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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

#4

[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: JUL 08 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 dismissed.

The record reflects that the applicant is a native and citizen of India who, on August 17, 1994, was placed into immigration proceedings for having entered the United States without inspection on August 4, 1992. On October 17, 1995, 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 Maria Torres (Ms. Torres), a U.S. citizen by birth. On August 28, 1998, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States.

On May 11, 1999, the applicant filed a motion to reopen with the immigration judge. On August 9, 1999, the immigration judge denied the motion to reopen. The applicant filed an appeal of the denial of the motion to reopen with the Board of Immigration Appeals (BIA). On November 1, 2001, the BIA dismissed the applicant's appeal.

On March 11, 2003, the applicant married [redacted] New York.[1] On August 5, 2008, the applicant filed the Form I-212, indicating that he resided in the United States. On November 13, 2009, [redacted] filed a Form I-130 on behalf of the applicant, which remains pending. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant seeks a waiver 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 naturalized U.S. citizen spouse, two U.S. citizen children and one derivative U.S. citizen stepchild.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision,* dated October 14, 2009.

On appeal, counsel contends that the district director "misconstrued and misapprehended the issue of inadmissibility as well as unfavorable factors" in the applicant's case. *See Counsel's Brief,* undated. In support of his contentions, counsel submits the referenced brief and copies of financial information. 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 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.

[1] The AAO notes that the record does not contain a divorce decree or death certificate establishing the legal termination of the applicant's marriage to [redacted] however, for the purposes of this decision, the AAO will regard [redacted] as the applicant's wife.

(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 Secretary has consented to the alien's reapplying for admission.

On appeal, counsel contends that the district director completely ignored that the applicant was grandfathered under section 245(i) of the Act. The AAO finds that counsel's contention is unpersuasive since whether the applicant is grandfathered under section 245(i) of the Act is not a factor to be weighed in exercising discretion. Section 245(i) of the Act does not have any bearing on whether an applicant is eligible for permission to reapply for admission. The record reflects that the district director did not make a finding that the applicant is inadmissible under section 212(a)(6)(A)(i) of the Act, nor did she find the applicant ineligible for permission to reapply for admission.

Counsel contends that the applicant's favorable factors were not evaluated properly. Counsel contends that generally speaking, applications for permission to reapply for admission are approved if the foreign national is the beneficiary of an approved family-based petition, has only been deported one time, does not have a criminal record, did not commit significant immigration violations, and can demonstrate hardship to his or her family. Counsel admits that the district director considered the fact that the applicant was married to a U.S. citizen and has two U.S. citizen children but failed to appreciate that the applicant has been married for more than six years and has two children.[2] Counsel contends that this important factor was dismissed by the district director by stating that these equities were obtained were residing in the United States in an illegal status. Counsel contends that the district director has plainly ignored that if the applicant was in a legal status he would not require the equity as a favorable factor nor have applied for permission to reapply for admission. Counsel's contentions are unpersuasive. 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

[2] The AAO notes that counsel's contention is contradictory.

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 a discretionary determination. 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 legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion. The AAO finds that the district director correctly gave diminished weight to the applicant's after-acquired equities according to applicable case law and principles.

Counsel contends that the district director ignored the fact that [redacted] stated under oath that she will be unable to pay a monthly mortgage of $3,700 and questioned this fact in light of the applicant's tax returns. Counsel states that the applicant earns a rental income from the portion of the house which is rented to a tenant, as indicated in the tax returns. The AAO finds that the district director did not ignore [redacted] statement, since acknowledgement of the statement was necessary in order to make the inquiry into the tax returns. Furthermore, the tax returns are not evidence of the situation under which the applicant receives rental income, nor are they evidence of the ownership of property or the amount of debt or monthly mortgage owed on a property. The AAO finds that [redacted] statement and counsel's assertions are insufficient evidence that the applicant owns a home or that he pays a $3,700 per month mortgage. A copy of the deed, mortgage invoices, W-2s, receipts for rental income, etc., would be appropriate evidence of these facts. Going on record without supporting documentary evidence is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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).

Counsel contends that the district director did not provide due weight to the forensic psychological evaluation, which concludes that, in the event that the applicant is removed from the United States, the applicant's children will forever lose their male role model and, since [redacted] would have to seek full time employment, the children will forever lose their mother's presence in the home and daily contact with their mother has become an important part of the children's well-being. Counsel states that the report further highlights that, due to the loss of a father who earns an income and a mother who cares for them, the children would be likely to develop depression, significant trust issues, diminished self-esteem and difficulty in forming relationships. Counsel states that the report highlights how the applicant takes extra care of and provides financial support for the applicant's child from a prior relationship, who is described as weak in reading, by arranging for the cost of a tutor and transportation needs. Counsel states that, if the applicant is removed from the United States, these arrangements would be impossible and it is highly unlikely that the children could ever afford to go to college. Counsel contends that the district director incorrectly evaluated that [redacted] and the children would not be affected more than the normal case.

The record contains a forensic psychological evaluation, dated April 25, 2007, for [redacted] written by [redacted] a licensed psychologist, which is based on a single two-hour interview with [redacted] translator was present at the interview. It states that [redacted] and the children are highly likely to remain in the United States if the applicant is removed from the United States. It states that [redacted] and the children are all U.S. citizens and would not travel to India due to the risk of mistreatment, torture and death. During the interview, [redacted] reported that she endured an extremely abusive and unstable relationship in her second marriage. [redacted] reported that due to extremely poor telephone and mail service in the applicant's village in India, telephone calls, e-mail and mail would be extremely limited and undependable. [redacted] reported that visits to India would be extremely unlikely and would, at the very least, expose her to unsafe, unstable and dangerous circumstances. [redacted] reported that the children would forever lose contact and their relationships with the applicant. [redacted] reported that she would become a single parent, solely responsible for raising and parenting three children. [redacted] reported that she has never worked and that the applicant has been the sole source of her financial and emotional support since they were married. [redacted] reported that she would have no income and would be unable to afford the mortgage, food, clothing and household expenses. [redacted] reported that she and the children would have to move into an apartment that she could afford, most likely far from the Queens area in which the family now resides. [redacted] reported that she has an extremely limited support system and that her parents are deceased. [redacted] reported that she has no relatives and few friends in the United States. [redacted] reported that the applicant is deeply involved in the children's activities. [redacted] reported that the applicant plays with the children, reads to them, helps the children with their homework and offers advice and guidance to the children on a daily basis. [redacted] reported that the applicant takes the children to festivals and on trips. [redacted] reported that the applicant provides for the cost of a tutor and transportation for her oldest child, who described as weak in reading. [redacted] reported that these services would not be possible for her oldest child without the applicant's financial support. [redacted] reported that there are no extended family members who would be available to mitigate the harm to the children should the applicant be removed from the United States.

[redacted] opines that, under these circumstances, the marriage of [redacted] and the applicant would come to an end. [redacted] opines that [redacted] would lose her partner, provider, and the man she has loved in the only stable and enduring relationship she has had. [redacted] opines that [redacted] would be deprived of the applicant's affection, sexual relationship and companionship. [redacted] opines that [redacted] would most likely become devastated, depressed, disappointed, angry and quite lonely. [redacted] opines that [redacted] who has never had employment and who, at present, has no marketable skills would either have to work full-time (requiring child care expenses) or go on welfare and suffer the shame and embarrassment of depending on public funding for herself and her children. [redacted] opines that, due to [redacted] limited understanding and use of English and lack of marketable skills, she would have considerable difficulty in finding work. [redacted] opines that the applicant would have difficulty finding employment in his village in India and would have difficulty supporting himself financially much less his wife and children. [redacted] opines that [redacted] would literally be on her own as a single parent in an extremely difficult emotional, financial and family situation. [redacted] opines that the children have been fortunate to have [redacted] at home with them at all times and that, in the event that the applicant is removed from the United States and [redacted] is required to work full-time, the children would forever lose her

presence in the home and the daily contacts with her that have become so important for their well-being. [redacted] opines that the children would forever lose their male role model. [redacted] opines that, essentially suffering the losses of their mother and father, the children would be likely to develop depression, significant trust issues, diminished self-esteem, and difficulty forming relationships because of the loss of their parents. [redacted] opines that the children would be likely to become insecure, untrusting and difficult to get along with, losing a sense of their identities, because they will most likely have to move to a new area and begin at a new school. [redacted] opines that the children will lose the applicant as a valuable source of support and guidance and that the youngest child, described as highly attached to the applicant, might be the most devastated of the siblings. [redacted] opines that it is unlikely that the children will ever afford college tuition and that their career opportunities and earning power would be compromised to an unknown extent if the applicant is removed from the United States. [redacted] concludes that, within a reasonable degree of psychological certainty, [redacted] and the children will suffer severe and enduring hardship in the event that the applicant is removed from the United States.

The AAO notes that there is no evidence to establish that the conditions counsel, [redacted] and [redacted] claim the applicant, [redacted] and the children will face in India exist. [redacted] does not indicate that the applicant, [redacted] or her children suffer from a psychological diagnosis that requires treatment or counseling. In that [redacted] findings appear to be based on a single interview with [redacted] 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 [redacted] and the children would be unable to receive appropriate care in the absence of the applicant for any psychological diagnoses incurred due to the removal of the applicant from the United States. 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)).

The record reflects that [redacted] is a native of India who became a lawful permanent resident in 2000 and a naturalized U.S. citizen in 2006. [redacted] has a thirteen-year-old son from a prior relationship who is a native of India, became a lawful permanent resident in 2000, and derived U.S. citizenship through his mother in 2006. The applicant and [redacted] have a nine-year-old daughter and an eight-year-old son who are both U.S. citizens by birth. The applicant is in his 40's and [redacted] is in her 30's.

Counsel contends that the district director has failed to appreciate that the loss of the applicant's income may result in his wife and children becoming public charges. Counsel contends that the district director misconstrued [redacted] statement in regard to her lack of family ties outside the United States and ostracization in the Indian community due to her prior marriages. Counsel states that, even if the applicant is removed from the United States, [redacted] may not receive any social, financial or emotional support from the rest of the family, which will cause extreme and outrageous hardship to her and the children. The AAO notes, however, that [redacted] has at least one sibling who resides in the United States who has previously assisted her when her second marriage was terminating. Counsel states that the applicant is not involved in any criminal or

immigration violations except the present one and his case should be granted in the interest of family unity.

[redacted] in a statement attached to the Form I-212, states that she was previously married to a man who died and then married a man who lived in the United States [redacted] She states that [redacted] visited her in India three times for the first 1½ years of their marriage before she came to the United States. She states that, when she came to the United States, she discovered that her husband was not the man she knew in India as he became a heavy drinker and very violent. She states that [redacted] was unable to hold a job and would not support her financially so she moved in with her brother. She states that the applicant was her brother's roommate and stood by her during this time. She states that the applicant always supported her financially, is a very kind father to her son from a prior marriage, and she has always suffered to find happiness, but found it with the applicant. She states that the applicant's family and their society have never accepted the marriage because she was previously married and has a son. She states that she and the applicant do not have a house in India except for the applicant's parents' house. She states that she has no place to stay in India and the applicant's family would not accept her. She states that, when she returned to India for the funeral of her parents, the applicant's mother came to her house to insult her with some of the women from their village. She states that the applicant is a very responsible and caring father who helps the children with their homework and takes the children on trips and to activities. She states that it would be impossible to survive in India since she has no work skills. She states that it will be impossible to stay and support her children in the United States. She states that, if she remains in the United States, her children will be unable to have contact with their father since there is limited electricity and no cell phone service in India. She states that her children will be unable to remain in the United States without their father and will not be able to adjust to the different lifestyle in India. She states that the children's education will be disturbed. She states that her oldest child is very sensitive and it took him some time to adjust to previous changes in school. She states that, if the applicant is not in the United States, she will not have a source of income and the house requires a $3,700 per month mortgage.

Documentation in the record establishes that the applicant has been employed in the United States from August 1992 until present. The record contains evidence establishing that the applicant has filed joint federal taxes from 2004 through 2007. The record reflects that the applicant was issued employment authorization from November 16, 1995 until November 15, 1996.

Documentation in the record establishes that, at the time the applicant was apprehended by immigration officers in 1994, he was in possession of an employment authorization card which was not validly obtained.

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.*

As established by the record, the favorable factors in this matter are the applicant's naturalized U.S. citizen spouse, his derivative U.S. citizen stepson, his two U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, his payment of federal taxes, his clear background and the pending immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, official establishment of the relationship to his stepson, the birth of his children and the filing of the immigrant petition benefiting him occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; his obtainment of a fraudulent employment authorization card; his failure to appear at an immigration hearing; his failure to comply with a removal order; his unlawful presence in the United States; and his unauthorized employment in the United States, except for the period during which he was issued 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.