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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:

Office: SAN FRANCISCO, CA

Date: JUN 24 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, San Francisco, 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 sustained and the application approved.

The applicant is a native and citizen of Mexico who, on September 18, 2006, appeared at the Los Angeles International Airport. The applicant presented her Mexican passport containing a U.S. nonimmigrant visitor's visa. Immigration officers suspected that the applicant was an intending immigrant and placed her into secondary inspections. A search of the applicant's belongings revealed bank statements establishing that she had been employed in the United States during her prior visits utilizing her U.S. nonimmigrant visitor's visa. The applicant admitted that she had been employed by two individuals as a babysitter and had been paid approximately \$400 per week and \$50 per day by those employers, respectively. She admitted that she had opened a bank account in the United States so that she could cash her employment checks. She admitted that she did not have work authorization. She admitted that she was returning to her life in San Mateo, California in seeking admission on this occasion. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an immigrant without valid documentation. On September 19, 2006, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). On March 24, 2007, the applicant married her U.S. citizen spouse in Mexico. On July 10, 2007, the applicant filed the Form I-212, indicating that she resided in Mexico.¹ The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). She 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 her U.S. citizen spouse and U.S. citizen daughter.

The field office director 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 April 8, 2008.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated June 3, 2008. In support of his contentions, counsel submits the referenced brief and copies of documentation to support a finding of hardship. 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

¹ The AAO notes that if it is later confirmed that the applicant has illegally reentered the United States at any time after her 2006 removal, she is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until she 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).

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.

Counsel contends that the applicant only performed child sitting services in the United States for two families for a short period of time in 2005 and that her employment was informal and infrequent with only small amounts of financial remuneration. The applicant, in her statement to immigration officers, indicated that she was consistently employed by one family since September 2005, receiving approximately \$400 per week from that particular employer. The applicant admitted that she had been employed by another family for a period of 6 months at the time of her apprehension and that she received approximately \$50 per day from that particular employer. The AAO finds that the applicant's employment in the United States was not as informal or as infrequent as counsel suggests.²

Counsel contends that the field office director's characterization that the applicant had used public health programs for residents of the State of California to be a gross exaggeration. The record reflects that the applicant used public benefits in connection with a hospital stay associated with a miscarriage. The AAO, therefore, finds that the field office director did not mischaracterize the applicant's use of public benefits.

Counsel contends that the applicant did not enter the United States on three separate occasions since 2003. While the passports submitted by counsel may only reflect a single entry between 2003 and 2006, U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States on January 26 2005, February 19, 2005, November 20, 2005 and March 6, 2006. The AAO, therefore, finds that the applicant entered the United States on four occasions between 2003 and her apprehension on September 18, 2006.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] have a 1-year-old daughter who is a U.S. citizen by birth. The applicant is in her 20's and Mr. [REDACTED] is in his 40's.

On appeal, counsel asserts that the field office director's decision was based on numerous factual and legal inaccuracies and failed to take into consideration important factors relating to the applicant's immediate family. Counsel states that, on December 19, 2007, the applicant gave birth to her U.S.

² The AAO notes that the applicant's spouse, in an affidavit, asserts that the applicant did not receive remuneration for babysitting in the United States; however, the record contains a Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867A), in which the applicant admits to working for specific individuals and for specific amounts of money.

citizen child in La Paz, Baja California, Mexico. Counsel asserts that the applicant has been living in Mexico since her removal and has lived there with her U.S. citizen daughter. Counsel states that Mr. [REDACTED] has made several trips to Mexico to visit his wife and daughter. Counsel states that the applicant was not informed that the public benefits she received in connection with a hospital stay was intended for use only by residents of the State of California. Counsel states that the applicant has not overstayed any period of authorized admission to the United States and has never attempted to enter the United States without inspection. Counsel contends that the applicant has only committed minor immigration infractions on isolated occasions and that the field office director unjustly and harshly mischaracterized the applicant's actions.

Counsel states that the applicant and her daughter are unable to join [REDACTED] in the United States as a result of the denial of permission to reapply for admission and that [REDACTED] can only visit the applicant and his daughter for brief periods and at significant expense and hardship to him. Counsel states that [REDACTED] has been deprived of his ability to live with his wife and child. Counsel states that the applicant has no criminal background. Counsel contends that the applicant is a person of good moral character, as is evidenced by letters of recommendation from her prior employers. Counsel contends that the applicant is the beneficiary of an approved immigrant visa petition. Counsel contends that the applicant is capable of continuing to be a valuable and contributing member of the community if permitted to reenter the United States. Counsel states that the applicant has not made any attempt to reenter the United States without prior approval since her removal from the United States in 2006. Counsel states that the applicant has been forced to assume all child rearing responsibilities for her daughter, who currently resides with her in Mexico. Counsel states that [REDACTED] sends funds to support the applicant and his child in Mexico. Counsel states that the applicant's daughter is being deprived of residing with her father and such deprivation will result in great psychological and developmental hardship as long as it continues. Counsel contends that [REDACTED] is also being subjected to psychological and emotional hardship caused by being unable to reside with his wife and daughter. Counsel states that [REDACTED] is employed full-time in the United States and is the sole support for his family. Counsel states that, as evidenced by a letter from his employer, [REDACTED] has expended and exceeded all of his accrued vacation time at work due to being forced to travel to Mexico to visit his spouse and daughter. Counsel contends that the situation is also a financial hardship due to the costs associated with air fare, money transfers and loss of unpaid time off. Counsel states that the applicant's job performance has been compromised by his need to visit the applicant and his daughter in Mexico, since his duties include being on call for emergencies. Counsel states that the building operations and Mr. [REDACTED] place of work have suffered, not only due to [REDACTED] absence from job duties, but also because of his state of mind while at work.

[REDACTED] in his statement, states that the applicant had a free medical card from a clinic, in case of emergency. He states that he and the applicant returned to Mexico every 6 months in order to get her nonimmigrant status extended. He states that he was legally separated from his ex-wife in 2004 and that the final dissolution of the marriage took three years because of the court system and missed court appearances. He states that the field office director failed to consider his daughter, who

was born on December 19, 2007, in Mexico.³ states that he and the applicant were scheduled for an exit interview at the U.S. Consulate in Ciudad Juarez, Mexico on May 13, 2008.

Letters of recommendation from friends, co-workers and family state that, since the applicant has been returned to Mexico, [REDACTED] has made monthly trips to visit to his wife and daughter. They state that, beyond a being an emotional stress, the separation from his wife and child has also been an extreme financial burden. They state that [REDACTED] employment has suffered, not only because of his absence, but also because of his state of mind. They state that [REDACTED] has been devastated and that the applicant is an incredible woman and loving mother. They state that the applicant loves being a mother and has done a wonderful job caring for her child by herself. They state that they miss both the applicant and her daughter desperately. They state that [REDACTED] has been strong for his family, but the distress has been taking a toll, and that they worry about his health and health of his family. They state that the effect of the separation from his spouse has also greatly affected [REDACTED] three other children in the United States. They state that Mr. [REDACTED] other children need [REDACTED] and miss their sister who resides in Mexico. They state that [REDACTED] pain has greatly affected his other children's school and everyday life. They state that all their lives will be greatly improved when the applicant and her daughter can return to the United States.

A letter from [REDACTED] physician states that, since the applicant has not been allowed to return to the United States, [REDACTED] has visited her for one week each month. They state that, as a result of this travel, he has been unable to provide the attention that he is accustomed to providing to his other children in the United States, especially his teenage daughter who has diabetes. They state that [REDACTED] has experienced a dramatic change in his mood and effect since his separation from the applicant due to his concern for the welfare of the applicant and his daughter in Mexico. They state that [REDACTED] has become quiet, reserved and depressed and suffers from sleep deprivation. They state that reunification with the applicant and his daughter would greatly improve [REDACTED] quality of life and restore his mood permitting him to provide an interrupted care for his family.

A letter from [REDACTED] teenage daughter's physician states that she suffers from type I diabetes mellitus. They state that she is very close to [REDACTED] and she is concerned about her father, and his separation from her little sister, who resides in Mexico. He states that this child is very sensitive and caring, and he believes that this separation has adversely affected her well-being, as reflected in both her diabetes and episodes of depression which have occurred over the last few years. He states that it is his firm impression that if the stresses on the family could be resolved, that [REDACTED] teenage daughter would take better care of herself and her health would definitely be improved.

Police Clearance letters from Baja California, Mexico, indicate that the applicant has no arrest record. The record establishes that the applicant was employed in the United States from September 2005 until her departure in September 2006.

³ The AAO notes that, while evidence of the applicant's pregnancy was provided at the time the Form I-212 was submitted, the field office director was not in possession of evidence that a child had been born to the marriage at the time of his decision.

Letters from the applicant's employers in Mexico reflect that she was employed as a graphic designer from December 15, 2002 until December 31, 2003 and as a general cashier and designer from January 4, 2004 until January 5, 2005. They state that the applicant was responsible, honest and reliable in her duties.

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 U.S. citizen spouse, her U.S. citizen daughter, general hardship to the applicant and her family if she were denied admission to the United States, the absence of a criminal background, and the approved immigrant visa petition filed on her behalf. The AAO notes that the applicant's marriage, the birth of her child and the filing of the immigrant visa petition benefiting her 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 unauthorized employment in the United States from September 2005 until September 2006.

The applicant's unauthorized employment 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 she 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.