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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

PUBLIC COPY

H4

FILE: [redacted] Office: NEW YORK, NY Date: JAN 20 2011

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 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 Ecuador who, on February 2, 1999, appeared at John. F. Kennedy International Airport. The applicant presented an Ecuadorian passport containing a substituted biographical page and photograph and a U.S. nonimmigrant visa bearing the name [redacted] The photograph on the U.S. nonimmigrant visa did not match the applicant or the substituted photograph on the biographical page of the passport. The applicant was placed in secondary inspection. The applicant refused to admit that he was not the true owner of the document and insisted that he was the person identified in the passport. The applicant admitted, however, that he paid $1200 for the U.S. nonimmigrant visa. A dental examination established that the applicant was greater than 18-years-old, while the passport presented by the applicant indicated that he was under the age of 18. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to obtain admission to the United States by fraud and for being an immigrant without valid documentation. On February 4, 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 the name [redacted]"

On November 28, 2008, the applicant married his U.S. citizen spouse in Queens, New York. On March 6, 2009, 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 his behalf by his U.S. citizen spouse. The Form I-485 indicates that the applicant entered the United States without inspection on January 1, 1999. On May 19, 2009, the Form I-130 was approved. On the same day, the Form I-485 was denied. On September 9, 2009, the applicant filed a Form I-212, indicating that he resided in the United States. 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 spouse.

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 March 26, 2010.

On appeal, counsel contends that the district director abused her discretion in denying the Form I-212. *See Counsel's Brief,* dated May 22, 2010. In support of her contentions, counsel submits the referenced brief, affidavits, medical documentation, recommendation letters, psychological documentation, financial documentation, immigration documentation 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 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 applicant's basis for removal from the United States is not an unfavorable factor to be considered since the applicant was not treated humanely during his detention and was not provided sufficient translation of the documentation which he signed. The AAO does not review any matters that fall under 8 C.F.R. § 235.

On appeal, counsel contends that the district director abused her discretion in denying the Form I-212. Counsel contends that the district director failed to consider and weigh all the evidence. Counsel contends that the district director arbitrarily and capriciously accorded too much weight to the two negative factors in the applicant's case. Counsel contends that the district director erred in concluding that the applicant failed to prove that his spouse would suffer exceptional hardship if she remains in the United States in the applicant's absence. Counsel contends that she submits additional documentation to establish the favorable factors in the applicant's case. Counsel contends that, while the applicant's spouse is an after-acquired equity, the district director failed to give any weight to or consider the applicant's spouse. Counsel contends that the applicant is deserving of permission to reapply for admission.

The record contains letters and affidavits from the applicant, his spouse, and the applicant's spouse's family members attesting to the need for the applicant's presence in the United States, the purported hardship the applicant will suffer if the applicant is not permitted to remain in the United States and the applicant's good moral character.

The record contains letters of recommendation attesting to the need for the applicant's presence in the United States, the purported hardship the applicant will suffer if the applicant is not permitted to remain in the United States and the applicant's good moral character.

The record contains letters from the applicant's spouse's patients and her coworkers attesting to the need for the applicant's spouse's presence in the United States.

The record contains medical documentation for the applicant's spouse, mother-in-law and father-in-law. The record contains psychological documentation for the applicant's spouse.

The record contains a Good Conduct Certificate issued by the City of New York for the applicant.

The record contains individual federal tax returns for the applicant from 2004 through 2007 and joint federal tax returns from 2008 through 2009. The record reflects that the applicant has been employed

in the United States from at least 2004 through 2008. The applicant has never been granted employment authorization in the United States.

The record reflects that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and is required to obtain a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), by filing an Application for Waiver of Grounds of Inadmissibility (Form I-601). The record reflects that the applicant has failed to file a Form I-601.

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; the general hardship to the applicant and his family if he were denied admission to the United States; the absence of a criminal record; the filing of federal tax returns; and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage 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 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.

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 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. The AAO also finds that the applicant is inadmissible under the provisions of section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without inspection and does not qualify for the exception for battered spouses under section 212(a)(6)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(A)(ii). The record reflects that, while the applicant meets the physical presence in the United States requirements, he does not have a qualifying petition filed prior to April 30, 2001 that would render his inadmissibility moot pursuant to section 245(i) of the Act.[1] Aliens present within the United States without admission or parole are statutorily ineligible for a waiver of inadmissibility. Therefore, if an alien is present in the United States without admission or parole, and seeks to adjust his status, the alien is subject to a permanent ground of inadmissibility. Therefore, the applicant is mandatorily inadmissible to the United States and no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.[2]

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[1] While counsel submits a copy of a withdrawn Alien Labor Certification (ALC) with a priority date of April 30, 2001, the record does not reflect that the name of the beneficiary on the ALC matches the name of the applicant and counsel fails to submit additional documentation, such as the certified ETA-750s, in regard to the ALC to establish that the ALC does indeed refer to the applicant. Moreover, even if the applicant is not inadmissible pursuant to section 212(a)(6)(A) of the Act, the applicant remains ineligible for permission to reapply for admission under section 212(a)(9)(C) of the Act.

[2] 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).

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.