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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

H4

[REDACTED]

FILE:

[REDACTED]

Office: FRESNO, CA

Date: **DEC 28 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Fresno, 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 the Philippines who, on February 18, 1993, was admitted to the United States as a nonimmigrant fiancé. On February 20, 1993, the applicant married her U.S. citizen fiancé. On April 16, 1993, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on her behalf by [REDACTED] her U.S. citizen spouse. On March 18, 1994, the applicant divorced [REDACTED]. On September 27, 1995, the applicant pled guilty to and was placed on diversion for fighting in public. The applicant was sentenced to 18 months of probation. On March 21, 1995, the applicant married [REDACTED] a naturalized U.S. citizen. On May 10, 1995, [REDACTED] filed a Form I-130 on behalf of the applicant which was approved on July 25, 1995. On April 2, 1997, the Form I-485 was denied. On July 25, 1997, the applicant divorced [REDACTED]. On May 27, 1998, the applicant was placed into immigration proceedings for having overstayed her nonimmigrant status. On September 22, 1998, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States. On February 24, 1999, the applicant was removed from the United States and returned to the Philippines.

On April 14, 2006, the applicant filed a second Form I-485 based on a Form I-130 filed on her behalf by [REDACTED]. The Form I-485 indicates that the applicant reentered the United States without inspection in June 2000. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212. On August 31, 2006, the Form I-130 was approved. On September 13, 2006, the Form I-485, Form I-601 and Form I-212 were denied. On May 27, 2008, the approval of the Form I-130 was revoked because Mr. Valdez indicated that the applicant had entered the marriage solely for the purpose of evading immigration laws, the applicant was abusive and he wished to withdraw the petition.

On June 16, 2008, the applicant filed a third Form I-485 based on a second Form I-130 filed on her behalf by [REDACTED]. On the same day, the applicant filed a Form I-212. On September 22, 2008, the second Form I-130 was approved. On the same day, the Form I-485 and Form I-212 were denied.

On November 9, 2008, the applicant filed a fourth Form I-485 and the Form I-212. On January 5, 2009, the applicant filed a fifth Form I-485 based on a third Form I-130 filed on her behalf by Mr. [REDACTED]. On January 21, 2009, the approval of the second Form I-130 was revoked because the applicant's marriage to [REDACTED] had not been valid at the time of the approval. On March 12, 2009, the third Form I-130 was approved. On the same day, the fourth and fifth Forms I-485 were denied. 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). 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 three U.S. citizen children.

¹ The AAO notes that the applicant married [REDACTED] prior to the official termination of her marriage to [REDACTED].

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 March 12, 2009.

On appeal, counsel contends that the field office director's decision was wrong and that the applicant is statutorily eligible for permission to reapply for admission.² *See Counsel's Brief*, dated May 6, 2009. In support of his contentions, counsel submits the referenced brief, a declaration from the applicant and copies of documentation already in the record. 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 of an 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

² The AAO finds that the field office director did not find the applicant to be statutorily ineligible for permission to reapply for admission. The AAO notes that the field office director incorrectly stated that the applicant remains inadmissible under section 212(a)(9)(A)(ii) of the Act because ten years from the applicant's last departure had not yet passed. The AAO finds that the applicant remains inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act because she reentered the United States prior to the passage of ten years from the date of her removal and is thus applying for *nunc pro tunc* permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act; however, as discussed below, the applicant is also inadmissible under section 212(a)(9)(C) of the Act and is ineligible for permission to reapply for admission.

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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

(I) the alien's battering or subsection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant has a 16-year-old son from a previous relationship who is a U.S. citizen by birth. The applicant and [REDACTED] have a 13-year-old son and a 9-year-old son who are both U.S. citizens by birth. The applicant and [REDACTED] are in their 40's.

The record contains letters from the applicant, [REDACTED] and the applicant's second son attesting to the applicant's good moral character and the need for her presence in the United States.

The record contains recommendation letters from friends attesting to the applicant's good moral character and the need for her presence in the United States.

The record contains educational documentation for the applicant's two youngest children reflecting that the children are doing well in school.

The record reflects that the applicant has been employed in the United States at least from April 1993 until April 6, 1995 and from 2005 until 2007. The record reflects that the applicant was issued employment authorization from February 18, 1993 through June 9, 1994; May 2, 1995 through March 28, 1997; August 31, 2006 through February 28, 2007; and September 11, 2008 through September 10, 2009. The record reflects that the applicant has filed joint federal taxes from 2007 through 2008.

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 U.S. citizen spouse; her three U.S. citizen children; the general hardship to the applicant and her family if she were denied admission to the United States; the absence of a criminal record since 1995; and the approved immigrant visa petition filed on her behalf. The AAO notes that the applicant's marriage, birth of her two youngest children 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," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of her nonimmigrant status; her criminal history; her failure to appear at an immigration hearing; her failure to comply with a removal order; her unlawful reentry into the United States after having been removed; her inadmissibility under section 212(a)(9)(C) of the Act; her unlawful presence in the United States; and her unauthorized employment in the United States, except for periods of authorization.

The applicant in the instant case has multiple immigration violations and a criminal history. 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 she 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.

Beyond the decision of the field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(9)(C)(i)(II) of the Act and does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) of the Act. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.³

ORDER: The appeal is dismissed.

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).