

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

H4

FILE:

Office: PORTLAND, OR

Date: JUL 27 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, 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, Portland, Oregon 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 August 8, 1989, was admitted to the United States as a lawful permanent resident. On December 18, 1995, the applicant pled guilty to and was convicted of felony sexual abuse in the first degree in violation of section 163.427 of the Oregon revised statutes (ORS). The applicant was sentenced to 75 months in jail and 120 months of probation. On December 18, 2002, the applicant was placed into immigration proceedings as a lawful permanent resident who had been convicted of an aggravated felony, specifically the sexual abuse of a minor. On January 2, 2003, the applicant married his U.S. citizen spouse, [REDACTED], in The Dalles, Oregon. On January 22, 2003, the immigration judge ordered the applicant removed from the United States under section 237(a)(2)(A)(iii) of the immigration and nationality act (the Act), 8 U.S.C. §1182(a)(2)(A)(iii). On January 24, 2003, the applicant was removed from the United States and returned to Mexico.

On April 2, 2004, the applicant filed a motion to reopen with the immigration judge. On April 20, 2004, the immigration judge denied the applicant's motion to reopen. On April 27, 2004, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On August 5, 2004, the BIA dismissed the applicant's appeal of the motion to reopen. The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On September 1, 2005, the Form I-130 was approved. On October 2, 2006, the Ninth Circuit denied the applicant's petition for review. On March 20, 2008, the applicant filed the Form I-212, indicating that he resided in Mexico. The applicant is indefinitely 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), 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, lawful permanent resident mother and U.S. citizen father.

The field office director determined that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(I)(I), for having been convicted of a crime involving moral turpitude. The field office director determined that, as a lawful permanent resident convicted of an aggravated felony, the applicant was not eligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). The field office director also determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision* dated June 25, 2008.

On appeal, counsel contends that the applicant's conviction for sexual abuse is not a conviction for sexual abuse of a minor and is, therefore, not an aggravated felony. Counsel contends that the applicant has not been convicted of a crime involving moral turpitude because the applicant's conviction for sexual abuse is not one that involves baseness or depravity contrary to accepted moral standards. Counsel contends that, if the AAO finds that the applicant has been convicted of a crime involving moral turpitude, he is not inadmissible under 212 (a)(2)(A)(i)(I) of the Act because he is eligible for the exception under section 212 (a)(2)(A)(ii) of the Act, 8 U.S.C. §1182 (a)(2)(A)(ii), as a juvenile. *See Attachment to Form I-290B and Counsel's Brief.* In support of her contentions,

counsel submits the referenced attachment and brief, copies of case law and documentation from the immigrant visa section of the U.S. Consulate. 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. [Emphasis Added]

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] do not appear to have any children. The applicant's father is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized US citizen in 1999. The applicant's mother is a native and citizen of Mexico who became a lawful permanent resident in 1989. The applicant and Ms. [REDACTED] are in their 30s, the applicant's mother is in her 50s and the applicant's father is in his 60s.

Counsel contends that, in light of the Ninth Circuit Court of Appeals decision *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008), the applicant's conviction for sexual abuse is not an aggravated felony. Counsel's contention is unpersuasive. The AAO notes that the Ninth Circuit Court of Appeals case to which counsel cites is based on statutory rape statutes in California, while the applicant's conviction is for sexual abuse in the first degree in violation of Oregon law. *Estrada-Espinoza* holds that "sexual abuse of a minor" under section 101(a)(43)(A) of the Act, 8 U.S.C. §1101 (a)(43)(A), must consist of 4 elements: (1) a mens rea or level of knowingly; (2) a sexual act;

(3) with a minor between the ages of 12 and 16; and (4) an age difference of at least 4 years between the defendant and the minor. Section 163.427 of the Oregon revised statutes provides that:

- (1) A person commits the crime of sexual abuse in the first degree when that person:
 - (a) Subjects another person to sexual contact and:
 - (A) The victim is less than 14 years of age;
 - (B) The victim is subjected to forcible compulsion by the actor; or
 - (C) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless; or
 - (b) Intentionally causes a person under 18 years of age to touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person.
- (2) Sexual abuse in the first degree is a Class B felony.

The AAO finds that section 163.427 of the ORS does not provide all 4 elements required for a finding that the conviction is an aggravated felony; however, the AAO must also look to the record of conviction in each applicant's individual case to determine whether the record can establish that the applicant has been convicted of an aggravated felony. The record of conviction in the applicant's case reflects that the applicant pled guilty to count 2 of the indictment. Count 2 of the applicant's indictment charged the applicant with "unlawfully and knowingly subjecting the victim, a person under the age of 14 years, to sexual contact by touching her vagina or breasts, a sexual or intimate parts of the victim, contrary to the statutes in such cases made and provided against the peace and dignity of the State of Oregon specifically sexual abuse in the first degree." The count to which the applicant pled sets forth 3 of the elements required to find that a conviction is one of "sexual abuse of a minor." The record establishes that the applicant was 5 years older than the victim at the time the offense occurred. The AAO, therefore, finds that the applicant's conviction is an aggravated felony under section 101(a)(43)(A) of the Act. The AAO also notes that the applicant's conviction is an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. §1101(a)(43)(F) as a crime of violence for which the term of imprisonment was at least one year. *See United States v. Gomez-Mendez*, 486 F.3d 599 (9th Cir. 2007).

Counsel contends that the applicant's conviction is not a crime involving moral turpitude in light of the Ninth Circuit Court of Appeals decision *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2006). Counsel's contention is unpersuasive. The AAO notes again that the Ninth Circuit Court of Appeals case to which counsel cites relates to statutory rape statutes in California, while the applicant's conviction is for sexual abuse in the first degree in violation of Oregon law. *Quintero-Salazar* holds that the California statutory rape statute involves an act that is only statutorily prohibited rather than inherently wrong and thus generally does not involve moral turpitude. The court notes that this statute includes "unlawful sexual intercourse" with a minor and that "unlawful sexual intercourse" under the California statute includes sexual intercourse with a person who is not the spouse of the perpetrator. The court continues to note that a minor may marry with the written consent of the parents and a court order, therefore rendering the sexual act with a minor to not fall under "unlawful sexual intercourse." Finally, the court finds that the statute is *malum prohibitum* rather than a *malum in se* because the California state statute is a strict liability crime that does not require any showing of scienter, lacking the requisite element of willfulness or evil intent as required by *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 at 1165-66 (9th Cir. 2006) for a finding that the conviction is one involving moral turpitude. The record of conviction, as discussed above, clearly

establishes that the applicant was convicted of sexual abuse of a minor as defined in 18 U.S.C. § 2243 and involves a mens rea of knowingly. The AAO, therefore, finds that the applicant has been convicted of a crime involving moral turpitude and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Counsel contends that the field office director failed to apply the exception under section 212(a)(2)(a)(ii) of the Act to the applicant's case. Section 212(a)(2)(A)(ii) states in pertinent part, that:

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States

The record reflects that the applicant was 16 years old at the time the offense occurred and he was released from confinement in 2002. Accordingly, the AAO finds that the applicant's conviction for sexual abuse in the first degree is eligible for treatment under the juvenile exception.

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

Counsel, on appeal, contends that approval of the application for permission to reapply for admission will serve a useful purpose. Counsel states that the applicant has committed only one crime and that such crime was committed on July 20, 1995, at which time the applicant was only 16 years old.¹ Counsel states that the applicant was released from confinement on May 22, 2002 and has applied for an immigrant visa more than 5 years after his release. Counsel contends that the applicant's application for (a)(9)(A)(iii) admission should be approved.

in a letter accompanying the Form I-212, states that she has known the applicant since he was 14 and that they have been friends, best friends, boyfriend/girlfriend and husband and wife during that time. She states that the applicant has had a hard life and that his mother was extremely abusive. She states that she is surprised that the applicant outlived the time of his coexistence with his mother. She states that after his mother abandoned the family the applicant found himself in jail at the age of 16. She states that even though she is aware of the circumstances surrounding the applicant's conviction she feels that the applicant has paid for his crime. She states that the judge had no choice in sentencing the applicant so harshly. She states that it truly sickened her when she hears from the applicant what he witnessed in jail and with whom he was forced to fraternize. She states that upon the applicant's release he immediately found work and started all of his probationary

¹ The AAO notes that the indictment reflects the offense took place on August 24, 1995.

requirements. She stated that the applicant was organizing to enroll in college. She states that she and the applicant were residing together when immigration officers detained him for removal. She states that the applicant left Mexico at the age of 7 days old and that Oregon is the only life he has ever known. She states that the applicant would not have remembered much Spanish had it not been for his studies. She states that the applicant living in Mexico has been a struggle in more ways than one for both of them. She states that for the applicant it has been like another prison but that this time his release date is unknown. She states that the applicant is the most caring, kind and patient person she had ever met. She states that the applicant is a very hard worker, an avid reader with an interest in history and a fitness buff. She states that the applicant is affectionate and a calming influence on her worrying nature. She states that the applicant, after returning to Mexico, obtained a job and has been with the same company to date. She states that the applicant dreams of being able to return to the United States, of beginning college and being the productive member of society he has longed to be. She states that everything has been on hold for them: family relationships, friendships, college, children, fun. She states that she and the applicant do not feel comfortable or accepted in Mexico and they often encounter many difficulties in their personal lives and in the applicant's work. She states that she has returned to Oregon in order to attend school after residing with the applicant in Mexico for 3½ years. She states that she visits the applicant as much as possible but that such visits cannot equate to a life together. She states that supporting two households and travel expenses is an additional financial burden upon them. She states that being separated takes a heavy emotional, physical and financial toll on both she and the applicant that will only be alleviated by the applicant's return to the United States.

Letters of recommendation from friends and family members state that the applicant has been residing in Mexico for most of the time that he has been married to [REDACTED]. They state that Ms. [REDACTED] returned to Oregon to continue her education and visits the applicant as often as she is able to do so. They state that it has been difficult for the applicant and [REDACTED] to be separated from their families and everything that is familiar to them. They state that the applicant has been working full time in Mexico to make ends meet. They state that the applicant's work ethic is exceptional. They state that the applicant is lucky to have a job and that he receives a minimum hourly wage. They state that the applicant is a very kind, gracious, outgoing, polite, considerate, respectful, intelligent, compassionate and caring person. They state that the applicant did not have a good childhood. They state that the applicant came to the United States when he was very young and that he grew up and attended school in Oregon. They state that the applicant has maintained his dignity and respect for both the U.S. and Mexican laws while in Mexico. They state that the applicant speaks fluent Spanish and English. They state that they are aware that the applicant has been imprisoned and that this does not change their opinion of him. They state that the applicant has not had any encounters with law enforcement in the U.S. or in Mexico since he was released from prison. They state that the applicant has paid for his mistake and continues to pay for it some 10 years later. They state that the applicant's conviction is as a result of the victim's attempt to save face and the passage of measure 11 in the State of Oregon, which permitted minors to be prosecuted as adults. They state that the applicant's parents did not serve a supportive advisory role and that the applicant followed the advice of his legal counsel. They state that knowing the experiences that the applicant had in jail and what he has accomplished only strengthens their respect and admiration for him. They state that he has persevered through many troubles. They state that the applicant has certainly been rehabilitated, completing the process by himself or with the help of [REDACTED]. They state that the applicant is embarrassed and very remorseful over his conviction. They state that the applicant never intended to hurt anyone but realizes that everyone's life was changed because of that day. They state

that prior to returning to Mexico the applicant maintained a full-time job and was on his way to becoming a productive member of society. They state that, if given the opportunity, the applicant would become a productive citizen and a true partner for [REDACTED] if he returned to the United States. They state that the applicant is very caring in support of [REDACTED]

A letter from the applicant's employer, Playas de Rosarito, indicates that the applicant is a responsible hard-working and honest person who has been employed by them since March 5, 2004.

A letter dated May 24, 2007 from [REDACTED] counselor, Portland Community College, indicates that she has met with [REDACTED] on a regular basis since October 2006. She states that [REDACTED] came to see her because she was feeling anxious and needed to talk to someone about the living situation with her husband. She states that they focused on the emotional distress of the separation. She states that [REDACTED] feels some frustration and guilt about living apart from the applicant in order to pursue her educational goals. She states that it has taken its toll on her and that she is anxious about the applicant's living situation and future. She states that [REDACTED] is depressed about the losses they have experienced and their unknown future. She states that the stress has affected her sleep, ability to enjoy life and her concentration. She states that she encouraged Ms. [REDACTED] to be medically assessed for anxiety and depression in the hope that she can benefit from treatment.

A letter dated June 8, 2007 from [REDACTED], states that [REDACTED] was seen on June 1, 2007 when she first came to the clinic to establish care. She states that [REDACTED] has chronic depression and anxiety, which is worsened by the separation from the applicant. She states that she started [REDACTED] on antidepressant medication and a prescription for a sleeping medication. She states that [REDACTED] reported seeing a counselor at her school. She states that a follow-up with her was planned for 6 to 8 weeks out. The AAO notes that there is no evidence to establish that [REDACTED] has received treatment since this evaluation, or that she continues to require or receive treatment.

The record contains a psychological evaluation for [REDACTED] dated February 19, 2007, written by [REDACTED], a licensed psychologist and based on a single interview with Ms. [REDACTED]. Dr. [REDACTED] notes that he performed an evaluation of the applicant at the request of the court for sentencing purposes in January 1996. The results of that psychosexual evaluation indicated that the applicant posed no significant threat to the community and that his admitted sexual misconduct was situational rather than being indicative of a pattern of antisocial conduct in general was sexually deviant proclivities in particular. The AAO notes that [REDACTED] obtained the information regarding the applicant's evaluation during a single telephonic interview. [REDACTED] reported substantial emotional distress over her separation from the applicant, noting that she has been struggling to maintain a stable life with him as a married couple and maintain a productive life for herself in Oregon where her family and his family reside. [REDACTED] reported ongoing symptoms of emotional distress which she says have worsened over the years since the applicant's removal. She reports that she has found herself becoming increasingly morose and socially isolated. She reports she has difficulty getting to sleep and staying asleep and displayed periods of intense and controlled tearfulness. She reports that she has experienced episodes of intense anxiety in the form of panic attacks which are typically triggered by separation anxiety during times of long absence from the applicant. [REDACTED] finds that intense concern over the separation from the applicant proves to be the dominant theme of [REDACTED] statements. He finds that her comments reflect an

understanding of the wrongfulness of his criminal conduct in 1995 although she emphasizes her belief that he was remorseful and committed to making things right by his victim and society. Dr. [REDACTED] finds that the applicant is suffering from moderate depression characterized by symptoms including sadness, pessimism about her future, feelings of guilt or worthlessness, difficulty experiencing pleasure, instability of mood, agitation, episodes of uncontrollable tearfulness, and problems thinking and concentrating. [REDACTED] concludes that the results of psychological testing are consistent with observed and reported behavior in indicating the presence of major depression, cardinal symptoms of which include pervasive loss of interest in previously pleasurable activities, sleep disturbance, psychomotor agitation, decreased energy, intense feelings of guilt, worthlessness and powerlessness, difficulty concentrating, and modern pessimism regarding her future. Dr. [REDACTED] finds that the present state of emotional distress is understandable given the difficulty she and the applicant have experienced. [REDACTED] diagnoses [REDACTED] with major depression, moderate. [REDACTED] finds that this is a direct consequence of the strained marital situation that she and the applicant currently face and that his return to the United States would result in substantial rapid amelioration of [REDACTED]' emotional disorder. The AAO notes that there is no evidence to establish that [REDACTED] has received treatment or counseling since this evaluation, or that she continues to require or receive treatment or counseling. In that [REDACTED]'s findings appear to be based on a single interview with [REDACTED] the AAO does not find them to reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional. As a result, the evaluation's conclusions must be considered speculative and of diminished value to a finding of hardship.

The AAO notes that the evidence in the record does not establish that [REDACTED] would be unable to receive appropriate care or medication in the absence of the applicant. The evidence in the record also does not establish that [REDACTED] would be unable to receive appropriate care or medication in Mexico. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains copies of awards and certificates that the applicant received while serving his sentence: Certificate of Completion for the Cognitive Self Change Program Phase 1 dated January 2000; Pathfinder's Certificate of Award dated June 22, 2001; Certificate of Completion for the Cognitive Self Change Program Phase 2 dated November 30, 2001; Certificate of Completion for the Snake River Correctional Institutions Transitions Class dated November 5-30, 2001; Certificate from the Baseball League for Outstanding First Raised Red Eagle's Team Player dated November 2001; Certificate of Award for the Weight Lifting Contest to 2nd Place dated October 10, 2001; certificate of award for 2nd Pl. In the June 23, 2001 Weight Lifting Contest; Certificate of Appreciation for the March Of Dimes Walk America dated May 2001; Certificate of Award for 3rd Place in the 2000 C2 Soccer League dated August 2000; Certificate of Award for First Place in the SRCM 5K Run dated September 2000; Certificate of First-Place Team in the Labor Day 2000 4 x 400 Relay; and Certificates for First-Place in the First Annual McClaren Bench Classic dated June 11, 1997.

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 and father, the applicant's lawful permanent resident mother, the general hardship to the applicant and his family members if he were denied admission to the United States, his length of residence in the United States, and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage 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," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's conviction for sexual abuse in the first degree and his removal from the United States as a lawful permanent resident convicted of an aggravated felony. The AAO notes the particularly serious nature of the applicant's conviction for "sexual abuse of a minor," but also notes the age at which he was convicted and the circumstances surrounding his conviction.

The applicant's removal from the United States as a lawful permanent resident convicted of an aggravated felony and conviction for sexual abuse in the first degree 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.