate to her son. She stated that she and the applicant had a five-year courtship prior to their marriage. She states that, after converting to Christianity from Islam, the applicant became a mentor to her. She states that her family has no problem in welcoming the applicant as their brother. She states that the applicant's youngest son has an incredible brotherly relationship with her son. She states that the applicant is not only a loving person, but respects her as a woman. She states that the applicant is not perfect but that he strives to be the head of his household and loves her the way God

² While counsel and the applicant's mother assert that the applicant's mother has four children besides the applicant, documentation in the record and U.S. Citizenship and Immigration Services (USCIS) records can only establish the existence and legal status in the United States of three of those siblings.

loves his church. She states that the applicant's thought process is always to become a better husband, father, brother, and friend. She states that the applicant has never abandoned his children and always wants the best life for them.³

The applicant's mother, in an affidavit accompanying the appeal, states that she recognizes the applicant has been involved in an incident in Georgia, but that the applicant that she knows has been a "cornerstone" to her family. She states that the applicant is loving and a hero to his siblings. She states that the applicant first came to the United States approximately 24 years ago. She states that the applicant helped his sister to walk away from an abusive stepmother. She states that the applicant later helped his sister to walk away from an abusive man. She states that, during this time, the applicant was the only support system that the applicant's sister had. She states the applicant has no social or economic ties to Trinidad and that the whole family resides in the United States. She states that the applicant's sister is very ill and in the last stages of kidney disease. She states that she is devastated by the thought of losing her daughter. She states that this situation also causes much sorrow to the applicant. She states that all of her children have furthered their education in the United States and contributed to society and that they consider the United States their home.

The applicant's youngest son, in an affidavit accompanying the appeal, states that he entered the Ninth Grade and is attending Revere High School. He states that he has resided with the applicant for most of his life. He states that he considers his stepmother's son to be a brother. He states that he has a close relationship with his biological mother, but that he spends most of his time with his father. He states that it is scary for him to think of the possibility that his father could leave the United States.

Letters of recommendation from friends and pastors, state that the applicant has served faithfully in the church and its activities. They state that the applicant is a stable man of faith and deeply committed to his spouse, family, church and community. They state that they have watched the applicant grow as a person and observed his constant push to strive for excellence. They stated that the applicant has been an inspiration. They state that the applicant's desire for serving others is evident. They state that he currently serves in the media Ministry and is utilizing his gift of song in the choir as a soloist. They state that the applicant has also served in ushering Ministry and donates his time and efforts to the maintenance of the church building. They state that the applicant has always demonstrated honesty and integrity and they believe him to be a man of highest moral character. They state that the applicant's family is widely known and well respected within the local Christian community. They state that the applicant and his spouse often volunteered to help their city. They state that the applicant is an intelligent, upright and ambitious man with the deep commitment to and respect for law and authority. They state that the applicant has never run afoul of the law. They state that they have never known the applicant to be involved in any laws or reckless behavior. They state that the applicant's honesty and deep rooted traits of moral integrity are the result of the Christian home from which he comes. They state that the applicant is a natural leader and has demonstrated great skill in being a follower and a good team member. They state that his ability to submit to authority and to cooperate with others have endeared him to others with whom he interacts. They state that the applicant can be an asset to any endeavor he undertakes. They state

³ The AAO notes that

does not address the applicant's prior conviction and rehabilitation.

that the applicant is a diligent, trustworthy, ardent worker, enterprising, progressive, and ambitious person.⁴

A letter from _____ Director of Social Work, Dialysis Clinic, Inc., dated September 15, 2008, indicates that she has been the applicant's sister's social worker. She states that she has known the applicant for fourteen years, during which time she has seen him be very caring, responsible and compassionate. She states that the applicant's sister has endured many medical issues and that the applicant has always been supportive and involved in his sister's medical care. She states that the applicant has brought his sister to the hospital during many medical emergencies, taking care of her when she was ill, and helping to provide a safe and nurturing environment in which to live. She states that the applicant has been an outstanding member of his community and a faithful, responsible family member not only to his sister but to his mother and his own children. She states that the applicant can be counted on to support his family and that, without him, the applicant's sister would not have had the quality of life that she has today.

Medical documentation establishes that the applicant's sister is disabled from her medical conditions, which include: end stage renal disease requiring hemodialysis three times per week; cardiomyopathy and pulmonary hypertension.

Medical documentation establishes that the applicant's son has had his immunizations, is overdue for a checkup, and that his last visit in 2002, was given singular and albuterol for asthma.

Other documentation in the record establish that the applicant has been given an award for his work with the Music Department of Parkway Christian Center; provided musical overture in celebrating black history month; has been presented as an artist by his brother, _____; provided his vocal talents to Memorial Day exercises in the city of Revere; provided his vocal talents to the Faith International Ministries sixth anniversary celebration; provided his vocal talents to the MIT Artists behind the Desk series; provided his vocal talents to the Winthrop Lodge Flag Day celebrations; and provided his vocal talents to commencement exercises.⁵

The record reflects that the applicant has been employed in the United States since at least October 5, 1981. The applicant has never been issued employment authorization.

The AAO notes that the applicant has been convicted of rape, an aggravated felony and a crime involving moral turpitude. *Matter of B-*, 5 I. & N. Dec. 538 (BIA 1953); *Ng Sui Wing v. United States*, 46 F.2d 755 (C.C.A. 7, 1931). Specifically, the applicant pled guilty to having carnal knowledge of the victim (the applicant's girlfriend's minor daughter) forcibly and against her will. The AAO notes that the applicant is required to show, not just that admission to the United States would not be contrary to the national welfare, safety, or security of the United States, but also that there will be exceptional and extremely unusual hardship to a qualifying relative in order to seek a waiver

⁴ The AAO notes that the persons who write these letters of recommendation do not address the applicant's prior conviction and his rehabilitation and, in some instances, appear to be completely unaware of the applicant's criminal past.

⁵ The AAO notes that documentation in the record establishes that the applicant has not always provided his services without compensation. The record establishes that the applicant received \$400 for services rendered during a two-day period for commencement services.

of his conviction for rape because the conviction is one which involves violence. *See* 8 C.F.R. § 212.7(d).⁶

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

⁶ Counsel contends that the applicant did not file an Application for Waiver of Grounds of Inadmissibility (Form I-601) because he is not in a position to file for admission to the United States; however, the AAO notes that the applicant may file a Form I-601 either prior to seeking admission or in conjunction with an application for admission. Moreover, the applicant's inadmissibility and need for a waiver are negative factors to be considered in adjudicating the applicant's application.

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 applicant’s two U.S. citizen children, the applicant’s U.S. citizen stepchild, the applicant’s U.S. citizen mother, the applicant’s U.S. citizen siblings, the general hardship to the applicant and his family members if he were denied admission to the United States, and the approved immigrant visa petition and pending immigrant visa petition filed on his behalf.⁷ The AAO notes that the applicant’s marriage, the births of his U.S. citizen children, the official establishment of the stepchild relationship, the applicant’s mother and two siblings’ adjustments to that of lawful permanent residents and subsequent naturalizations 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,” to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant’s original overstay of his nonimmigrant status; his failure to comply with voluntary departure; obtaining a nonimmigrant visa without obtaining permission to reapply for admission; reentering the United States after removal without obtaining permission to reapply for admission; his failure to appear at an immigration hearing; his failure to comply with the second order of voluntary departure; his failure to comply with an order of removal; his conviction for felony rape, an aggravated felony; his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. §1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, specifically a conviction involving violence; obtaining a nonimmigrant visa under a fraudulent alternative name and without obtaining permission to reapply for admission or a waiver for his conviction; reentering the United States after removal under a fraudulent or alternative name and without obtaining permission to reapply for admission or a waiver for his conviction; his unauthorized and unlawful presence in the United States; his unauthorized employment in the United States; and his inadmissibility under section 212(a)(6)(A) of the Act, 8 U.S.C. §1182(a)(6)(A), for being unlawfully present in the United States and ineligible for adjustment of status under section 245(i).

The applicant in the instant case has multiple immigration violations and a serious criminal conviction. 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.

⁷ The AAO notes that the petition filed by the applicant’s mother is no longer current because the applicant is now married; however, the applicant is still eligible to utilize this petition once a visa number becomes available.