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U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEW YORK, NY Date: AUG 04 2009

IN RE: [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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, 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 and the application approved.

The applicant is a native and citizen of Ecuador whose lawful permanent resident mother, on November 23, 2002, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On January 26, 2004, the applicant was placed into immigration proceedings after having entered the United States without inspection in September 2002.[1] On February 20, 2004, the immigration judge ordered the applicant removed. On February 26, 2004, the applicant was removed from the United States and returned to Ecuador. On June 22, 2005, the Form I-130 was approved.

On August 12, 2008, the applicant filed the Form I-212, indicating that he resided in Ecuador.[2] The applicant is inadmissible pursuant to 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 reside in the United States with his lawful permanent resident mother and father, one lawful permanent resident sibling for and one U.S. citizen sibling.

The district director determined that the applicant did not in a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision,* dated November 26, 2008.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. Counsel contends that the district director based her decision on incorrect information and failed to take into account documentation submitted with the application. *See Counsel's Brief,* dated December 22, 2008. In support of his contentions, counsel submits the referenced brief and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

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

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[1] The AAO notes that the applicant was under the age of eighteen at the time of entry and did not start to accrue unlawful presence in the United States until his eighteenth birthday, which occurred on September 16, 2003.

[2] The AAO notes that if it is later confirmed that the applicant has illegally reentered the United States at any time after his 2004 removal or if he reenters the United States illegally after having been granted permission to reapply for admission, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years and the AAO's approval of the Form I-212 is automatically revoked. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007).

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.

On appeal, counsel contends that the district director erred in finding that the applicant had been previously ordered removed from the United States and was a fugitive from a warrant issued in 2000. The AAO finds that the district director incorrectly stated that the applicant had entered the United States without inspection in May 2000 and had been issued a final order of deportation on September 5, 2000. The record clearly reflects that the applicant's own brother, [redacted] had given the applicant's biographical information when he was apprehended by immigration officials and ordered removed in 2000. A fingerprint match concluded that the applicant was not the same individual who had been ordered removed in 2000.

The record reflects that the applicant's mother is a native and citizen of Ecuador who became a lawful permanent resident in 2002. The applicant's father is a native and citizen of Ecuador who became a lawful permanent resident in 2002. The applicant's sister is a native and citizen of Ecuador who became a lawful permanent resident in 2003. The applicant's half-brother is a native of Ecuador who became a lawful permanent resident in 1995 and a naturalized U.S. citizen in 2000. The applicant is in his 20's, the applicant's mother is in her 60s and the applicant's father is in his 50s.

On appeal, counsel states that the applicant only came to the United States in September 2002, at the age of seventeen, because he was the only immediate family members who still resided in Ecuador. He states that the applicant was still a child when he came to the United States and he came because he wanted to be with his family. Counsel states that the applicant's mother suffers from high blood pressure and morbid obesity, while his father suffers from prostate disease and colitis. Counsel contends that while the applicant illegal entry into the United States cannot be condoned, the mitigating factors are clear, convincing and unequivocal. Counsel states that the application established the hardship the applicant's parents are now enduring in their separation from the applicant. He states that the applicant's parents are not healthy and both suffer from conditions that are exacerbated by stress. Counsel states that the separation of the applicant from his mother has caused deterioration in her mental condition as evidenced by the psychological report. Counsel states

that the applicant is working in Ecuador as a farmer and that his skills are needed in the United States. Counsel states that the applicant's removal from the United States is solely from his illegal entry into the United States and not based on any criminal activity.

The applicant's mother, in a letter accompanying the Form I-212, states that the applicant came to the United States illegally because he did not want to be separated from his family who were living in the United States. She states that her husband has prostate problems and colitis, while she has high blood pressure. She states that she is overweight and has trouble walking. She states that every time she thinks about her separation from the applicant she feels her blood pressure increasing. She states that she has periods of time where all she does is cry. She states that she has visited the applicant in Ecuador six times since his removal. She states that her depression becomes unbearable and she must see the applicant. She states that she feels hopeless knowing that he is in Ecuador and that she is separated from him. She states that it causes her extreme depression to be separated from her husband when she is visiting the applicant in Ecuador.

The applicant's father, in a letter accompanying the Form I-212, states that the applicant came to the United States illegally because he did not want to be separated from his family who were living in the United States. He states that the applicant is his youngest child and his spouse has to visit him because she is unable to be separated from him for very long. He states that his wife has returned to Ecuador approximately 6 times in order to be with the applicant. He states that his wife really misses the applicant when she is in the United States and it has caused her depression to be separated from him. He states that his wife's depression is becoming more and more serious and that he is very worried about her condition. He states that he has visited the applicant three times in Ecuador and that he is also constantly depressed over his separation from the applicant. He states that he is fifty-seven years old and really needs to have his son near him. He states that it is frustrating for him to be separated from the applicant. He states that it causes him extreme depression to be separated from his spouse when she visits the applicant in Ecuador.

Medical documentation in the record establishes that the applicant's mother has been treated for high blood pressure since January 11, 2007 by [redacted]. Medical documentation in the record establishes that the applicant's father has been treated for prostate disease and colitis since January 11, 2007 by [redacted]

A letter from J.R. Medical and Diagnostic Services, P.C., states that the applicant's mother has been a patient for several years and has multiple medical problems. It states that the applicant's mother needs emotional and physical support as she does not have anyone who can take her to her medical appointments. It states that the applicant's mother needs this emotional support from the applicant who is young, able and willing to care for her medical needs. The AAO notes that this statement conflicts with information contained within the psychological evaluation, which indicates that the applicant's mother relies upon the applicant's sister for emotional, logistical and financial support.

The record contains an undated psychological evaluation for the applicant's mother written by [redacted], a licensed psychologist and based on a single interview with the applicant's mother. The applicant's father and sister were present at the interview. It states that the applicant's mother is concerned about her husband because he has become progressively isolated, withdrawn and irritable since the removal of the applicant. The applicant's mother reported that her husband has had difficult times expressing his feelings but has recently admitted that he does not know how he

would go on with life if the applicant is not permitted to return to the United States. The applicant's mother reported that she did not have a history of mental illness herself prior to the overwhelming stress she experienced surrounding the applicant's immigration issues. The applicant's mother reported, however, that there is a history of depression and other mental ailments is in her extended family which she attributes to the difficult experiences in Ecuador due to poverty, violence and unemployment. [redacted] found that the applicant's mother's symptom profile, results of administered scales, body language, and diagnostic interview as well as prior diagnoses corroborate her finding that she meets the criteria for a major depressive disorder, recurrent and an Axis II diagnosis of borderline personality disorder. [redacted] observed that the applicant's mother sobbed frequently, was anxious, had difficulty modulating her affect, taking turns to speak, became angry at her daughter for answering a question she had asked her to assist her with, and demonstrated extreme irritability and attention-seeking behavior. The applicant's mother reported that she cries every day and has daily fights with her daughter, her sons and even grandchildren. The applicant's mother reported that she has difficulty sleeping, has had nightmares and has recurrent thoughts about her son being taken away. The applicant's mother reported that she is not finding joy or pleasure in her life. [redacted] noted that these are significant symptoms that are consistent with her diagnosis and place the applicant's mother at risk for possible hospitalization if she continues to experience high levels of distress and lack of control. [redacted] notes that she is particularly concerned due to the applicant's mother's more serious symptoms indicative of poor prognosis should she continue to be under such severe stress. The applicant's mother reported that she sometimes becomes so afraid and feels that she would kill herself if the applicant does not come back to the United States because she does not feel she would tolerate how "bad" she feels about his removal. The applicant's mother reported that she is very distraught over the applicant's detention and subsequent removal. She reported that she thinks about the applicant every day and that something is happening to him for which she cannot forgive herself or be able to "change the situation." [redacted] reports that the manner in which the applicant's mother's concerns are expressed is consistent with that of an individual who has clinical levels of distress, anxiety and poor coping skills. [redacted] concludes that this is the reason why she recommends immediate treatment for the applicant's mother in order to reduce the chances that her symptoms are exacerbated and require psychiatric hospitalization. Dr. [redacted] opines that the applicant's mother's limited coping and her increasing symptoms, coupled with her history of mental illness, place her at risk for outcomes that represent extreme and unusual psychological hardship beyond that are not experienced by most families who are forced to separate. [redacted] noted that the applicant's father appeared to be a kind and hard-working individual whose affect also suggests depression, and he does not appear to be emotionally unavailable as he is overwhelmed and spends his time either working or isolating from others. [redacted] states that, as such, the applicant's mother relies on her daughter for emotional, logistical and financial support.

The AAO notes that there is no evidence to establish that the applicant's mother has received treatment or counseling since this evaluation, or that she continues to require or receive treatment or counseling. In that [redacted] findings appear to be based on a single interview with the applicant's mother, the AAO does not find them to reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional. As a result, the evaluation's conclusions must be considered speculative and of diminished value.

Furthermore, the AAO notes that there is no evidence in the record to establish that the applicant's mother or father would be unable to receive appropriate care or medication in the absence of the applicant or appropriate care or medication in Ecuador. Going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 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 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 lawful permanent resident mother, lawful permanent resident father, one lawful permanent resident sibling, one U.S. citizen sibling, general hardship to the applicant and his family if he were denied admission to the United States, the absence of a criminal background, his age at the time of entry into the United States and the approved immigrant visa petition filed on his behalf.

The AAO finds that the unfavorable factors in this case include the applicant's original unlawful entry and his unlawful presence in the United States from September 16, 2003 until February 26, 2004.

The applicant's unlawful entry and unlawful presence in the United States cannot be condoned. However, the AAO finds that given all of 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.

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.

ORDER: The appeal is sustained and the application approved.