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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

#4

Date: JUL 26 2011 Office: PANAMA CITY, PANAMA FILE: [redacted]

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

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Field Office Director, Panama City, Panama, and 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 Colombia who was found inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been removed from the United States. The applicant now 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 spouse and children.

On October 7, 2010, the Field Office Director denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). *Decision of the Field Office Director*, dated October 7, 2010.[1]

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) erred in denying the applicant's application for permission to reapply for admission into the United States. *Form I-290B*, filed November 9, 2010. Counsel claims that the applicant's wife "is currently and will continue to suffer extreme hardship." *Id.*

The record includes, but is not limited to, counsel's motion to expedite, counsel's appeal brief, statements from the applicant and his wife in English and Spanish[2], letters of support for the applicant and his wife, medical documents for the applicant's wife and in-law's, a letter from [redacted] regarding the applicant's wife's mental health, tax and insurance documents, pay stubs and retirement documents for the applicant's wife, household and utility bills, bank statements, school documents for the applicant's children, marriage and divorce documents for the applicant and his wife, a U.S. Department of State Human Rights Report on Colombia, articles on endometrial hyperplasia and endometrial polyps cancer, and documents pertaining to the applicant's removal proceeding. The entire record was reviewed and considered, with the exception of the Spanish language statement, in arriving at a decision on the appeal.

Section 212(a)(9)(A) of the Act provides, in pertinent part:

(A) Certain alien previously removed.-

. . . .

[1] The AAO notes that the Field Office Director denied the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) and Form I-212 in the same decision; however, the applicant, through counsel, filed two separate appeals. Therefore, the AAO is issuing two separate decisions on the Form I-601 appeal and the Form I-212 appeal.

[2] Pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), an applicant who submits a document in a foreign language must provide a certified English-language translation of that document. As a statement from the applicant is in Spanish and is not accompanied by an English-language translation, the AAO will not consider it in this proceeding.

(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 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The record of proceeding reveals that the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589), which an immigration judge denied on November 13, 2001. The applicant filed an appeal of the immigration judge's decision to the Board of Immigration Appeals (Board), which the Board dismissed on January 21, 2003. On or about July 19, 2006, the applicant filed a motion to reopen the Board's decision. On October 27, 2006, the Board denied the applicant's motion to reopen. On or about November 27, 2006, the applicant filed a motion to reconsider with the Board. On March 22. 2007, the Board denied the applicant's motion to reconsider. On July 15, 2008, the applicant was removed from the United States. As such, the applicant is inadmissible under section 212(a)(9)(A)(ii)(I) of the Act for being removed from 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 unlawfully. *Id.*

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an OSC had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980), the Ninth Circuit Court of Appeals (Ninth Circuit) reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds). In *Wang*, the alien sought discretionary relief and a finding of extreme hardship through a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang*, that "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country."

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c) waiver of deportation discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing hardship to a spouse and for purposes of assessing favorable equities in the exercise of discretion.

In counsel's appeal brief dated November 30, 2010, counsel states the applicant's wife has lived her entire life in the United States, all her family resides in the United States, she has no ties to Colombia, her mother is elderly with multiple medical problems and she helps her with her care, she is raising the applicant's children in the United States and they are adapted to the United States, she has worked for the federal government for over 25 years, she has property and assets in the United States, including a home and vehicle, and she is the primary wage earner for the family and provides the family with medical insurance. In a statement dated October 20, 2010, the applicant's wife states if she were to join the applicant in Colombia, she would have to leave her "25 year $65,000.00 income job" and this "would be detrimental to [her]." The AAO notes that evidence in the record establishes that the applicant's wife has been employed with the federal government since November 14, 1985. The applicant's wife states her "income is essential to [her] well being." Counsel states the applicant's wife "qualifies for retirement in November 2016" and if she moved to Colombia, "[s]he would lose her retirement benefits, her health benefits and an excellent potential for a promotion." The applicant's wife states that the thought of losing her income and the financial difficulties she will have in retirement is causing her depression. In a letter dated October 22, 2010, licensed social worker [redacted] reports that the applicant's wife has "headaches, insomnia, problems maintaining attention, anxiety, panic attacks, and depression." [redacted] indicates that the applicant's wife "is very worried that if [the applicant] is not allowed to join her in the United States she would have to give up her career." In a statement dated January 16, 2009, the applicant states his wife "tries to travel to Colombia as frequent as she can but because of her job and the financial situation [it] is very difficult for her to travel that often." The AAO finds the record to include some documentation of the applicant's wife's income and expenses; however, this material offers insufficient proof that the applicant's wife is unable to support herself in the applicant's absence. The financial documentation in the record reflects that the applicant's wife is the primary wage earner in the household, and there is no evidence that she has encountered economic challenges since the applicant's removal. Additionally, the AAO notes that there is no documentary evidence in the record establishing that the applicant is unable to obtain employment in Colombia and, thereby, financially assist his wife from outside the United States. In fact, during the applicant's waiver interview on April 21, 2009, the applicant stated that he provides financial support for his wife.

[redacted] indicates that the applicant's wife "is concerned for her elderly parents who are aging. She has cared for them since they moved to the State of Florida for the past eight years." The applicant's wife claims that she financially helps her parents and even "helped them with the down payment of their home." The applicant's wife states if she moves to Colombia, she will not be able to afford to send for her parents or for her to travel back to the United States to visit them. The applicant's wife states her "mother is in a remission state of Breast cancer and has diabetes type II with multiple other problems." In a letter dated October 22, 2010, [redacted] states the applicant's mother-in-law is elderly, she suffers from multiple medical problems, and the applicant's wife helps with her care. In

a letter dated February 20, 2009, Dr. [redacted] states both of the applicant's wife's parents are elderly and they suffer from multiple medical problems. In an undated statement, the applicant's wife states her father "has to get an esophageal operation." Counsel states it "would be detrimental for [the applicant's children] to move to Colombia where they have not been for over 10 years." The applicant's wife states her stepchildren "never knew their biological mother as she passed away when the youngest was only six months old and [her stepson] was 2 years old. The only mother that they've ever known is [her]." Additionally, the applicant's wife states the thought of being separated from her biological daughter hurts. Counsel states the applicant's wife's biological daughter is studying in college and the applicant's wife "is the only parent that she has close to her, has lived with her and is extremely close to." The applicant's wife states her daughter "solely depends on [her]."

The applicant's wife states her family has been torn apart, and it "is causing [her] so much stress in [her] daily life and [has] significantly...disrupted [her] mental well being." The applicant's wife states "[i]t has been an extreme mental anguish to wait and live in the unknown.... The sorrow and the inability to function everyday progresses and with a multitude of emotions [she] [does] [not] seem stable anymore." Counsel states the applicant's absence from the United States has "emotionally traumatized" his wife, she "has gotten physically sick," and been "diagnosed with Depression." As noted above, Mr. [redacted] reports that the applicant's wife has "headaches, insomnia, problems maintaining attention, anxiety, panic attacks, and depression." In counsel's motion to expedite dated April 27, 2011, counsel claims that the applicant's wife "has been diagnosed with endometrial hyperplasia," which is a "pre-cancer diagnosis with an approximate 35% risk of cancer." The AAO notes that counsel submitted two articles on endometrial hyperplasia and endometrial polyps cancer which support her claims. In a letter dated April 22, 2011, [redacted] states the applicant's wife has been diagnosed with endometrial hyperplasia. He recommends that "she have laparoscopic hysterectomy, bilateral ovary removal, and possible pelvic lymph node dissection." He recommends that she have "assistance and family supportive care from [the applicant] during her post operative recovery for approximately 6 weeks." Counsel states the applicant's wife "is raising [the applicant's] 2 children by herself"; however, "after the surgery she won't be able to work nor take care of the children, she would not be able to drive and would need to rest after such a delicate surgery." In a letter dated April 6, 2011, [redacted] states "[i]t is a severe hardship for [the applicant's wife] to undergo this major surgery without the assistance of [the applicant] to help her with their 12 and 14 year old children, drive her for the two weeks after surgery and otherwise provide care after discharge from the hospital. She has no family or other support in Brevard County." Counsel states "[t]he severity of this health condition and amount of stress that this family is going through is immeasurable. [The applicant's wife] needs [the applicant] more than ever."

Regarding the hardship the applicant's wife and children are facing, the AAO notes that 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 wife and children, but it will be just one of the determining factors.

The applicant's wife states the applicant "is so sorry about staying once he learned about the deportation order in 2005, and regrets what happened with the stamp, he knows that this has caused so much pain to [her] and the separation of his children and [herself] he knows that this is devastating for all of [their] family but he is so sorry he didn't realize this was truly unlawful and he regrets every minute." The applicant states this "has caused pain and suffering to [him] and [his] family such hard times.... This has truly taught [him] and [his] family a great lesson. [They] have been working with Attorney's since the moment [they] found out about the denial and deportation order since 2005 trying to do the right thing since then." Even though the applicant claims he did not know about the Board's denial of his appeal on January 21, 2003, the AAO notes that the applicant made no effort to contact the Board or immigration court to follow-up with the status of his appeal. Therefore, the applicant's failure to abide by the Board's removal order is an unfavorable factor. Additionally, the AAO notes that the applicant was unlawfully present in the United States from March 23, 2007, the day after the Board denied the applicant's motion to reconsider, until July 15, 2008, the day he was removed from the United States, and that period of time is an unfavorable factor. Further, the AAO notes that the applicant was working without authorization and that is another unfavorable factor. The AAO also notes that the applicant's procurement of the backdated Colombian entry stamp is another unfavorable factor.

The favorable factors in this matter are the applicant's family ties to his United States citizen wife and lawful permanent resident children, extreme hardship to his spouse, hardship to his children, letters of support for the applicant and his wife, the lack of a criminal record, and the approval of a petition for alien relative filed by the applicant's wife on his behalf. The AAO notes that the applicant's marriage to his wife occurred on August 13, 2004, which was after the applicant was ordered removed from the United States, and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

The AAO finds that the unfavorable factors in this case include the applicant's misrepresentation, his failure to abide by a removal order, and his period of unauthorized presence and employment in the United States.

While the applicant's actions cannot be condoned, the AAO finds that given all 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.

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