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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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FILE:

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Office: NEW YORK, NY

Date:

SEP 24 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)

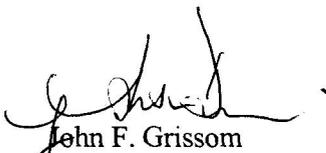
ON BEHALF OF APPLICANT:

[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 District Director, New York, New York, 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 Colombia who, on January 19, 2000, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, which expired on July 18, 2000. The applicant's biological father, on March 26, 2001, filed an Application for Asylum and for Withholding of Removal (Form I-589). The applicant was included as a derivative beneficiary on the Form I-589. On May 17, 2001, the Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On March 7, 2002, the immigration judge ordered the applicant removed *in absentia*. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On April 13, 2002, the applicant's biological mother married a U.S. citizen. On August 17, 2002, the applicant's U.S. citizen stepfather filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on March 24, 2003. On May 8, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On October 8, 2003, the BIA dismissed the applicant's appeal. The applicant failed to depart the United States. On April 2, 2005, the Form I-485 was administratively closed. On January 12, 2006, the applicant's mother became a lawful permanent resident. The applicant filed a motion to reopen immigration proceedings. On May 1, 2006, the motion to reopen was denied. On September 1, 2006, the applicant departed the United States and returned to Colombia, where counsel claims he has since resided.¹

On September 17, 2006, the applicant filed the Form I-212, indicating that he resided in the United States.² The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his lawful permanent resident mother and U.S. citizen stepfather.³

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision*, dated December 30, 2008.

¹ The AAO notes that the applicant was under the age of eighteen at the time of entry and did not accrue unlawful presence in the United States because he was still under the age of eighteen at the time of his departure.

² The record is unclear as to the applicant's residence. While counsel, on appeal, contends that the applicant resides in Colombia, the Form I-212, which was filed after the applicant's departure, indicates that the applicant resides in the United States. The AAO notes that if it is later confirmed that the applicant has illegally reentered the United States *at any time* after his 2006 departure or if he reenters the United States illegally after having been granted permission to reapply for admission, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years and the AAO's approval of the Form I-212 is automatically revoked. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

³ The AAO notes that the record is unclear as to whether the applicant's biological mother was ever married to his biological father and there is no divorce record or custody agreement in the record. As such, custody over the applicant was in question; however, the custody arrangement need no longer be verified prior to issuance of an immigrant visa because the applicant is now over the age of eighteen.

On appeal, counsel contends that the district director overlooked the applicant's age as an essential factor in evaluating the applicant's unfavorable factors. *See Attachment to Form I-290B*. In support of his contentions, counsel submits only the referenced Form I-290B and attachment. 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 of Homeland Security] has consented to the alien's reapplying for admission.

The record reflects that the applicant's mother is a native and citizen of Colombia who became a lawful permanent resident in 2006. The applicant's father is a native and citizen of Colombia who does not appear to have any legal status in the United States. The applicant's stepmother is a native and citizen of Colombia who does not appear to have any legal status in the United States. The applicant's stepfather is a U.S. citizen by birth. The applicant is in his 20's and the applicant's mother and stepfather are in their 30s.

On appeal, counsel states that the applicant departed the United States after the Form I-212 was filed and departed the United States at his own expense on September 1, 2006. Counsel states that the applicant is now residing in Bogota, Colombia. Counsel states that the district director overlooked the essential factor of the applicant's age in exercising discretion. Counsel states that the applicant was twelve years old at the time he was placed in immigration proceedings and seventeen years old when he removed himself from the United States. Counsel states that the applicant was not in a position to make an intelligent, deliberate or willful decision in regard to any legal proceedings and

it would be unfair to the applicant to impute to him any violation of the law committed by his parents.

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 a discretionary determination. 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 legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

As established by the record, the favorable factors in this matter are the applicant's lawful permanent resident mother, U.S. citizen stepfather, general hardship to the applicant and his family if he were

denied admission to the United States, the absence of a criminal background, his age at the time of entry into and departure from the United States and the approved immigrant visa petition filed on his behalf. The applicant's mother's adjustment of status to that of a lawful permanent resident, the establishment of the stepfather relationship and filing of the immigrant visa petition benefiting the applicant are all after-acquired equities to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of his nonimmigrant status and failure to comply with an order of removal.

The applicant's overstay of his nonimmigrant status and failure to comply with an order of removal 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.