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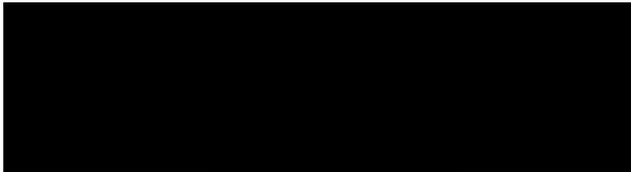
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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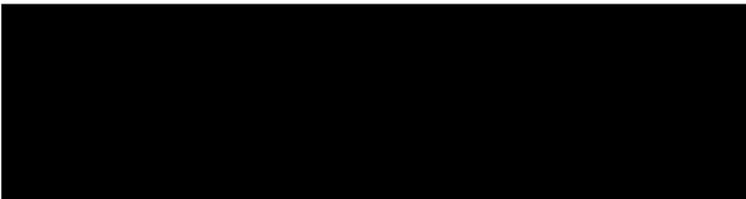
Date: **MAR 24 2010**

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).

Perry Rhew
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 dismissed.

The applicant is a native and citizen of Mexico who, on March 6, 1999, appeared at the San Luis, Arizona port of entry. The applicant presented a lawful permanent resident card bearing the name [REDACTED]. The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the document and he did not have valid documentation to enter the United States. The applicant admitted that he had previously resided and worked in the United States for a period of seven months. The applicant admitted that he knew that it was illegal to enter the United States utilizing the document. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud. On March 6, 1999, 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) under his full name [REDACTED].

On January 17, 2003, [REDACTED] filed an Immigrant Petition for Alien Worker (Form I-140) on the applicant's behalf, which was approved on October 7, 2003. The record reflects that the applicant has been employed in the United States since April 1997.¹ On December 22, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-140. The Form I-485 indicates that the applicant last entered the United States without inspection. On December 6, 2005, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On May 3, 2007, the applicant's Form I-485 was denied for abandonment.² 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). 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 child.

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 June 23, 2009.

On appeal, counsel contends that the district director failed to consider various positive factors in the applicant's case and that he warrants a favorable exercise of discretion. *See Form I-290B*, dated July 22, 2009. In support of her contentions, counsel submits the referenced Form I-290B, medical documentation, employment documentation, recommendation letters and a copy of the birth certificate for the applicant's U.S. citizen child. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

¹ The record reflects that the applicant paid federal taxes from 2002 through 2004.

² The record reflects that the applicant has been granted employment authorization in the United States from July 2004 until present; however, any employment authorization issued after the denial of the Form I-485 is invalid and the applicant has been engaging in unauthorized employment.

(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 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 subjection 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.

On appeal, counsel contends that the district director erred in alleging that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. Counsel states that the Federal Bureau of Investigation (FBI) Information Sheet reflects that the applicant was charged with "Fraud or Misuse of Entry Docs." Counsel states that the FBI sheet does not reflect that the applicant was specifically charged with fraud and that prosecution was declined. Counsel contends, therefore, that there is no evidence that the applicant committed fraud. The AAO finds counsel's contentions to be unpersuasive. The record contains a Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867A) and a copy of the document the applicant presented. The record clearly reflects that the applicant presented documentation that did not belong to him in order to seek entry into the United States. Furthermore, the applicant admitted that he knew that it was illegal to do so. Finally, a criminal conviction is not necessary to find an alien inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. To seek a waiver of this ground of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), an applicant must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).³

While counsel contends that the applicant is married, the record reflects that the applicant is unmarried. Furthermore, the record does not reflect that the woman to whom counsel claims the applicant is married has any legal status in the United States. The record reflects that the applicant has a four-year-old son who is a U.S. citizen by birth. The record indicates that the applicant may have a second child recently born in the United States. The record reflects that the applicant is in his 30's.

³ In order to seek a waiver under section 212(i) of the Act an applicant must establish extreme hardship to a qualifying family member, i.e., a lawful permanent resident or U.S. citizen spouse or parent. The AAO notes that the record reflects that the applicant does not have a qualifying family member in order to qualify for a waiver under section 212(i) of the Act.

On appeal, counsel contends that the district director failed to consider the applicant's spouse's affidavit that she was pregnant and that the applicant's son was born on February 15, 2006. Counsel contends that the district director failed to consider that the applicant's son has medical problems related to his ears and nose.⁴ Counsel contends that the district director failed to consider that the applicant and his spouse are expecting their second child. Counsel contends that the district director failed to consider that the applicant's employer has filed a labor certification on behalf of the applicant which makes him eligible to apply for adjustment of status under section 245(i) of the Act. Counsel contends that the district director failed to consider that the applicant is involved in the community. Counsel contends that the district director failed to consider that the applicant is very well liked by the community. Counsel contends that it has been more than ten years since the applicant's removal from the United States.

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.*

⁴ The AAO notes that the medical documentation does not establish that the applicant's son could not receive appropriate care for his medical conditions without the presence of the applicant in the United States, or alternatively in Mexico, if the applicant's son accompanied him to Mexico.

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 two U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, the absence of a criminal record and the approved immigrant visa petition filed on his behalf. The AAO notes that the birth of the applicant's children 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 original attempt to enter the United States by fraud; his inadmissibility under section 212(a)(6)(C)(i) of the Act; his unlawful reentry into the United States after having been removed; his inadmissibility under section 212(a)(9)(C) of the Act; his unlawful presence in the United States; and his unauthorized employment in the United States, except for periods of valid employment authorization.

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors.

Beyond the decision of the district 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, the applicant is statutorily ineligible to apply for permission to reapply for admission into the United States.⁵ See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Additionally, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(6)(C)(i) of the Act and no waiver is available to the applicant because he does not have a qualifying family member. Therefore, no

⁵ The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.

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.