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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**

PUBLIC COPY

H4

[REDACTED]

FILE:

[REDACTED]

Office: COLUMBUS, OHIO

Date:

OCT 20 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, Columbus, Ohio denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The applicant filed a motion to reopen the AAO's decision, which was granted; however, the AAO affirmed its decision to dismiss the appeal. The matter is again before the AAO on a second motion to reconsider or reopen. The motion to reopen will be granted, the order dismissing the appeal will be affirmed and the application will be denied.

The applicant is a native and citizen of Haiti who, on April 30, 2000, appeared at Miami International Airport. The applicant presented a photo-substituted Haitian passport and a counterfeit lawful permanent resident card, bearing the name "[REDACTED]". The applicant was placed into secondary inspections. The applicant admitted that he was not the true owner of the documents. The applicant admitted he did not have valid documentation to enter the United States. The applicant was found 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 being an immigrant without valid documentation. The applicant indicated that he feared returning to Haiti and, on May 5, 2000, he was placed into immigration proceedings pursuant to credible fear procedures. On February 15, 2001, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture and ordered him removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On March 27, 2002, the applicant married [REDACTED] a naturalized U.S. citizen. On April 29, 2002, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 21, 2002, the BIA dismissed the applicant's appeal. The applicant failed to depart the United States. On January 5, 2006, the Form I-130 was approved. The applicant filed a motion to reopen with the BIA. On April 20, 2006, the BIA dismissed the applicant's motion to reopen. On November 23, 2007, the applicant filed the Form I-212, indicating that he continued to reside in the United States. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 with his U.S. citizen spouse.

The field office director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated January 11, 2008.

On October 17, 2008, the AAO dismissed the applicant's appeal because the unfavorable factors in the applicant's case outweighed the favorable factors. *Decision of AAO*, dated October 17, 2008.

On May 26, 2009, the AAO granted the applicant's motion to reopen, affirmed the order dismissing the appeal and denied the application because the unfavorable factors in the applicant's case outweighed the favorable factors. *Decision of AAO*, dated June 25, 2009.

In his motion to reopen or reconsider, counsel submits additional evidence of hardship to the applicant's spouse. Counsel contends that the two new pieces of evidence submitted on motion constitute significant positive factors and warrant a favorable exercise of discretion. *See Form I-290B, Counsel's Motion to Reopen and Reconsider*, dated June 24, 2009. In support of his contentions,

counsel submits the referenced Form I-290B, copies of psychological documentation and copies of country conditions. 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.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or

- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) Requirements for motion to reconsider.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In support of his motion to reconsider, counsel does not contend that there was an incorrect application of law. Moreover, the basis of counsel's motion is two pieces of new evidence that were not available at the time the AAO rendered its decision and cannot, therefore, form the basis of a motion to reconsider. Accordingly, the AAO finds that counsel has not met the requirements for a motion to reconsider.

In support of his motion to reopen, counsel submits copies of psychological documentation in regard to the applicant's spouse and copies of country conditions. Counsel contends that the documentation establishes that the applicant's spouse continues to receive treatment for her diagnosis of major depression; that her condition has improved with medication, but may deteriorate if the applicant is removed from the United States; that the applicant's spouse may be hospitalized for her symptoms; and that she would face poor medical treatment if she were to accompany the applicant to Haiti.

Counsel submits the 2007/2007 U.N. Human Development Report, which contains generic data analysis in regard to Gross National Product (GDP), life expectancy, the human development index (HDI) and climate changes. Counsel fails to indicate how this documentation establishes that the applicant's spouse would be unable to receive appropriate medical care or treatment in Haiti.

Counsel submits a letter from [REDACTED], a licensed professional clinical counselor, which states that the applicant's spouse first had contact with her in November of 2008. She states that the applicant's spouse presented with tearfulness, sleep disturbance, weight increase, decreased memory and concentration, and migraines. She states that the applicant's spouse met the criteria for a diagnosis of major depression and was medicated by her family physician for her depressed condition. She states that the applicant's spouse reported improvement of her condition with medication. [REDACTED] opines that, in the event that the applicant is removed from the United States, it is likely that the applicant's spouse's condition will deteriorate and that she may be hospitalized for her symptoms.

The AAO notes that there is no evidence to establish that the applicant's spouse has continued to require counseling since [REDACTED] initial evaluation, or that [REDACTED] condition could not be treated through counseling and medication if she deteriorates. In that [REDACTED] findings appear to be based on a single interview with the applicant's spouse, 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, [REDACTED] conclusions must be considered speculative and of diminished value. The AAO notes that there is no evidence in the record to establish that the applicant would be unable to receive appropriate care or medication in the applicant's absence from the United States and the country conditions documentation does not establish that the applicant's spouse would be unable to receive appropriate care or medication in Haiti. 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).

As discussed in detail in the AAO's May 26, 2009 decision, the favorable factors in this matter are the applicant's U.S. citizen spouse, the general hardship to the applicant and his family if he were denied admission to the United States and the approved immigrant visa petition filed on his 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 unfavorable factors in this case include the applicant's attempt to enter the United States by fraud; his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; his failure to comply with an order of removal; his extended unlawful presence in the United States; and his extended unauthorized employment in the United States except for dates on which his employment was authorized.

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, while the motion to reopen will be granted, the order dismissing the appeal will be affirmed.

ORDER: The motion to reopen is granted. The order dismissing the appeal will be affirmed.