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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

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FILE: [REDACTED]

Office: KANSAS CITY, MO

Date: **JUL 06 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: Self-represented

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 Field Office Director, Kansas City, Missouri, 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 appears to be represented; however the record does not contain Form G-28, Notice of Entry of Appearance as Attorney or Representative. All representations will be considered but the decision will be furnished only to the applicant.

The applicant is a native and citizen of Honduras who, on February 18, 2003, was placed into immigration proceedings after having entered the United States without inspection on February 16, 2003.¹ On March 2, 2004, the immigration judge granted the applicant voluntary departure until June 30, 2004. On the same day, the applicant's U.S. citizen stepfather filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. 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 September 16, 2004, the applicant departed the United States and returned to Honduras.² On May 24, 2005, the Form I-130 was approved.

On February 12, 2008, the applicant filed the Form I-212, indicating that he resided in the United States.³ The applicant is inadmissible pursuant to 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 lawful permanent resident mother, U.S. citizen stepfather and three lawful permanent resident siblings.

The field office director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The field office director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated January 8, 2009.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Form I-290B*, dated February 10, 2009. In support of her contentions, counsel submits the referenced Form

¹ The AAO notes that the applicant was under the age of eighteen at the time of entry and did not start to accrue unlawful presence in the United States until his eighteenth birthday, which occurred on February 14, 2004.

² An executed Departure Verification Form (Form G-146) from the U.S. Embassy in Honduras confirms that the applicant departed the United States on this date.

³ The record reflects that the applicant received assistance in completing the Form I-212, which may have inadvertently led to the indication that the applicant resided in the United States. Documentation submitted on appeal, such as medical records, money transfers, paychecks, receipts and correspondence, reflect that the applicant has resided in Honduras since his departure on September 16, 2004. The AAO notes that if it is later confirmed that the applicant has illegally reentered the United States at any time after his 2004 removal, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007).

I-290B, criminal and medical records, money transfers, paychecks stubs, receipts, and correspondence. 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.

....

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.-Any alien who-
 - (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
 - (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.
- (ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the

United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

- (1) the alien's having been battered or subjected to extreme cruelty; and
- (2) the alien's--
 - (A) removal;
 - (B) departure from the United States;
 - (C) reentry or reentries into the United States; or
 - (D) attempted reentry into the United States.

The record reflects that the applicant's mother is a native and citizen of Honduras who became a lawful permanent resident in 2005. The applicant's stepfather is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 2004. The applicant's mother and stepfather were married on March 2, 2002. The applicant's mother has three other adult children from a prior relationship who are all natives and citizens of Honduras who became lawful permanent residents in 2005. The applicant is in his 20's, the applicant's mother is in her 40s and the applicant's stepfather is in his 50s.

On appeal, counsel states that the applicant was traveling to Chicago in order to obtain a passport during his period of voluntary departure, but that he was involved in a motor accident which left him injured. Counsel states that the family attempted to obtain an extension of voluntary departure, but that they received no response. The AAO notes that documentation in the record establishes that counsel filed a request for deferred action in the applicant's case; however, the district director does not have authority to extend the applicant's voluntary departure. Counsel states that the applicant departed the United States as soon as he had recuperated from his injuries. Counsel states that the applicant's mother has been supporting him while he has resided in Honduras.

Money Transfer records establish that the applicant's mother and other family members have transferred money to the applicant in Honduras on a frequent basis since his removal.

Clearance letters from the Criminal Background Unit of the Republic of Honduras and the Department of Registry Chief in the General Office of Criminal Investigation, indicate that the applicant has no arrest record as of February 26, 2007.

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 lawful permanent resident mother, U.S. citizen stepfather, three lawful permanent resident siblings, general hardship to the applicant and his family if he were denied admission to the United States, the absence of a criminal background, his age at the time of entry into the United States and the approved immigrant visa petition filed on his behalf. The AAO notes that the adjustment of the applicant's mother and

siblings to that of lawful permanent residents and the filing of the immigrant visa petition 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 original unlawful entry and his unlawful presence in the United States from February 14, 2004 until March 2 to 2004, and from June 30, 2004 until September 16, 2004.

The applicant's unlawful entry and unlawful presence in the United States 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.