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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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[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date: JUN 16 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.

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, Los Angeles, California 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 Mexico who, on May 2, 1989, pled guilty to and was convicted of infliction of corporal injury on a spouse in violation of section 273.5(A) of the California Penal Code (CPC). The applicant's sentence was suspended in favor of 24 months of probation and 2 days in jail. On April 19, 1990 the applicant pled *nolo contendere* to discharging a rifle in the city. The applicant's sentence was suspended in favor of 2 years probation and 2 days in jail. On May 4, 1990 the applicant violated his probation in regard to his conviction for infliction of corporal injury and the applicant's probation was reinstated with an additional 30 days in jail. On August 19, 1991, the applicant's father filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on November 20, 1991.

On December 16, 1993, the applicant was placed into immigration proceedings for entering the United States without inspection in April 1980. On December 22, 1993, the immigration judge ordered the applicant removed. On December 22, 1993, the applicant was removed from the United States and returned to Mexico. On March 3, 1995, the applicant pled *nolo contendere* to driving on a suspended license. The applicant's sentence was suspended in favor of 36 months of probation plus a fine or 10 days in jail. On June 14, 1995, the applicant pled guilty to driving as an unlicensed driver. The applicant's sentence was suspended in favor of 2 years of probation. On November 9, 1999, the applicant filed a motion to reopen with the immigration judge based on his marriage to a U.S. citizen.¹ On January 31, 2000, the immigration judge denied the applicant's motion to reopen. On February 7, 2000, the applicant pled *nolo contendere* to engaging in a high speed contest in violation of section 23109(C) of the California Vehicular Code. The applicant's sentence was suspended in favor of 24 months of probation plus a fine or 8 days in jail. On September 5, 2000, the applicant's probation was revoked. On June 6, 2001, the applicant's probation was reinstated with an additional 16 days in jail.

On April 22, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On the same day, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On November 5, 2007, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Los Angeles, California District Office. The applicant testified that he entered the United States without inspection in December 1993. 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 father and U.S. citizen adult son or.

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 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

¹ The AAO notes that the applicant divorced his US citizen spouse on December 20, 2001. Also, the visa number, which was based upon the Form I-130 filed by the applicant's father, had become available.

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 December 20, 2007.

On appeal, counsel contends the field office director's decision contained legal errors, fails to address the merits of the application for permission to reapply for admission and is based upon a conviction which occurred approximately 19 years ago. Counsel contends that the field office director failed to apply the petty offense exception under the Act. *See Counsel's Brief*, dated February 12, 2008. In support of his contentions, counsel submits only the referenced brief. 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 record reflects that [REDACTED] is not married. The applicant has a 21-year-old son who is a U.S. citizen by birth. The applicant's father, [REDACTED], is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 1996. The applicant is in his 40's and [REDACTED] is in his 70's.

Counsel contends that the field office director failed to apply the petty offense exception to the applicant's conviction for corporal injury on a spouse. Section 212(a)(2)(a)(ii) of the Act states in pertinent part:

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

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 273.5 (A.) of the California Penal Code provides:

Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.

While the applicant only received 2 days in jail for his conviction for corporal injury on a spouse, the charges against the applicant carried a maximum sentence of 4 years in State prison. Accordingly, the AAO finds that the applicant's conviction for corporal injury on a spouse is not eligible for treatment under the petty offense exception.

Counsel contends that that [REDACTED] waiver should be considered under section 212(a)(9)(B)(v) of the Act, 8 U.S.C § 1182(a)(9)(B)(v). Counsel contends that the field office director actor failed to apply section 212(a)(9)(B)(v). The AAO, however, finds that the applicant is not applying for a waiver under section 212(a)(9)(B)(v) of the act.² The applicant is applying for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

Counsel contends that the field office director improperly applied section 212(h) of the Act to the applicant's case.³ Counsel contends that the field office director's decision stated that section 212(h) of the Act contains a waiver for the offense of "inflicting corporal injury on a spouse" for spouses of U.S. citizens, while the petitioner in the applicant's case is his father. The AAO finds that the field office director erred in indicating that he had adjudicated a waiver under this section of the Act by stating that he had not found extraordinary circumstances that would merit a waiver of the applicant's conviction for inflicting corporal injury on a spouse. The AAO finds that the applicant

² Section 212(a)(9)(B)(v) of the Act applies to waivers sought in connection with inadmissibility under section 212(a)(9)(B)(i) of the Act, specifically those applicants who have accrued either more than 180 days or one year of unlawful presence, have departed the United States and are seeking reentry within the proscribed period of time.

³ The AAO, notes that it has already addressed counsel's concerns in regard to the field office director's failure to apply the petty offense exception.

has not filed an Application for Waiver of Grounds of Inadmissibility (Form I-601), even though his conviction requires him to file such an application, and that, therefore, the question of whether the applicant is eligible for such a waiver is not before the field office director or the AAO on appeal. The AAO, however, does find that the field office director was correct in concluding that the applicant would be required to show not just an extreme hardship to a qualifying relative but exceptional and extremely unusual hardship to a qualifying relative in order to seek a waiver of his conviction for corporal injury on a spouse because the conviction is one which involves violence. *See 8 C.F.R. § 212.7(d).*

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

Counsel, on appeal, contends that the field office director failed to consider evidence of hardship to the applicant and his family. Counsel states that it would be very difficult for the applicant to find employment in Mexico and that the minimum wage in Mexico would not permit him to provide for himself, let alone to provide economic support to his father. Counsel states that [REDACTED] is a retiree who has resided with the applicant for most of their lives. Counsel states that when the applicant's mother died [REDACTED] depended upon the applicant to raise his younger children with him. Counsel states that [REDACTED] continues to depend on the applicant. Counsel states that [REDACTED] was evaluated by a licensed psychologist who found that the applicant's removal from the United States would significantly affect [REDACTED]. Counsel stated that [REDACTED] became a U.S. citizen because he loves his life here. Counsel states that moving to Mexico is not an option for [REDACTED] because it would be difficult for him economically in Mexico and also because his other children live in the United States. Counsel states that [REDACTED] would suffer financial hardship if the applicant was unable to adjust his status. Counsel states that, while [REDACTED] receives a fixed income as a retiree, the applicant, if permitted to remain in the United States, could work and contribute to [REDACTED] expenses. Counsel states that [REDACTED] realizes that as he grows old he will require someone to care for him. Counsel states that [REDACTED] depends on the applicant to care for him.

Counsel states that the applicant has a U.S. citizen son. Counsel states that the applicant would like to be able to remain in the United States so that he can be with his son. He states that the applicant's son is in college and that the applicant would like to be able to help his son to pay for his education. Counsel states that if the applicant was removed from the United States he would send money back to the United States to help support his family; however, he would also need to support himself in Mexico. Counsel states that the applicant has a limited education and no work experience in Mexico, which renders it unlikely that the applicant would be able to earn a sufficient income to support both himself and his father. Counsel states that [REDACTED] will suffer emotional hardship if the applicant has to leave the United States. Counsel states that [REDACTED] is concerned that his son would have to spend the rest of his life in a difficult country and with extensive poverty. Counsel states that the hardship [REDACTED] and the applicant will suffer will compound the psychological hardship that [REDACTED] will experience.

[REDACTED], in a declaration accompanying the Form I-212, states that he came to the United States in 1981 and that he currently resides in Gardena California with the applicant. [REDACTED] states that he also resides with 5 of his U.S. citizen adult children and his one lawful permanent resident adult son. He states that the applicant is a very important person in his life. He states that when he was widowed his oldest son already had a family and could not help him in raising his children. He states that the applicant stepped in and helped raise his younger children, becoming another parent to the

siblings and contributing financially to the household. He states that he is very grateful to the applicant for helping raise his siblings. He states that if the applicant was removed from the United States it would be difficult for him financially. He states that he is retired and lives off of a pension. He states that it is difficult to make ends meet if the applicant were unable to help him financially. He states that it would also be difficult for him emotionally. He states that he is very close to the applicant and would miss him very much. He states that he does not wish to be separated from the applicant. He states that as he grows older he knows that he will require more help and that he can trust and depend on the applicant to help him. He states that he is concerned what will happen to the applicant if he has to live in Mexico. He states that the applicant has not lived there since he was a young adult and has lived his entire adult life in the United States. He states that he knows that the applicant loves living in the United States. He states that his children are very close to the applicant and would miss him a lot if he has to leave the United States. He states that the applicant also helps to care for his nieces and nephews.

The record contains a psychological evaluation for [REDACTED], dated February 4, 2007, written by [REDACTED], a licensed psychologist and based on a single interview with [REDACTED]. It states that [REDACTED] is a widower who has 10 adult children. It states that [REDACTED] lives in the city of [REDACTED] with 5 of his children and some grandchildren. It states that [REDACTED]'s family is very close and is supportive of each other. It states that [REDACTED] immigrated to the United States in 1980. Dr. [REDACTED] states that [REDACTED] reports symptoms of depression and anxiety due to the applicant's possible removal from the United States. [REDACTED] states that [REDACTED] reported problems with sleeping, difficulties in concentration, increased stress, excessive worries, and a decrease in energy. It states that [REDACTED] fears that if the applicant is removed to Mexico he would be faced with extreme difficulties. [REDACTED] reported his relationship with the applicant as being extremely close and that the applicant was negatively affected by his mother's death. [REDACTED] reported that he believed many of the applicant's problems stem from his mother's death and that he feels guilty and sad regarding his son's criminal problems. [REDACTED] reports that he is committed to the applicant's well-being and believes that if the applicant is removed it will likely result in serious problems for his son. [REDACTED] reports that he worries about the applicant and fears his removal would be devastating for him. [REDACTED] reports that he believes that his son has been able to avoid further problems over the last few years because he has provided the applicant with support and is constantly guiding him in a much more positive direction. [REDACTED] reports that he fears that the applicant will be at risk of hurting himself if he is removed from the United States. [REDACTED] states that the removal of the applicant would create significant emotional distress for [REDACTED] and that the stress of the applicant's possible removal appears to be the main contributing factor to [REDACTED] depressive and anxiety related symptoms. [REDACTED] states that the support that [REDACTED] receives from his children and grandchildren are likely protective factors which have helped to manage Mr. [REDACTED] symptoms, but as stress regarding the applicant's removal continues it is very likely that Mr. [REDACTED]'s symptoms will intensify. [REDACTED] reports that [REDACTED] test results indicate that he is experiencing a mild range of depression and a moderate level of anxiety related symptoms. Dr. [REDACTED] reports that [REDACTED] does not meet the criteria for a psychological disorder, but if his anxiety and depressive symptoms continue to intensify it is likely that [REDACTED] symptoms will reach a full-blown disorder if some form of intervention is not implemented. [REDACTED] concludes that it is apparent that the removal of the applicant would have a significant emotional impact on [REDACTED]. [REDACTED] recommends that [REDACTED] become involved in counseling to create additional support as well as to help him to learn ways in which he can further support his son. The AAO notes that there is no evidence to establish that [REDACTED] has received treatment or counseling since this evaluation,

or that he continues to require or receive treatment or counseling. In that [REDACTED] 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.

Furthermore, the AAO notes that there is no evidence in the record to establish that [REDACTED] would be unable to receive appropriate care or medication in the absence of the applicant. 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).

Letters of recommendation from family members state that they would be really sad if the applicant was removed from the United States. They state that the applicant is really important person in their lives. They state that the applicant is always there for them. They state that the applicant is a good man who cares a lot about his family. They state that the applicant helps his siblings with their children. They state that the applicant's removal will affect [REDACTED]. They state that they will all be affected by the applicant's removal.

The record reflects that the applicant has been employed in the United States since at least 1985. The applicant has been issued employment authorization from September 28, 2007 until September 27, 2008 and November 16, 2008 until October 15, 2009.

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 father, the applicant's U.S. citizen son, 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 filed on his behalf. The AAO notes that the birth of the applicant's U.S. citizen child occurred after the applicant was placed into immigration proceedings. It is, therefore, an "after-acquired equity," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry; his illegal entry into the United States after having been removed; his convictions for inflicting corporal injury on a spouse, discharging a rifle in the city, driving on a suspended license, driving as an unlicensed driver, and engaging in a high-speed contest; 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; his unauthorized and unlawful presence in the United States; and his unauthorized employment in the United States except for periods of employment authorization.

The applicant in the instant case has multiple immigration violations and criminal convictions. 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.