

PUBLIC COPY

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

identifying data deleted
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

H4

[REDACTED]

FILE:

[REDACTED]

Office: NEW YORK, NY

Date:

NOV 06 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).

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 applicant is a native and citizen of Jamaica who, on January 26, 2000, appeared at the Newark Liberty International Airport. The applicant presented her Jamaican passport containing a U.S. nonimmigrant visa and a fraudulent backdated reentry stamp. The applicant was placed into secondary inspection. The applicant admitted that she had remained in the United States past her authorized stay from January 1999 until December 1999. The applicant admitted that she obtained a fraudulent backdated reentry stamp to reflect that she did not overstay her nonimmigrant status. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and for being an immigrant without valid documentation. On January 27, 2000, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1).

On May 19, 2007, the applicant married [REDACTED] a U.S. citizen, in the Bronx, New York. On January 10, 2008, the applicant filed an Application to Register Permanent Residence or Adjust the Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on her behalf by her spouse. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that she continued to reside in the United States. The applicant indicated that, on April 17, 2000, she had reentered the United States by presenting a fraudulent travel document and an Arrival/Departure Record (**Form I-94**) bearing temporary evidence of admission as a lawful permanent resident under the name [REDACTED]. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). She 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 her U.S. citizen spouse.

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 2, 2008.

On appeal, counsel contends that the district director erred in finding that the applicant's unfavorable factors outweigh her favorable factors. *See Counsel's Brief*, dated October 31, 2008. In support of her contentions, counsel submits the referenced brief and affidavits from the applicant and her spouse. 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.

- (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.

Counsel contends that the district director's denial reasons only relate to the applicant's removal and events that led to her removal order, suggesting that the denial is based solely on the fact that the applicant has been removed; however, the applicant's fraud and fraudulent reentry, while related to her removal order, are separate incidents from the removal order and are properly considered as negative factors in the applicant's case.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] do not appear to have any children together. The record reflects that the applicant has two children from a prior relationship who are both natives and citizens of Jamaica. While counsel, the applicant and the applicant's spouse refer to the applicant's mother as residing in the United States with the applicant, there is no evidence in the record to establish that the applicant's mother resides with her or that she has any legal status in the United States. While counsel, the applicant and the applicant's spouse refer to the applicant's brother as residing in the United States, there is no evidence in the record to establish that the applicant's brother has any legal status in the United States. The applicant is in her 40s and [REDACTED] is in his 30s.

On appeal, counsel contends that the district director failed to consider all of the applicant's favorable equities. She states that the applicant has never been convicted of a crime. She states that the applicant has never received any type of welfare or public benefits in the United States. She states the applicant is hard-working and involved in her community.

[REDACTED] in affidavits on appeal and accompanying the Form I-212, states that he has truly found his soul mate in the applicant. He states that he is fully aware of the applicant's immigration status and understands that she could be removed from the United States. He states that he knows that the applicant made mistakes when she overstayed her nonimmigrant status and that her mistakes are haunting him. He states that he cannot imagine how he will survive without the applicant in his life. He states that he would suffer extremely if the applicant were removed to Jamaica. He states that the applicant is not a criminal and wants nothing more than to provide a better future for her children

and to be united as a family. He states that he resides with the applicant, his mother-in-law and stepdaughter. He states that he would experience extreme emotional, psychological, physical and financial hardships if the Form I-212 is not granted. He states that he would suffer extreme financial and emotional deprivation and hardship. He states that he and the applicant do everything together and that their goal is to return to school and achieve their bachelor's degrees, moving on to obtain master's degrees. He states that the applicant can be an asset to the United States and to him because he knows that she has the potential. He states that the applicant takes care of her mother because she suffers from arthritis and other joint pains. He states that the applicant helps with her brother who has multiple sclerosis and depends on her to assist whenever she can. He states that he has always wanted to visit Jamaica and meet the rest of his in-laws who are not fortunate enough to come to the United States. He states that if the applicant returned to Jamaica it would eventually cause the severing of their relationship because of the inevitable strain of a long-distance marriage. He states that it would be impossible for him to maintain his life and happiness since he would be deprived of the applicant's love, companionship and physical presence. He states that even though he is young he needs the applicant's companionship and emotional support, the loss of which he fears would result in loneliness and pain. He states that it would be impossible for him to adequately provide the financial support that the applicant would need to live in Jamaica and for him to continue to support himself in the United States. He states that the applicant left Jamaica seven years ago and has no prospect of a job or finances to support herself. He states that the applicant has the greatest respect for the law and the legal justice system. He states that the applicant is a law-abiding person and there has never been any deliberate intent on her part to show contempt for the law. He states that he and the applicant have one of the most loving and closest relationships you could imagine. He states that he has bonded with her family. He states that the applicant is his best friend and everything that a man is looking for. He states that the applicant is very kind and gentle.

The applicant, in an affidavit on appeal, states that the main reason she overstayed her nonimmigrant status was because she was working for a woman who had just given birth to a child and she was asked to stay and help her. She states that she did not want to leave this woman alone. She states that she knows that she made a big mistake by remaining in the United States and now realizes the consequences of this mistake. The applicant states that she knows that it was a mistake and regrets committing fraud by presenting a temporary travel document and lawful permanent resident stamp belonging to someone else in order to reenter the United States. She states that she desperately wanted to return to the United States in order to provide a better life for her children. She states that she hoped that her life in the United States would be better and she would be able to earn money and support her children in Jamaica. She states that she left Jamaica because life was difficult and she could not support her family financially. She states that she fully takes responsibility for her past mistakes. She states that her husband should not be punished for her mistakes and that he deserves to have a life with his wife. She states that they are a family and that they depend on each other and need each other. She states that she has never been convicted of a crime and has never received public benefits from the U.S. government.

Letters of recommendation from [REDACTED], indicate that the applicant has been employed with her since September 2002. She states the applicant cares for her son. She states that she has found the applicant to be consistently reliable, trustworthy and very hard working. She states that the applicant worked approximately 15 to 20 hours each week and is a mature, reliable person of the highest integrity. She states that she has the fullest confidence in the applicant's high moral character, integrity and the warm nurturing care she provides for her son.

The AAO notes that there is no evidence in the record to establish that the applicant's mother or brother have a medical condition for which they would be unable to receive appropriate care or medication in the absence of the applicant or appropriate care or medication in Jamaica. 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).

The record reflects that the applicant filed taxes from 2002 through 2003 and 2005 through 2006. The record reflects that the applicant has been employed in the United States since at least 2002 and also during her nonimmigrant visits to the United States prior to her removal. The record reflects that the applicant was issued employment authorization from April 1, 2008 through March 31, 2009 and from June 19, 2009 through June 18, 2010.

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 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.

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 her family if she were denied admission to the United States, her filing of taxes, the absence of a criminal background and the pending immigrant visa petition filed on her behalf. 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. 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 overstay of her nonimmigrant status; her unauthorized employment during her stay as a nonimmigrant; her original attempt to enter the United States by presenting a fraudulent backdated reentry stamp; her inadmissibility under section 212(a)(6)(C)(i) of the Act; her illegal reentry into the United States after having been removed; her use of fraudulent documentation in order to reenter the United States; her unauthorized employment in the United States except for periods of authorized employment; and her unlawful presence in the United States.

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 she 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.