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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 12 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:

[redacted]

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 Director, Vermont Service Center denied the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Iraq who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having departed the United States while an order of removal was outstanding and seeking readmission within ten years of that departure. The applicant is the husband and father of U.S. citizens and seeks a waiver of inadmissibility in order to reside in the United States with his family.

The director found the applicant to be inadmissible to the United States under section 212(a)(9)(A(ii)(II). He denied the Form I-212 based on his determination that the positive factors in the applicant's case were outweighed by the negative. *Director's Decision,* dated May 14, 2007.

On appeal, counsel contends that the director relied on erroneous facts in weighing the favorable and unfavorable factors in the applicant's case and that the unfavorable factors cited by the director are incorrect to a substantial degree. *Form I-290B, Notice of Appeal or Motion,* dated June 11, 2007.

The record indicates that the applicant was admitted to the United States on April 23, 2001 on a B-2 nonimmigrant visa valid until October 22, 2001. On August 28, 2001, the applicant filed a Form I-589, Application for Asylum and for Withholding of Removal and, on December 4, 2001, his case was referred to the immigration judge. The applicant's Form I-589 was denied by the immigration judge on January 3, 2003 and he was ordered removed to Iraq. The applicant appealed to the Board of Immigration Appeals (BIA). The applicant married his spouse on March 29, 2004. On April 23, 2004, the BIA affirmed the immigration judge's decision and a warrant of removal was issued by Immigration and Customs Enforcement. On June 2, 2004, the applicant departed the United States to seek asylum in Canada. A Form I-130, Petition for Alien Relative, filed on behalf of the applicant by his spouse, was approved on May 13, 2005.

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 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.

In that the record establishes that the applicant departed the United States on June 2, 2004 while an order of removal was outstanding, he is inadmissible to the United States under section 212(a)(9)(A)(ii)(II) of the Act.

On appeal, counsel asserts that the applicant merits a favorable exercise of discretion because he has a U.S. citizen spouse and child, has no criminal record and has complied with U.S. immigration law, which required him to depart the United States.

In support of the Form I-212, the applicant has submitted a significant amount of evidence, almost entirely related to his wife's physical and mental health. In a November 8, 2006 statement, the applicant's spouse asserts that she suffers from rheumatoid arthritis, migraine headaches, constant back and leg pain following surgery for a prolapsed disc, gastric reflux disease, hypotonic bladder and depression. She lists nine medications she is taking in relation to these medical conditions and submits copies of her medical prescriptions.

The applicant's spouse states that, prior to developing rheumatoid arthritis, she cared for her mother who suffers from a range of medical problems and that her medical condition now makes that difficult. She also notes that her rheumatoid arthritis makes being a single mother more difficult. She describes herself as being composed of "a damaged body & a damaged soul." A June 6, 2006 letter from [redacted] the physician's assistant who provides medical care to the applicant's mother-in-law, states that the applicant's mother-in-law suffers from morbid obesity, thrombocytopenia, nonspecific auto-immune disorder, diabetes, hypothyroidism, chronic bronchitis, sleep-related health problems and depression, the treatment of which requires medication. [redacted] also states that the applicant's spouse's mother needs a personal care giver in her home to assist and monitor her various health problems.

In support of the claims made by the applicant's spouse, the record offers August 10, 2006 and October 25, 2006 letters written by [redacted], a Canadian rheumatologist, who reports that the applicant's spouse has been diagnosed with rheumatoid arthritis and is currently receiving Humira injections. Letters from a range of medical personnel demonstrate that the applicant's spouse is being treated for degenerative disc disease. [redacted] a neurosurgeon, indicates, in a January 23, 2002 letter, that the applicant's spouse has developed chronic radicular pain following a 2001 back injury. [redacted] in Alva, Oklahoma reports that he has been treating the applicant's spouse for severe degenerative disk disease since February 2, 2005. The record also includes three 2005 reports from [redacted], a neurologist in Edmond, Oklahoma, who indicates that the

applicant's spouse has a degenerative disc disease of the lumbar spine; a November 11, 2002 finding by the Division of Vocational Rehabilitation of the Oklahoma Department of Rehabilitation Services that the impairment of the applicant's spouse constitutes an impediment to employment; and a June 4, 2004 vocational evaluation of the applicant's spouse as a result of her 2001 back injury. An October 15, 2006 psychological evaluation, prepared by [redacted] who is a licensed psychologist in Oklahoma City, finds the applicant's spouse to be on the threshold of a nervous breakdown, with a well-documented history of emotional trauma that has been compounded by her physical impairment. A February 14, 2005 letter from [redacted] a psychiatrist located in Enid, Oklahoma, notes that when he last saw the applicant's spouse on March 19, 2002, she was suffering from depression. Further evidence of the emotional state of the applicant's spouse is found in a psycho-social evaluation conducted on July 14, 2004 by [redacted] at the Enid Counseling and Diagnostic Center, Inc. At that time, the applicant's spouse was diagnosed with adjustment disorder with mixed anxiety and depressed mood.

At the time of filing, counsel contended that the combined physical and emotional problems of the applicant's spouse amount to extreme hardship. He further noted that the costs of her medical needs could be met only if she remains in the United States and that, as she is currently unemployed, she will require more government assistance unless the applicant is allowed to return to the United States. He asserts that the applicant is a person of good moral character and worthy of living in the United States, and that his family and friends miss him and speak only of his kindness and support. The AAO notes that the record contains letters written by the applicant's family, members of his spouse's family and friends supporting his return to 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 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-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 AAO finds these cited 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.

The favorable factors in this matter are the applicant's U.S. citizen spouse and child, the physical and emotional hardships being experienced by the applicant's spouse, the absence of any criminal record in the United States and Canada for the applicant, and the approved Form I-130 benefiting the applicant. The AAO finds that the applicant's marriage, approved immigrant petition and birth of his child occurred after the applicant was placed into proceedings in 2001. The AAO finds that these factors are "after-acquired equities" and that any favorable weight derived from them must be accorded diminished weight in exercising the Secretary's discretion in this matter.

Although the AAO notes the multiple unfavorable factors identified by the director in his decision, it finds there is only one unfavorable factor in this case, the applicant's failure to depart the United States immediately after the BIA issued its April 23, 2004 decision. In a separate proceeding, the AAO has found that the applicant did not accrue sufficient unlawful presence in the United States to render him inadmissible under section 212(9)(B) of the Act. In this same proceeding, it also determined that the applicant had not overstayed his B-2 nonimmigrant visa and had not worked in the United States without authorization.

While the applicant's failure to depart the United States immediately following the BIA's decision cannot be condoned, the AAO finds that, given all the circumstances of the present case, this failure is outweighed by the favorable factors previously noted and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application will be approved.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained and the application will be approved.

ORDER: The appeal is sustained. The application will be approved.