U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

H4

[redacted]

Date: DEC 15 2011 Office: SAN FRANCISCO FILE: [redacted]

IN RE: Applicant: [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.

Thank you,

for

Perry Rhew
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.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States 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), and section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II) for having been ordered deported from the United States and subsequently entering the United States without being admitted. The applicant seeks permission to reapply for admission after removal pursuant to 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 family.

On June 3, 1986, the applicant was ordered deported from the United States pursuant to section 241(a)(2) of the Act. The applicant subsequently re-entered the United States without inspection on about June 10, 1986.

On appeal, counsel for the applicant contends that the Field Office Director erred in failing to adjudicate the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) due to the fact that the applicant had not resided outside the United States for ten years following an order of removal.

The record includes, but is not limited to: Form I-290B; counsel's brief in support of appeal; a declaration from the applicant's spouse dated July 14, 2006; Form I-130 filed by applicant's spouse on April 30, 2001; Form I-130 filed by applicant's son on December 22, 2004; inadmissibility and removal records; birth and marriage records; medical documentation for a back injury suffered by the applicant in 1981; evidence of applicant's conviction for Driving Under the Influence in 1982, and two arrests for firearms violations in 1983. The entire record was reviewed in rendering a decision on appeal.

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 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 on June 3, 1986, the applicant was deported from the United States pursuant to section 241(a)(2) of the Act. During an interview with US Citizenship and Immigration Services on June 30, 2006, the applicant stated that he returned to the United States ten days later, and entered the United States without inspection. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

The field office director found the applicant to be inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II). *Decision of the Field Office Director,* dated June 2, 2009. Section 212(a)(9)(C)(i)(II) of the Act renders inadmissible those aliens who have been ordered removed under sections 235(b)(1) or 240 of the Act, or any other provision of law, and who enter or attempt to reenter the United States without being admitted. These aliens are permanently inadmissible, but may seek consent to reapply for admission from the Attorney General after they have been outside of the United States for 10 years. Section 212(a)(9)(C)(i)(II) of the Act applies to those aliens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997. The alien may have been placed in removal proceedings before or after April 1, 1997, but the unlawful reentry or attempted unlawful reentry must have occurred on or after April 1, 1997. *INS Memo Regarding Adjustment of Status and Entitlement Bars, Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act),* June 17, 1997. The applicant was removed from the United States and re-entered the United States in 1986, prior to April 1, 1997. As such, the Field Office Director erred in finding the applicant inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

The record further reflects that the applicant has resided in the United States since February 1977, with at least one trip to Mexico in 1986. The applicant's wife became a U.S. Citizen on May 20, 2008 and she states that a majority of her family resides in the United States, including two sisters and other relatives. *See Declaration of* [redacted] dated July 14, 2006. The applicant has two U.S. Citizen children residing in the United States, and the applicant is the beneficiary of a Form I-130 Immigrant Visa Petition filed by his son on December 22, 2004. Although the applicant only formally registered his marriage to his wife on April 27, 2001, the two children of the applicant and his spouse were born in 1981 and 1983. The record indicates the applicant's conviction for driving under the influence occurred in 1982. The applicant was arrested on two charges of firearms violations in 1983, but there is no record of conviction for these two offenses. There is no evidence of any further criminal record after 1983.

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 *Matter of 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 US Citizen spouse; the applicant's two US Citizen children; the general hardship to the applicant and his family if he were denied admission to the United States; the applicant's spouse's family ties in the United States; and the length of time since the applicant was last arrested or convicted of a crime in 1983.

The AAO finds that the unfavorable factors in this case include the applicant's original unlawful entry into the United States; his conviction for driving under the influence in 1982; his two arrests for firearms violations in 1983; his illegal reentry into the United States after having been removed; his unlawful presence in the United States; and his unauthorized employment in the United States.

The totality of the evidence demonstrates that the unfavorable factors in the present matter are outweighed by the favorable factors. The applicant has resided in the United States for the majority of the past 34 years, and has raised his family in the United States. The applicant's spouse and two children are U.S. Citizens, and the applicant has demonstrated that his family will suffer hardship if he is denied admission to the United States. Although the applicant did not enter into a formal marriage contract with his wife until April of 2001, the AAO notes that the applicant's relationship with his spouse began long before that date, as evidenced by the births of their two children in 1981 and 1983. This relationship pre-dated that applicant's deportation in 1986, therefore the AAO does not consider the relationship to be an "after-acquired equity," to which the AAO would accord diminished weight. While the record indicates the applicant was arrested on two firearms charges in 1983, the applicant did not provide records indicating that he was convicted of these charges; a document from the Superior Court of California, County of Santa Clara, indicates that the official record regarding the applicant's arrest on these charges was expunged on March 20, 2003. Due to the length of time since the applicant's last arrest, and the absence of any criminal record since 1983, the positive factors outweigh the negative factor of his criminal record.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. 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 the favorable factors in his application outweigh the unfavorable factors, and 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.