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FILE: Office: CALIFORNIA SERVICE CENTER Date: **APR 10 2008**

IN RE: Applicant: 

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Armenia who married her first husband on July 18, 1980, in Armenia. On November 7, 1980, the applicant's son, [REDACTED], was born in Armenia. On February 13, 1982, the applicant's daughter, [REDACTED], was born in Armenia. On December 7, 2000, the applicant entered the United States on a B-1 nonimmigrant visa, with authorization to remain in the United States until June 6, 2001. On June 15, 2001, the applicant filed an Application for Asylum and/or Withholding of Removal (Form I-589). The applicant's Form I-589 was denied and referred to an immigration judge. On August 27, 2001, a Notice to Appear (NTA) was issued against the applicant. On February 25, 2002, an immigration judge denied the applicant asylum and ordered her removed from the United States. On March 18, 2002, the applicant filed an appeal to the Board of Immigration Appeals (BIA). On September 10, 2003, the BIA affirmed the immigration judge's decision. On or about October 8, 2003, the applicant filed an appeal with the Ninth Circuit Court of Appeals (Ninth Circuit). On February 24, 2004, a Warrant of Removal/Deportation (Form I-205) was issued for the applicant. The applicant filed a motion for stay of removal with the Ninth Circuit, which the Ninth Circuit granted on March 29, 2004. On June 21, 2004, the applicant divorced her first husband. On July 6, 2004, the applicant married [REDACTED], a naturalized United States citizen, in California. On July 16, 2004, the applicant's husband filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On October 5, 2004, the District Director, San Francisco, California, determined that he lacked jurisdiction to adjudicate the applicant's Form I-485. On November 4, 2004, the applicant's husband filed another Form I-130 on behalf of the applicant. On December 9, 2004, the Ninth Circuit denied the applicant's appeal. On March 31, 2005, the applicant self-deported by departing from the United States. On February 14, 2006, the applicant's second Form I-130 was approved. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). She now 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 with her United States citizen husband.

The director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered removed under section 240 or any other provision of law, and section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for her unlawful presence. Additionally, the director found that the unfavorable factors in the applicant's case outweighed the favorable factors, and she denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Director's Decision*, dated February 20, 2007.

The AAO finds that the director erred in finding the applicant inadmissible for unlawful presence under section 212(a)(9)(B) of the Act. The AAO notes that the applicant's removal proceedings were pending until the Ninth Circuit dismissed her appeal on December 9, 2004, and the applicant voluntarily deported herself from the United States on March 31, 2005. Therefore, the applicant's unauthorized presence was for 112 days, and she is not inadmissible to the United States under section 212(a)(9)(B) of the Act. However, she is

inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(I) of the Act, for being ordered removed under section 240 of the Act.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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

(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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant, through counsel, claims that the "applicant is a person of good moral character. She has no police records. She has maintained bona fide relationship with her United States citizen spouse." *Appeal Brief*, filed April 4, 2007. The applicant's husband states they "have a very strong, loving and stable relationship. [He is] devoted to [his] wife, and she is very loving and caring, and is committed to [their] family.... [He has] very poor health and ha[s] been on disability since 1998.... [He is] suffering from [a] number of serious medical conditions, severe hypertension, arthritis, severe kidney insufficiency, and severe depression.... [He is] concerned about the impact a long separation from [his] wife would have on [their] family financially, emotionally, and physically.... After [he] married [the applicant], she took complete responsibility to care after [him]. She would always make sure [he] took [his] medications on time, when to

see doctors regularly and timely, and she would constantly watch for any signs and symptoms of deterioration in [his] health.” *Statement from* [REDACTED], dated February 14, 2006. [REDACTED] states the applicant’s separation from her husband has been “extremely difficult for [REDACTED].. [The applicant’s husband cannot] imagine the rest of his life without [the applicant]... It seems to [him] that [the applicant] is a great support for [REDACTED], taking very good care of him and assisting him in many ways, especially taking into account his serious disabilities.” *Letter from* [REDACTED], dated February 1, 2005. Regarding the hardship suffered by the applicant’s husband, unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant’s spouse, but it will be just one of the determining factors. The AAO notes that the Social Security Administration determined that the applicant’s husband is disabled. *See Decision by Administrative Law Judge*, dated January 7, 1999. Additionally, the applicant’s husband has been diagnosed with major depressive disorder, atrial fibrillation, uncontrollable hypertension, severe arthritis with multiple joint pains, severe kidney insufficiency resulted from surgical removal of his right kidney, and kidney-stone disease in the left kidney. *See letter from* [REDACTED], dated January 11, 2007; *see also letter from Richmond Area Multi-Services, Inc., Community Mental Health*, dated January 20, 2006; *see also letters from* [REDACTED], M.D., dated January 21, 2006 and July 29, 2005. The AAO notes that [REDACTED] states that the applicant’s husband’s atrial fibrillation “is a serious medical condition...and the risks of atrial fibrillations are life threatening.” *Letter from* [REDACTED], dated January 11, 2007. Additionally, [REDACTED] states that “the separation from [the applicant] ha[s] been contributing to further continuing deterioration of Mr. [REDACTED] fragile health.” *Letter from* [REDACTED], D., dated January 21, 2006.

The record of proceedings reveals that on February 25, 2002, an immigration judge ordered the applicant removed from the United States. The applicant filed an appeal with the BIA and on September 10, 2003, the BIA affirmed the immigration judge’s decision. The applicant filed an appeal with the Ninth Circuit, and on December 9, 2004, the Ninth Circuit denied her appeal. On March 31, 2005, the applicant departed from the United States. Based on the applicant’s previous order of removal, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) 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 unlawfully. *Id.*

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principle that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a BIA denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the BIA's denial rested on discretionary grounds, and that the BIA had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the BIA had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an Order to Show Cause (OSC) had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980), the Ninth Circuit reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds). In *Wang*, the alien sought discretionary relief and a finding of extreme hardship through a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang*, that "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country."

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c) waiver of deportation discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the BIA's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

The AAO finds that the above-cited precedent legal decisions establish the general principle that “after-acquired equities” are accorded less weight for purposes of assessing hardship to a spouse and for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant’s marriage to her United States citizen husband, hardship he is experiencing, a letter of recommendation, no criminal record, her voluntary self-deportation from the United States, and the approval of a petition for alien relative. The AAO notes that the applicant’s marriage to her husband occurred after her order of removal and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

The AAO finds that the unfavorable factors in this case include the applicant’s periods of unauthorized presence.

While the applicant’s actions cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary’s discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.