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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]

Date: MAY 29 2013 Office: ANAHEIM, CALIFORNIA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i); 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the International Adjudications Support Branch, Anaheim, California, on behalf of the Field Office Director, Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal of the Form I-601 is dismissed, the prior decision of the Field Office Director is withdrawn, and the application for a waiver of inadmissibility is declared unnecessary as the applicant is not inadmissible. In the same decision, the International Adjudications Support Branch also 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. This appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. Specifically, the International Adjudications Support Branch determined that the applicant willfully misrepresented a material fact when she obtained a non-immigrant visa in 2009 and cleaned her brother's house after being admitted to the United States. The applicant is applying for a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her U.S. citizen spouse.

The International Adjudications Support Branch concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601 accordingly. *Decision of the Field Office Director,* dated June 28, 2012.

On appeal, counsel asserts that the finding that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act is in error, as the applicant was not unlawfully employed in the United States, she only assisted her brother with the housework as a house guest, and she did not receive a regular salary. Alternatively, counsel asserts that the applicant has demonstrated that her spouse would experience extreme hardship if her waiver were not approved. *Statement Attached to Form I-290B, Notice of Appeal or Motion,* dated September 14, 2012.

The record contains the following documentation: a statement by the applicant's attorney in support of the Form I-290B; affidavits from the applicant and the applicant's brother regarding the circumstances of her performing housework in his home in the United States; a psychological evaluation of the applicant's spouse; a statement from the applicant's spouse; financial documentation; and information on country conditions in Mexico. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

> (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The applicant entered the United States in September 2009 as a non-immigrant and departed in March 2010, within her period of authorized stay. On June 4, 2010, the applicant attempted to enter the United States with her non-immigrant border crossing card. In a sworn statement before a U.S. immigration official, the applicant stated that she worked in the United States cleaning her brother's house and that she was paid $50.00 every 15 days. The applicant was subjected to expedited removal under section 212(a)(7)(A)(i)(I) of the Act.

The applicant married a U.S. citizen in Mexico on November 5, 2010. The Form I-130, Petition for Alien Relative (Form I-130) he filed on her behalf was approved in June 2011. The applicant applied for an immigrant visa at the U.S. consulate in Ciudad Juarez, and she subsequently was found inadmissible under section 212(a)(6)(C)(i) for making a material misrepresentation to obtain a benefit under the Act, and under section 212(a)(9)(A)(i) as an alien who has previously been removed from the United States.

On appeal, applicant's counsel contends that the applicant is not inadmissible for misrepresentation, stating that the allegations that the applicant entered the United States for the purpose of working and that she was gainfully employed while in the United States are erroneous. Counsel contends that the applicant came to the United States to visit relatives and stayed mostly at her brother's home. While there the applicant helped around the house, and the applicant's brother sometimes gave her pocket money. In support of these contentions, the applicant submits an affidavit, stating that during her stay in the United States, she helped her brother with chores at his home and did not receive a salary, but her brother aided her economically, not as payment, but as appreciation for her assistance. According to the applicant's brother's affidavit, while the applicant was in the United States at his home, she helped with the dishes and some housecleaning. The applicant's brother states that the applicant helped because she wanted to do so, was not required to do so, and not as gainful employment. The applicant's brother states that he gave her pocket money from time to time and that the pocket money was a normal and natural thing one does for a family member who is visiting and does not have a lot of money.

The regulation at 8 C.F.R. § 274a.1(h) provides a definition for employment, as follows:

> The term employment means any service or labor performed by an employee for an employer within the United States . . . . However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.

See 8 C.F.R. § 274a.1(h)

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In the case at hand, the record fails to establish that the applicant, by fraud or willful misrepresentation, obtained a non-immigrant visa for the purpose of entering the United States to work as a housekeeper for her brother or for any other benefit under the Act. Rather, the record indicates that while the applicant was in the United States, she engaged in casual employment providing domestic service in a private home of her brother that was sporadic, irregular or intermittent. The record therefore fails to establish that the applicant sought an immigration benefit through fraud or misrepresentation.

Based on the record, it has not been established that the applicant made a willful or material misrepresentation to procure an immigration benefit under the Act. The AAO thus finds that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act. Therefore, the Form I-601 is not necessary. Having found that the applicant does not require a waiver, no purpose would be served in discussing whether his U.S. citizen spouse has established extreme hardship under section 212(i) of the Act. Accordingly, the appeal will be dismissed, the prior decision of the International Adjudications Support Branch is withdrawn and the application for a waiver of inadmissibility is declared unnecessary as the applicant is not inadmissible.

The AAO notes that the International Adjudications Support Branch denied the applicant's Form I-212 in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant does not require a waiver of inadmissibility under section 212(a)(6)(C)(i) of the Act, it will withdraw the field office director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(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 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-

(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 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.

On June 4, 2010, the applicant was ordered removed from the United States. As such, she is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission. The applicant does not contest her inadmissibility under section 212(a)(9)(A) 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 favorable factors in this case are as follows:

- The applicant's U.S. citizen husband lives in the United States.
- The applicant's attorney contends that the applicant's spouse will suffer hardship if the applicant's request for permission to reapply for admission to the United States is not approved, whether he lives in the United States apart from her or relocates to be with her in Mexico. The record includes a psychological evaluation of the applicant's spouse that shows he is suffering psychological problems due to his separation from the applicant. The psychological evaluation gives a diagnosis of major depressive disorder, recurrent and severe with psychotic features and generalized anxiety disorder. It also reflects that he has been prescribed medication for his depression.
- The applicant is the beneficiary of an approved Form I-130.
- The applicant does not appear to have a criminal record.

The unfavorable factor in this case is the applicant's expedited-removal order.

The totality of the evidence, even considering the diminished weight of the applicant's after-acquired equities, demonstrates that the unfavorable factor in the present matter is outweighed by the favorable factors.

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 of the denial of the Form I-601 is dismissed, the prior decision of the International Adjudications Support Branch is withdrawn and the application for a waiver of inadmissibility is declared unnecessary, as the applicant is not inadmissible. The appeal of the denial of the Form I-212 is sustained.