U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, D.C. 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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

ON BEHALF OF APPLICANT:

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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 Field Office Director, San Francisco, California, 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 sustained.

The record reflects that the applicant is a native and citizen of Guatemala who initially entered the United States without inspection on or about March 29, 1985. He was taken into custody by U.S. immigration officials on March 30, 1985, and found to be subject to deportation for having entered the United States without inspection pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1251(a)(2). The Immigration Judge granted him voluntary departure to occur on or before October 10, 1985. However, the applicant did not leave the United States by October 10, 1985. Rather, he was deported to Guatemala at the expense of the U.S. government on October 11, 1985. And, he reentered the United States without inspection on or about November 30, 1989. Subsequently, on January 28, 2011, he filed an Application to Register Permanent Residence or Adjust Status (Form I-485) as the beneficiary of a Petition for Alien Relative (Form I-130) that was filed by his United States Citizen sibling and approved on June 30, 2005. The applicant concurrently filed Form I-212. The applicant was found to be inadmissible pursuant to section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C). The applicant through counsel contests this finding of inadmissibility.

The Field Office Director found the applicant inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and ineligible to apply for consent to reapply for admission. The Field Office Director denied the Form I-212 accordingly. *Field Office Director's Decision*, dated April 29, 2011.

On appeal, counsel asserts that the Field Office Director incorrectly applied section 212(a)(9)(C) of the Act as it only applies to applicants who were removed and subsequently reentered the United States on or after April 1, 1997; the applicant is not inadmissible under section 212(a)(9)(C) of the Act; a legacy Immigration and Naturalization Service (now, the United States Citizenship and Immigration Services (USCIS)) memo titled, "Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)" along with Interim Guidance found in 74 No. 25 Interpreter Releases 1033 at 1035 (July 7, 1997), outline the relevant law; and since the section was improperly applied, the denial of Form I-212 was incorrect and the applicant's adjustment of status application should be granted. *Form I-290B*, dated May 24, 2011.

The record includes, but is not limited to: counsel's briefs, a letter from a trial attorney for the U.S. Office of Immigration Litigation to the U.S. Court of Appeals, 9th Circuit; identity documents; and financial documents.

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

> (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 . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The AAO notes that the policy memo referenced by counsel states that, "Section 212(a)(9)(C)(i)(II) of the Act applies to those aliens ordered removed before or after April 1, 1997, and who enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997." *Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Subject: Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*, dated June 17, 1997. In this case, the applicant reentered the United States without inspection by U.S. immigration officials on or about November 30, 1989, and has remained in the United States to date. As such, the AAO finds that he did not enter or attempt to reenter the United States unlawfully any time on or after April 1, 1997, and is therefore, not inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Accordingly, the applicant does not require permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act.

However, the record indicates that the applicant is inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A). Accordingly, the AAO finds that the applicant does require permission to reapply for admission into the United States under section 212(a)(9)(A) of the Act.

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

> (A) Certain aliens previously removed.-
>
> ...
>
> (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
>
> ...

> 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 [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). As discussed previously, the applicant was deported from the United States on October 11, 1985, for having entered the United States without inspection by immigration officials and reentered the United States again without inspection by immigration officials on or about November 30, 1989. The applicant is therefore inadmissible under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. §1182(a)(9)(A)(ii)(I). Accordingly, the AAO will evaluate whether the applicant merits a 212(a)(9)(A)(iii) waiver of inadmissibility as a matter of discretion in order to reside with his U.S. Citizen brother and Lawful Permanent Resident son.

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 the applicant's close family ties in the United States, his U.S. Citizen brother and Lawful Permanent Resident son; an approved I-130 Petition; no evidence of a criminal record; a grant of voluntary departure; over 25 years have passed since the applicant was deported for having entered the United States without inspection; proof of automobile insurance; and the likelihood that the applicant may be found eligible for lawful permanent residence.

The unfavorable factors include the applicant's immigration violations, deportation and reentry without inspection; the lack of hardship; and the applicant's unauthorized employment.

The AAO finds that the applicant's reentry without inspection after being deported from the United States is serious in nature. Nevertheless, the AAO concludes that, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the applicant is eligible for a section 212(a)(9)(A)(iii) waiver of inadmissibility.

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.

The AAO notes that the Field Office Director denied the applicant's Form I-485, application to adjust status, solely on the basis of the applicant's inadmissibility under section 212(a)(9)(C) of the Act. *Field Office Director's Decision*, dated April 29, 2011. Because the AAO finds that the applicant is not inadmissible under section 212(a)(9)(C) of the Act and is eligible for a favorable

exercise of the Secretary's discretion under section 212(a)(9)(A)(iii) of the Act, there remains no basis, in the present record, for the denial of the adjustment application. Accordingly, the Field Office Director should reopen the adjustment application pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i) and issue a new decision.

ORDER: The appeal is sustained. The Field Office Director shall reopen the denial of the Form I-485 application and continue to process the adjustment application.