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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**

H4

Date: AUG 08 2012

Office: HOUSTON, TX

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:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Field Office Director, Houston, Texas. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects the applicant is a native and citizen of Mexico who was found to be subject to the reinstatement provisions of section 241(a)(5) of the Act. The applicant has two U.S. citizen children and seeks permission to reenter the United States in order to reside with her daughters.

The field office director found that there is no waiver available for an applicant who is subject to the reinstatement provisions of section 241(a)(5) of the Act and denied the application accordingly. *Decision of the Field Office Director*, dated January 25, 2012.

On appeal, counsel contends that the field office director erroneously found that no waiver is available and that the field office director applied a circular argument. Counsel contends the applicant has lived in the United States since 1993, has never committed any crimes, and should have an opportunity to seek permission to return after her prior deportation.

The record shows, and counsel concedes, that the applicant entered the United States without inspection in April 1988. An immigration judge granted the applicant voluntary departure until August 1988, with an alternate order of deportation. The applicant did not timely depart the United States and self-deported in January 1989, after the period for voluntary departure had elapsed. The applicant subsequently re-entered the United States without inspection four years later, in July 1993.

The field office director found that the applicant is subject to the reinstatement provision under section 241(a)(5) of the Act. As described below, the AAO finds the field office director erred in finding that no waiver is available to the applicant.

Section 241(a)(5) of the Act provides in pertinent part:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The regulation at 8 C.F.R. § 241.8 states that:

(a) [A]n alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration

judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

- (1) Whether the alien has been subject to a prior order of removal. . . .
- (2) The identity of the alien. . . .
- (3) Whether the alien unlawfully reentered the United States

(b) [I]f an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

A thorough review of the record reflects that the applicant in the present matter was not given a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required by 8 C.F.R. § 241.8(b).¹ Consequently, the applicant's prior removal order was not reinstated. The applicant is not subject to the provisions of section 241(a)(5) of the Act as that statute applies to orders of removal which have been reinstated and an alien subject to the reinstated order, not to any order which may possibly be reinstated. The applicant is thus eligible to file a Form I-212 application to cure her past deportation. The AAO will therefore adjudicate the merits of the Form I-212 application.

Section 212(a)(9) of the Act provides:

(A) *Certain aliens previously removed.*

- (i) *Arriving aliens.* Any alien who has been ordered removed under section [235(b)(1) of the Act] . . . and who again seeks admission within 5 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-

¹ The AAO notes that Immigration and Customs Enforcement (ICE) is the agency responsible for issuance of the Form I-867.

- (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 Attorney General has consented to the alien's reapplying for admission.

In this case, the applicant departed the United States in January 1989 while an order of deportation was outstanding. The applicant did not remain outside of the United States for ten years as required and re-entered the United States without inspection in July 1993. Therefore, the applicant is 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.

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.

The adverse factors in the present case include the applicant's entries into the United States without inspection in 1988 and 1993, the applicant's order of deportation and her failure to report for deportation as instructed, and periods of unauthorized presence and employment. The favorable and mitigating factors in the present case include: the applicant's family ties to the United States, including two U.S. citizen children; the passage of time since her removal and reentry; the applicant's regular payment of taxes; the fact that the applicant owns her own business; and the applicant's lack of any criminal convictions.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. 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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.