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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**

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JUL 07 2009

FILE:

Office: VERMONT SERVICE CENTER
(RELATES)

Date:

IN RE:

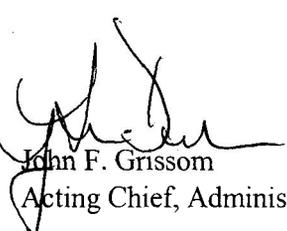
APPLICATION: Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 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 the Dominican Republic who, on November 2, 1989, was placed into immigration proceedings after he entered the United States without inspection. On December 20, 1989, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States. On May 4, 1996, the applicant married [REDACTED], a U.S. citizen. On July 2, 1996, 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]. On February 2, 1998, the applicant filed a second Form I-485 based on a second Form I-130 filed by [REDACTED]. On March 18, 1998, the first Form I-130 was denied for failure to appear. On August 29, 1998, the first Form I-485 was denied. On November 27, 1998, the applicant filed a Form I-212 based on his marriage to [REDACTED]. On May 26, 1999, the Form I-212 was denied for abandonment. On March 2, 2001, the applicant divorced [REDACTED].

On April 26, 2001, the applicant married [REDACTED] then a lawful permanent resident. On April 30, 2001, the applicant filed a third Form I-485 based on a Form I-130 filed by [REDACTED]. On September 17, 2002, [REDACTED] became a naturalized U.S. citizen. On February 13, 2003, the second Form I-485 and Form I-130 filed by [REDACTED] were denied for failure to appear. On August 28, 2003, [REDACTED] filed a second Form I-130 on behalf of the applicant. On the same day, the applicant filed the Form I-212, indicating that he continued to reside in the United States. 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 spouse and four U.S. citizen children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated February 4, 2008.

On appeal, counsel contends that the director improperly considered the evidence and made several errors of fact. *See Form I-290B*, dated February 22, 2008. In support of his contentions, counsel submits only the referenced Form I-290B. On the Form I-290B, counsel indicates that he will forward additional evidence and/or a brief within thirty days. The regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B require the affected party to submit the brief or evidence directly to the AAO, not to the Vermont Service Center or any other federal office. The record does not contain the brief and/or evidence that counsel indicated would be submitted to the AAO. Even if counsel were to submit evidence that a brief was filed with an office other than the AAO, the AAO would not consider the brief on appeal because counsel failed to follow the regulations or the instructions for the proper filing location. Accordingly the record is complete.

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 record reflects that [REDACTED] is a native of the Dominican Republic who became a lawful permanent resident in 1987 and a naturalized U.S. citizen in 2002. The applicant and [REDACTED] have an eleven-year old daughter, a nine-year old son and a seven-year old son who are all U.S. citizens by birth. The applicant has a 14-year old son from a prior marriage who is a U.S. citizen by birth. The applicant and [REDACTED] are in their 30's.

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

On appeal, counsel contends that the director improperly considered the evidence and made several errors of fact. Counsel contends that the director ignored statements made by the applicant in support of the Form I-212. Counsel contends that the director abused his discretion.

The applicant, in an affidavit accompanying the Form I-212, states that he first married [REDACTED] in 1993. He states that his 14-year old son was born to this marriage and that the marriage began to fall apart when [REDACTED] continued to live a lifestyle which included an active social life. He states that he and [REDACTED] agreed to divorce and were divorced on February 24, 1995. He states that he married [REDACTED] after six months of dating. He states that they began to grow apart and he began to have an affair with [REDACTED]. He states that his second child was conceived with [REDACTED] approximately four months after he married [REDACTED]. He revealed his affair to [REDACTED], who, at first forgave him. He states that [REDACTED] then left him in December 1998. He states that he attempted to contact [REDACTED], but was unable to until 2001, when [REDACTED] agreed to divorce him. He states that he had continued his relationship with Ms. [REDACTED] and had another child with her during this time. He states that he has four U.S. citizen children. He states that he has not left the United States since his first entry. He states that he has an

approved immigrant visa petition and has a strong and loving relationship with [REDACTED]. He states that he has never been convicted of a crime and has not committed a crime for which he has not been convicted.

[REDACTED], in an affidavit accompanying the Form I-130, states that the applicant is a loving father to his children, supporting them financially and emotionally. She states that she is not employed and that the applicant is the sole provider for the family.

The record reflects that the applicant has been employed in the United States since December 1989. The applicant has been issued employment authorization from February 11, 1998 until June 9, 1999.

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. *Supra*.

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, his four U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, his otherwise clear background, and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, the birth of his children and the filing of the immigrant visa petition 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 entry into the United States without inspection; his failure to appear at an immigration hearing; his failure to comply with an order of removal; his extended unlawful presence in the United States; and his extended unauthorized employment in the United States, except for February 11, 1998 through June 9, 1999.

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.