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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: HAGATNA, GU Date: FEB 18 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Field Office Director, Hagatna, Guam 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 dismissed.

The applicant is a native and citizen of China who, on July 26, 1997, was admitted to the United States as an H-2B nonimmigrant. The applicant remained in the United States after his nonimmigrant status expired on March 25, 1998. On March 8, 1999, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On April 1, 2002, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On July 3, 2002, the immigration judge ordered the applicant removed *in absentia*. On July 3, 2002, a warrant for the applicant's removal was issued. The applicant failed to depart the United States. On March 10, 2004, the applicant filed a motion to reopen with the immigration judge. On March 24, 2004, the immigration judge granted the applicant's motion to reopen. On November 10, 2004, the immigration judge denied the applicant's applications for asylum, withholding of removal, convention against torture and voluntary departure based on her adverse credibility finding. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On October 28, 2005, the BIA dismissed the applicant's appeal. The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On April 19, 2007, the Ninth Circuit denied the applicant's petition for review. On the same day, the applicant married his U.S. citizen spouse, [redacted]. On May 13, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed on his behalf by [redacted]. On July 27, 2007, the applicant filed a Form I-212. On August 17, 2007, the applicant's Form I-485 was denied. The applicant is inadmissible under 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 U.S. citizen spouse.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated August 17, 2007.

On appeal, counsel contends that the field office director failed to consider all the relevant facts in analyzing the applicant's case. *See Counsel's Letter,* dated September 13, 2007. In support of her contentions, counsel submits the referenced letter, medical and financial documentation and copies of documentation previously provided. The entire record was considered 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 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.

The record reflects that [redacted] is a U.S. citizen by birth in Guam. The applicant and [redacted] do not have any children together. The applicant has a 16-year old daughter who is a native and citizen of China. The applicant is in his 40's and is in her 50's.

On appeal, counsel contends that the field office director failed to correctly apply an extreme hardship analysis to the applicant's case. However, the AAO finds that the field office director erred in stating that the applicant was subject to the extreme hardship requirement set forth in section 212(i) of the Act, 8 U.S.C. § 1182(i). A section 212(a)(9)(A)(iii) waiver, or permission to reapply for admission, is one that requires a balancing of the favorable and unfavorable factors in an applicant's case. While hardship to family members may be a factor to be considered in determining whether an applicant warrants a favorable exercise of discretion, a finding of extreme hardship is not required.

The AAO now turns to a consideration of positive and adverse factors in the present case.

Counsel asserts that the applicant does not dispute the facts stated in the field office director's decision. He asserts that [redacted] suffers from heart disease and severe diabetes, for which she has been hospitalized and sent for off-island medical treatments. Counsel asserts that [redacted] has no other family members who could accompany her to medical treatments locally and off-island. Counsel asserts that the field office director erred in finding that there was no hardship in the applicant's case because (1) [redacted] is ambulatory; (2) the applicant has not been actively involved in the administration of [redacted]' medication; and (3) [redacted] is financially independent. Counsel asserts that the field office director summarily and dismissively states that there is a lack of evidence of hardship because the applicant and [redacted] have only been married for four months. Counsel asserts that the field office director failed to consider that [redacted] needs the applicant to accompany her in emergency medical situations even though she is ambulatory in general. Counsel asserts that the field office director was unreasonable and lacked humanitarian principles in stating

that [redacted] was able to call 911 for emergency treatment because 911 is commonly the last resort for people with medical emergencies and it is a sign of hardship to live alone. Counsel asserts that the field office director failed to consider the emotional support [redacted] requires from the applicant. Counsel asserts that, simply because the applicant is not actively participating in the administration of [redacted] medication, does not mean that she will not suffer hardship without him. Counsel asserts that all patients with diabetes know that family support is important for diabetes care and that patients with quadruple bypass need similar familial support. Counsel asserts that the applicant has a limited English vocabulary and cannot read [redacted]' medication lists, which renders him incapable of being actively involved in her medication. Counsel asserts that the applicant is there for physical and emotional support to [redacted]. Counsel asserts that, while [redacted] drew $28,465 from her retirement benefits in 2006 and owns her home, she has multiple medical expenses which are not covered by medical insurance, as well as her medical insurance payment, her mortgage and utilities, etc. Counsel asserts that [redacted]' monthly expenditures should be considered and that [redacted] is hardly financially independent. Counsel asserts that some of [redacted] medical accounts have been delinquent.

[redacted], in her letters, states that she met the applicant on February 14, 2005 and they began to see each other occasionally. She states that they finally decided to marry due to her health condition. She states that there are times when she needs him to be with her or sign documents, but he could not because their relationship was not official. She states that she has a heart condition and is a diabetic patient who is frequently in the emergency room (ER) and is referred off-island. She states that she has been off-island on four occasions since 2001. She states that she underwent a quadruple heart bypass in 2001. She states that she was single and lived alone at the time, with only her sister checking in on her occasionally. She states that her sister has her own family and baby sits her grandchildren, which makes it hard for her sister to check on her constantly. She states that there are times when she drives herself to the ER alone or calls 911 for an ambulance because there was no one at home with her. She states that she would go off-island unaccompanied by family members, which startles people at the hospital. She states that she hopes the applicant will be able to stay with her and care for her heart condition. She states that her heart condition frightens her, especially if it is at night, since most of her attacks occur in the night or mid-morning. She states that she has been in and out of the ER too many times to count. She states that on July 4, 2006, a stent or balloon was performed on her in the United States. She states that two days prior to her return to Guam she had another attack and was taken by ambulance back to the hospital, where she was hospitalized for two more days. She states that she was finally able to return to Guam in November 2006. She states that, after she returned from the United States, she received bills from her health insurance claiming that she was responsible for 20% of the costs. She states that collection agencies are now looking for that money from her. She states that she received numerous letters and constant telephone calls from those agencies and that is why she needs the applicant to be with her. She states that she needs the applicant to be with her when she has attacks and to help with her medical bills, etc. She states that her diabetes is also bad. She states that she does not know why her diabetes is bad, but while she was in the hospital her blood sugar was still so high that the doctors were puzzled. She states that she is also experiencing cramping and numbness in both her legs to the point where she always needs the applicant to get her out of bed. She states that she has a family history of heart disease and diabetes. She states that her father died in 1979 at the age of 55 from a heart attack. She states that her youngest sister died in 1989 at the age of 29 from heart and kidney failure. She states that her youngest sister's daughter went off-island at the same time she did in July 2006, for an aneurism of

the heart. She states that she lost a younger brother in 1989 at the age of 32 from a heart attack. She states that she retired from the government in November 1994 in order to care for her mother who was hospitalized and referred for leg amputation. She states that her mother developed congestive heart failure and died in 1997. She states that she lost another brother in 2005 at the age of 59 from a heart attack.

A letter from [redacted]., dated September 8, 2007, states that [redacted] is her patient. She states that [redacted] continues to experience Angina Pectoris and other medical problems. She states that [redacted] needs someone to be with her, especially at night. She states that [redacted] is dependent on the applicant for her care since other family members are unable to care for her.

Medical records dated in 2005, which entirely consist of handwritten physicians' treatment notes that are mostly illegible, indicate that in January 2005, [redacted] had two stents and in May 2001, she underwent a 4 vessel heart bypass. They indicate that [redacted] was in the ER for "chest pain" or "chest tightness" on five occasions in 2005. They indicate that the applicant was transported to the ER by a relative on two of those occasions, by herself on one occasion and by ambulance on two occasions. A report from [redacted]' annual mammogram, dated June 26, 2007, indicated that the screening was normal. An undated letter from [redacted] indicates that [redacted] underwent cardiac catherizations in California on June 21, 2005, and July 5, 2006, attended consultations with cardiologists in California on September 11, 2006 and October 27, 2006, and was seen at Anaheim Memorial Medical Center on October 11, 2006. A Clinic Record which consists of handwritten physicians' notes that are sometimes illegible, dated August 13, 2007, by [redacted] M.D., indicates that [redacted] was married in 2007 and retired in 1994. It indicates that [redacted] needs her husband because he does her accucheck, watches her at night for angina and monitors her diabetes. It indicates that none of [redacted] siblings are able to check on her more often.

A copy of an internet publication entitled "Voices of Diabetes," states that family support is helpful for diabetes care. The publication quotes a diabetes patient: "Six years later, I still need the support from my friends and family when I am down. Every day is a new day for me, teaching myself what foods I can eat, which exercises work best, and when my body is telling me that my glucose is low. There are always struggles. As a newlywed (I have been married almost 9 months), having my husband around has been so important for me as well, especially when I can't figure out why my blood glucose is high or why I have to take so much insulin to get below 100. When I get frustrated, I have him there to give me a hug and tell me that everything will be okay."

A list provided by counsel indicates that [redacted]' medications are insulin, metroprolol, ranitidine, plavix, benazepril, furosemide, vytorin, niaspan, folic acid, magnesium, ecotrin, mutli-vitamins, vitamin E, vitamin B6 and nitroglycerine. The list states that [redacted]' doctor recommends blood sugar testing to be done twice per day.

Financial documents in the record indicate that, in 2007, [redacted] was scheduled to receive $24,825.84 from the government of Guam's retirement fund. A list provided by counsel estimates [redacted]' monthly bills to total approximately $5,267. An undated, unsigned and non-specific letter states that an account at Pacific Cardiovascular Associates in Santa Ana, California is seriously delinquent. The record contains what appears to be paid medical bills or collection agency notices for [redacted], in 2006 and 2007, from [redacted], Anaheim Memorial Hospital

Authority, Pacific Cardiovascular Associates. and Anaheim Memorial Medical Center. The record contains a monthly bill from Pacific Cardiovascular Associates for [redacted] in the amount of $62.79. The record contains a delinquent notice, dated June 25, 2007, from [redacted]., Inc. in regard to Long Beach Memorial and an "[redacted]" sent to an address in Carson, California.

The record reflects that the applicant has been employed in the United States, in various professions, since July 1997. The record reflects that the applicant was authorized to engage in employment with Continental Sea, Inc. from July 26, 1997, until March 25, 1998, under his H-2B nonimmigrant admission. The applicant was issued general employment authorization from October 21, 1999 until October 20, 2001; from June 14, 2004 until June 13, 2005; August 13, 2005 until August 12, 2006; and September 27, 2006 until September 26, 2007.

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. 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 those equities acquired by applicants after they have been placed into immigration proceedings, and that these 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 U.S. citizen spouse, the general hardship to the applicant and his spouse in the event of his removal, his spouse's medical conditions, his employment since 1997, and a pending immigrant visa petition benefiting him. The AAO notes that the applicant's marriage and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. These factors are "after-acquired equities," which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's overstay of his nonimmigrant status; the immigration judge's negative credibility finding; the BIA and Ninth Circuit's upholding of the negative credibility finding; his failure to comply with an order of removal; his unauthorized presence in the United States after expiration of his nonimmigrant status and prior to filing for asylum; his unauthorized presence in the United States after the appeals process had concluded; and employment in the United States except for valid periods of employment authorization.

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors.

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 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.