U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: ATLANTA, GEORGIA Date: JUL 20 2006

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)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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 into the United States after Deportation or Removal (Form I-212) was denied by the District Director, Atlanta, Georgia, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Costa Rica who applied for admission into the United States on January 29, 2003, at the Hartsfield International Airport, Atlanta, Georgia. The applicant presented a valid Costa Rican passport containing a valid non-immigrant visa. He was found inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa. Consequently, on January 20, 2003, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 travel to the United States and reside with his U.S. citizen spouse.

The District Director determined that the applicant was inadmissible under section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C) as an alien who has been ordered removed under section 235(b)(1) of the Act and entered or attempted to reenter the United States, and determined that he is not eligible for the benefit sought. The District Director then denied the Form I-212 accordingly. *See District Director's Decision* dated June 23, 2005.

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

> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general.-Any alien who-
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> (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.

The AAO finds that the District Director erred in finding that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. As noted above, the applicant was expeditiously removed on January 30, 2003. The record of proceedings does not reflect that the applicant entered or attempted to reenter the United States after being removed.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246

(1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

The AAO finds that although the applicant is not inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, he is clearly inadmissible pursuant to section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

Section 212(a)(9)(A) 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.
> >
> > . . . .
> >
> > (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 Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

On appeal, filed by the applicant's spouse, she states that on January 29, 2003, the applicant applied for entry into the United States in order to visit her and for medical follow up. The applicant's spouse states that despite the fact the he was in possession of an unexpired passport and a valid visa he was denied entry with no hearing and that no documentation was given to the applicant stating the reason of his denial. The applicant's spouse further states that the applicant did not have any previous immigration violations, nor was he unlawfully present in the United States at any time prior to January 29, 2003. She further states that the applicant always complied with the time restraints imposed by the Immigration and Naturalization Service (now Border and Customs Protection (CBP)) and at no time did he ever violate those time constraints. In addition, she states that during the applicant's four visits to the United States all his living expenses were paid by her. The applicant's spouse submits a statement regarding the hardships that she has endured as a result of the applicant being denied entry into the United States. She states that she is suffering from acute depression and anxiety. She has undergone tests regarding liver masses, and due to her emotional state, she has been unable to follow through with the medical advice provided by her oncologist. The applicant's spouse states that she is forced to decide if she will stay in the United States without her husband in order to undergo medical treatment of the liver masses or compromise her health and relocate to Costa Rica with her husband. Additionally, the applicant' spouse states that she has suffered severe financial hardship. Every two months she travels to Costa Rica to be with the applicant and if he is permitted to enter the United States she would not have to incur the exorbitant costs of travel to Costa Rica nor the extensive international phone calls, and she would be able to supplement her income through a second job. Furthermore, she states that she is the one suffering the consequences of the applicant not being permitted lawful reentry into the United States. Finally, the applicant's spouse reiterates that the applicant never violated his visa, that the grounds cited by the

District Director for the denial of the Form I-212 are arbitrary, capricious, erroneous, and without merit, and requests that it be reevaluated and granted.

The applicant's spouse's assertions are not persuasive. The record of proceedings contains a Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867B) in which the applicant admitted under oath that he worked in the United States without authorization and, therefore, failed to maintain the status for which he was admitted. The AAO does not have jurisdiction over the circumstances surrounding the applicant's expedited removal from the United States. The fact remains that the applicant was removed from the United States on January 30, 2003, and he is therefore inadmissible under section 212(a)(9)(A)(i) of the Act. The proceeding in the present case is limited to the application for permission to reapply for admission into the United States after deportation or removal under section 212(a)(9)(A)(iii) of the Act. That is the only issue that will be discussed.

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.

There is no independent corroboration to show that the applicant's spouse's medical condition would be jeopardized if she decides to relocate to Costa Rica with the applicant, nor has it been shown that adequate medical facilities are unavailable in Costa Rica. In addition, there are no laws that require the applicant' spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

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 court 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-Nunoz 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 considering discretionary weight. 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 applicant in the present matter married his U.S. citizen spouse on December 6, 2003, over ten months after he was expeditiously removed from the United States. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of his not being allowed into the United States. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case are the applicant's periods of unauthorized employment in the United States. To reward a person for remaining and working in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after he was expeditiously removed form the United States, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant 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.