U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 03 2008
[consolidated therein]

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:

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 application for permission to reapply for admission after removal was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The AAO notes that on appeal, the applicant, through counsel, requested 30-days to submit a brief and/or evidence to the AAO. *Form I-290B*, filed January 26, 2007. The record contains no evidence that a brief or additional evidence was filed within 30-days. On February 29, 2008, the AAO sent counsel a facsimile requesting evidence of the brief and/or additional evidence, or a statement by counsel that neither a brief nor evidence was filed; however, the AAO received no reply from counsel. Therefore, the record must be considered complete.

The applicant is a native and citizen of Jamaica who entered the United States on November 27, 1996, on a B-1 nonimmigrant visa, with authorization to remain in the United States until November 26, 1997. On February 27, 1997, the applicant departed the United States. On May 8, 1997, the applicant reentered the United States on a B-1 nonimmigrant visa, with authorization to remain in the United States until June 7, 1997. At some point, the applicant departed the United States. On January 15, 1998, the applicant reentered the United States on a B-1/B-2 nonimmigrant visa, with authorization to remain in the United States until July 14, 1998.[1] The applicant failed to depart the United States by July 14, 1998. On August 9, 1998, the applicant was arrested for petit larceny and disorderly conduct in Sullivan County, New York. In September or October 1998, the applicant departed the United States. On December 17, 1998, the applicant reentered the United States on a B-1/B-2 nonimmigrant visa. On December 18, 1998, the applicant was expeditiously removed from the United States. On September 1, 1999, the applicant reentered the United States without inspection. On February 1, 2000, the applicant's criminal charges for petit larceny and disorderly conducted were dismissed. On September 7, 2003, the applicant married [redacted] a United States citizen, in New York. On November 4, 2003, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On January 24, 2005, the applicant's wife withdrew the Form I-130, and the applicant's Form I-485 was denied based on his previous removal from the United States. On the same day, the applicant's previous removal order was reinstated (Form I-871). On January 27, 2005, a Warrant of Removal/Deportation (Form I-205) was issued. On January 28, 2005, the applicant was removed from the United States. On March 1, 2005, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On March 4, 2005, the applicant's wife filed another Form I-130, which was approved on May 31, 2005. On January 25, 2006, the Acting Director determined that the Form I-212 was abandoned and denied the application. On March 9, 2006, the applicant filed another Form I-212. The applicant is 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). He 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 with his United States citizen wife.

The Acting Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for being ordered removed under section 240 or any other provision of law. The Acting

[1] The AAO notes that the applicant's passport contains a Jamaican entry stamp dated February 5, 1998; however, the applicant stated he did not depart the United States until September or October 1998.

Director found that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Form I-212 accordingly. *Acting Director's Decision*, dated January 4, 2007.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

. . . .

(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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant, through counsel, asserts that the Acting Director "did not consider all the evidence presented...[and the] decision is arbitrary and capricious." *Form I-290B*, *supra*. Counsel claims that "[t]he applicant is not permanently barred from admission to the US since he is married to a US Citizen and entitled to a waiver for any past immigration law violations." *Id.* The AAO notes that the applicant's marriage to a United States citizen is a favorable factor; however, he married his wife after he was removed from the United States; and therefore, it will be given less weight. The applicant's wife states "[i]n January 1990, [she] met [the applicant]...[and] [a]fter living together for thirteen years, [they] married." *Affidavit from* [redacted], dated February 3, 2005. The AAO notes that all the years of the applicant's unauthorized presence are an unfavorable factor. Counsel claims the Acting Director "failed to consider the extreme and unusual hardship which has already resulted from the [applicant's] separation from his spouse and family as a result of his removal

from the US." *Id.* The applicant's wife states the applicant's "forced departure from the U.S. has already been disastrous. [She is] lonely, confused, depressed and do[es] not know where to turn. [They] desperately need each others guidance and companionship. [The applicant] is everything to [her] and [she is] everything to him. It has been immensely difficult to function without [the applicant]." *Affidavit from* [redacted], *supra.* 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, but it will be just one of the determining factors.

The applicant states that his "wife is very dear to [him] and [he is] having great difficulty living without her. [He] desperately need[s] her especially when [he is] not feeling well. Jamaica, although a beautiful Island, has limited availability of modern medicines which [he] desperately need[s]... If [he is] not allowed to return to the United States in the near future, [his] health is certain to deteriorate." *Statement from the applicant*, undated. The applicant's wife states the applicant "requires special care and [her] care." *Affidavit from* [redacted], *supra.* Dr. [redacted] states the applicant "suffers from a terminal illness and needs to have proper medical care in order to prolong his life. The illness he is afflicted with requires medication that is unique to his biological profile. These medications are not available in Jamaica and he needs them to survive. [The applicant] has medical insurance through his wife that covers his medical expenses." *Letter from* [redacted] *MD, Catskill Regional Medical Center*, dated November 29, 2005. Counsel states the applicant was "found to be HIV positive, for which he currently receives limited treatment. Jamaican medical facilities and treatment for HIV illness are very limited. It is essential that the [applicant] be allowed to return to the United States." *Letter from counsel*, dated March 2, 2006. The AAO notes that other than statements made by counsel and [redacted] there was no documentation submitted establishing that the applicant could not receive treatment for his medical condition in Jamaica or that the applicant has to remain in the United States to receive his medical treatments.

The record of proceedings reveals that on December 18, 1998, the applicant was expeditiously removed from the United States. On September 1, 1999, the applicant reentered the United States without inspection. Based on the applicant's previous order of deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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 of Immigration Appeals (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 Order to Show Cause (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.

The favorable factors in this matter are the applicant's family ties to a United States citizen, his wife, general hardship she may experience, approval of a petition for alien relative, and letters of recommendations. The AAO notes that the applicant's marriage to his wife occurred after his order of deportation 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 failure to abide by an order of deportation, the passport stamp dated February 5, 1998 which was fraudulently obtained, his reentry without inspection into the United States subsequent to his December 18, 1998 deportation, his arrest record, and periods of unauthorized presence and employment.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that 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.