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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

[redacted]

H4

Date: DEC 29 2011 Office: SAN BERNARDINO, CA 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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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 application for permission to reapply for admission after removal was denied by the Field Office Director, San Bernardino, California, and 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 was found inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been removed from the United States. The applicant now 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 spouse and children.

On June 29, 2011, the Field Office Director denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). *Decision of the Field Office Director*, dated June 29, 2011.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) "simply failed to consider the totality of evidence presented in support of the waiver request and has applied the incorrect standard of proof." *Counsel's appeal brief*, dated July 29, 2011. Counsel states that USCIS "declared [the applicant] ineligible due to having demonstrated no prospective hardship to a spouse or parent who is a U.S. Citizen or permanent resident." *Id.* The AAO notes that counsel correctly claims that "[i]t is true that [the applicant] would need to have a qualifying relative for an I-601 waiver, but no such showing of hardship is required for an I-212." *Id.*

The record includes, but is not limited to, counsel's appeal brief, statements from the applicant, medical documents for the applicant's son, pay stubs and an employment verification for the applicant, birth certificates for the applicant's children, and documents pertaining to the applicant's removal proceeding. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(A) of the Act provides, in pertinent part:

> (A) Certain alien previously removed.-
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> . . . .
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (II) departed the United States while an order of removal was outstanding, and 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The record of proceeding reveals that on February 14, 1996, the applicant attempted to enter the United States by presenting a Border Crossing Card (Form I-586) in someone else's name.[1] On March 12, 1996, an immigration judge ordered the applicant removed from the United States. On the same day, the applicant was removed from the United States. The applicant reentered the United States without inspection shortly thereafter. He has remained in the United States since that time. As such, the applicant is inadmissible under section 212(a)(9)(A)(ii)(I) of the Act for being removed 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 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,

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[1] On appeal, counsel states that the applicant "claims that he never offered the card to try to gain entry into the U.S. but simply had the card in his possession." The AAO notes that the record establishes that on February 14, 1996, at the Calexico Port of Entry, the applicant presented the Form I-586 to the inspecting officer, who suspected the applicant was not the lawful owner of the Form I-586. *See Record of Deportable Alien* (Form I-213), dated February 14, 1996. At that time, the applicant was sent to secondary inspection, where he admitted he was not the lawful owner of the I-586. *Id.* The applicant claimed that he found the Form I-586 in a street in Mexicali, Mexico. *Id.*

> [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 Seventh 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.

On appeal, counsel states the applicant is married, he has three United States citizen children, and he is gainfully employed. Counsel claims that the applicant "is the principal wage earner supporting his wife and three children. His wife is unable to work given the responsibilities of childcare." In a statement dated July 29, 2011, the applicant states he works full-time, his wife works part-time, and "[t]ogether [they] can barely afford to pay [their] bills." He claims that "[w]ithout [his] income, it will be very difficult for [his] wife to support [their] family and [he] doubt[s] whether [he] can find work in Mexico that will allow [him] to send money to the United States." In a statement dated February 10, 2011, the applicant states his family will suffer "emotional and psychological distress" if he is removed from the United States. Counsel states that the applicant's children "have lived their entire lives in the United States," "[t]hey have no familiarity with Mexico[,] and would suffer serious setbacks educationally, financially and emotionally if forced to relocate to that country." Counsel also states the applicant's youngest child "suffers from recurrent seizures due to epilepsy and is constantly under a physicians care." In an undated statement, [redacted] states the applicant's son "has a past medical history significant for complex partial epilepsy and requires anti seizure medications with adjustments and frequent monitoring for side effects." The applicant states his son's "seizures cause [his son] to lose consciousness. When he has a seizure [they] have to take him to the emergency room immediately, because if left untreated, he could experience permanent brain damage." The AAO notes that the record contains medical documentation establishing the applicant's son's frequent visits to the emergency room. Counsel claims that the applicant's wife provides for their son's "daily needs and transportation to doctor's visits." The applicant states his son "takes three medications every day," they "are required to take him to the doctor every three months," and "there is no cure for this disease." [redacted] states she sees the applicant's son "once every three to six months." Counsel states the applicant "is very concerned that his son will not receive adequate medical attention in Mexico." The

AAO notes that [redacted] indicates that the applicant's son "requires sub-specialty care by a pediatric neurologist, which is not readily available in all areas."

Regarding the hardship the applicant's wife and children will face, the AAO notes that unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's wife and children, but it will be just one of the determining factors.

The AAO finds that the applicant's attempted entry into the United States by presenting a Form I-586 in another person's name and his removal from the United States are unfavorable factors. Additionally, the applicant's reentry into the United States without inspection is another unfavorable factor. Further, the AAO also notes that the applicant was working without authorization and that is another unfavorable factor.

The favorable factors in this matter are the applicant's family ties to his United States citizen wife and children, hardship to his spouse and children, his son's serious medical condition, the lack of a criminal record other than a conviction for a minor traffic violation, and the approval of a petition for alien worker filed by the applicant's employer on his behalf. The AAO notes that the applicant's marriage to his wife occurred on October 26, 2006, which was after the applicant was ordered removed from the United States, and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

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 and the application approved.

ORDER: The appeal is sustained. The application is approved.