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U.S. Citizenship  
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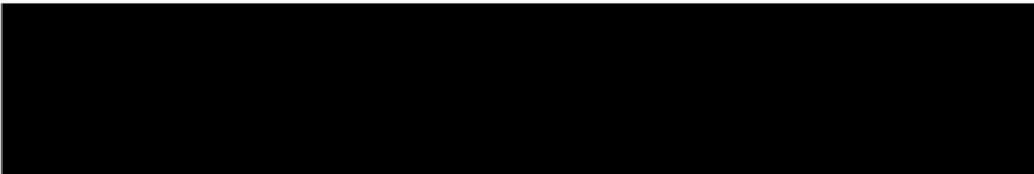
Date: OCT 27 2008

IN RE:



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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Houston, Texas 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 Mexico who, on May 5, 1989, was convicted of price tag switching under section 32.47A of the Texas Penal Code. The applicant was sentenced to four days in jail and a fine. On May 2, 1997, the applicant married his then lawful permanent resident spouse, [REDACTED]. On October 31, 1997, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on January 5, 1999. On May 16, 2000, the applicant filed an Application for Asylum and Withholding of Removal (Form I-589). On June 28, 2000, the applicant's Form I-589 was referred to an immigration judge and he was placed into immigration proceedings. On October 11, 2000, the applicant's applications for asylum and withholding of removal were withdrawn with prejudice and his application for cancellation of removal denied. The immigration judge granted the applicant voluntary departure until December 10, 2000. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On March 5, 2002, the BIA dismissed the applicant's appeal. The applicant failed to surrender for removal or depart from the United States, thereby changing the grant of voluntary departure to a final order of removal.<sup>1</sup> The applicant filed a motion to reopen with the BIA. On September 25, 2003, the BIA denied the applicant's motion to reopen. On October 8, 2003, a warrant for the applicant's removal was issued. The applicant failed to depart the United States. On August 20, 2004, [REDACTED] became a naturalized U.S. citizen. On April 26, 2006, the applicant filed the Form I-212. On April 27, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. On September 27, 2006, immigration officers apprehended the applicant and he was removed from the United States and returned to Mexico, where he has since resided. On December 27, 2006, the applicant's Form I-485 was denied. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). 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 return to the United States and reside with his U.S. citizen spouse and two U.S. citizen children.

The district director determined that no purpose would be served in adjudicating the Form I-212 because the applicant was also inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure. *See District Director's Decision* dated October 16, 2006.

On appeal, counsel contends that the district director erred in failing to inform the applicant that he was required to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) because the applicant is not a legal expert. Counsel contends that the applicant's Form I-212 should be remanded to the district director to enable the applicant to file a Form I-601. Counsel contends that the applicant's prior counsel failed to file supporting documentation for the Form I-212 and the applicant should be given the opportunity to file supplemental documentation at the time he files the Form I-601. *See Counsel's Brief*, dated December 14, 2006. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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<sup>1</sup> The AAO notes that there is documentation in the record indicating that the applicant made a claim that he departed the United States on January 30, 2005, and subsequently reentered the United States while his appeal was pending before the BIA. The AAO finds, however, that the evidence is insufficient to find that the applicant departed the United States.

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 on a 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.

Counsel, on appeal, asks that the Form I-212 be remanded to the district director so that the applicant may file the Form I-601 waiver request and have the Form I-212 considered in conjunction with the Form I-601. The AAO notes that counsel's request fails to take into account that the applicant is now living in Mexico and may not file a Form I-601 waiver request with the district director. Form I-601 instructions requires persons residing outside the United States to file the Form I-601 with the U.S. embassy or consulate where they will apply for their visa.

Counsel also contends that the applicant's Form I-212 should be remanded to the district director to permit him to submit documentation in support of the application because prior counsel failed to submit supporting documentation with the Form I-212. The AAO notes, however, that the applicant was afforded the opportunity to submit supporting documentation upon appeal and that the record does not indicate that any additional evidence has been provided.

The AAO finds that the district director erred in basing her denial of the applicant's Form I-212 on his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. The applicant's inadmissibility under 212(a)(9)(B)(i)(II) of the Act may be waived under section 212(a)(9)(B)(v) of the Act by filing a Form I-601.<sup>2</sup>

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<sup>2</sup> The AAO notes that the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is also a waivable ground of inadmissibility.

It is only appropriate to deny an applicant's Form I-212 without making a determination as to whether the applicant warrants a favorable exercise of discretion when the applicant is *mandatorily* inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964).

The record reflects that Ms. Abundez is a native of El Salvador who became a lawful permanent resident in 1997 and a naturalized U.S. citizen in 2004. The applicant and Ms. Abundez have a 12-year old son and a nine-year old son who are both U.S. citizens by birth. The applicant and Ms. Abundez are in their 30's.

The AAO now turns to a consideration of positive and adverse factors in the present case.

Letters of support from friends, co-workers and congregants state that the applicant has been a youth pastor and deacon at the Iglesia Cristo Vive church for many years and is a teacher at the church's Bible Institute and its Sunday school. They state that the applicant loves God and is an honest, trust-worthy, hard-working, and responsible person of good moral character. They state that he is a good husband and father. A diploma from the Marantha Biblical Institute indicates that the applicant received a diploma in theology on May 21, 1994. Copies of Iglesia Cristo Vive church records report the applicant's contributed to the church in 2002, 2003 and 2004.

Tax records reflect that the applicant paid federal taxes in 1989 and 1990, and from 1991 through 2005. The applicant was issued employment authorization from September 6, 2000, until November 4, 2002.

The immigration judge at the applicant's hearing noted the applicant's filing of a seasonal agricultural worker application despite full knowledge that he had never performed agricultural work in the United States, his decision to file an asylum application to "get his papers quicker," abusing the privileges afforded under the Act and his failure to acknowledge his guilt in connection with his 1989 conviction.

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. *Supra*.

*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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> 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 precedent legal decisions to 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 naturalized U.S. citizen spouse, his two U.S. citizen sons, his payment of federal taxes, his years of service to his church, and the approved immigrant visa petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry; the applicant's conviction for price-tag switching; the applicant's abuses of immigration law as identified by the immigration judge; the applicant's failure to comply with an order of voluntary departure; his failure to comply with an order of removal; his unlawful presence and employment in the United States; and his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The applicant in the instant case has multiple immigration violations and a criminal conviction. The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors.

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.