



U.S. Citizenship  
and Immigration  
Services

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**PUBLIC COPY**

H4

FILE:

Office: NEW YORK, NY

Date: **OCT 20 2009**

IN RE:

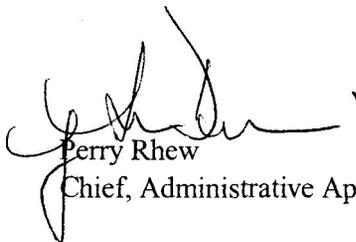
APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

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 Mexico who, on May 4, 1995, was apprehended at her place of employment. The applicant had presented a fraudulent lawful permanent resident card and Social Security card in order to gain employment. On the same day, the applicant was placed into immigration proceedings for having entered the United States without inspection in October 1994. On July 31, 1995, the applicant married [REDACTED] a lawful permanent resident, in Manhattan, New York. On November 14, 1995, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On March 21, 1996, the immigration judge denied the applicant's request for voluntary departure and ordered her removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On July 29, 1996, the Form I-130 was approved. On July 22, 1998, the BIA dismissed the applicant's appeal and denied voluntary departure.

On November 14, 2002, the applicant filed a motion to reopen with the BIA. On March 20, 2003, the BIA denied the applicant's motion to reopen. On September 3, 2008, the applicant filed the Form I-212, indicating that she continued to reside in the United States. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). 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 now naturalized U.S. citizen spouse and two U.S. citizen children.

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 February 24, 2009.

On appeal, counsel contends that the district director's decision failed to apply the standards or criteria that must be applied to an application for permission to reapply for admission. Counsel contends that the favorable factors in the applicant's case outweigh the unfavorable factors. *See Form I-290B*. In support of her contentions, counsel submits the referenced Form I-290B and copies of documentation previously provided. 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.

The record reflects that [REDACTED] is a native and citizen of Mexico who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 1997. The applicant and [REDACTED] have a thirteen-year-old son and a ten-year-old son who are both U.S. citizens by birth. The applicant is in her 30s and [REDACTED] is in his 40s.

On appeal, counsel states that the applicant does not have a criminal record, has not had any problems with the police and is not a danger to society. She states that the applicant has been peaceably residing in the United States continuously since October 1994, is raising children and taking care of her husband, and paying taxes as required by law. Counsel states that the applicant's deportation is not recent. She states that the applicant is the kind of hard working individual the United States should encourage to reside in the United States. Counsel states that the applicant's spouse has established a home in the United States, established a business, is the sole source of income in the United States and has paid his taxes as required by law. She states that the applicant and his spouse have created a stable and loving home for the children and are very concerned about the effect that separation of the family would have on their children. She states that the applicant's oldest child is enrolled in the sixth grade at Thomas J. McCann Woodside Intermediate School and the applicant's youngest son is enrolled in the third grade at Maurice A. Fitzgerald Elementary School. She states that, although the children are doing fairly well in school, they are having problems expressing their emotions appropriately and have difficulty communicating with others. She states that the applicant's children have resided in New York City their entire lives. She states that the children have visited Mexico and find it very difficult to be there. She states that the children, while residing in Mexico, experienced loss of appetite and refused to eat. She states that the applicant's oldest child was very stressed about being in Mexico and he constantly stated that he hated being there. She states that, given the country conditions in Mexico, the applicant's spouse would suffer hardship if the applicant is not permitted to return to the United States. She states that, according to the U.S. Department of State, violence by criminal elements in Mexico affects many parts of the country, kidnapping continues at an alarming rate and, in some instances, U.S. citizens have become victims of harassment, mistreatment and extortion. She states that the applicant's spouse and children are accustomed to urban American living where police protection and other emergency services are available. She states that the applicant's spouse will suffer a great deal of stress by having his family forced to live in an environment in which he will be unable to rely on the

police if they become victims of a crime. She states that Mexico's economy is still recovering from the worst recession in fifty years and that the minimum wage does not provided a decent standard of living for a worker family and only a small fraction of the workers in the formal workforce receive the minimum wage. She states that the hardships the applicant's spouse and children would encounter in Mexico are likely to literally take years away from their lives as the life expectancy in Mexico is currently at least five years less than the life expectancy in the United States. She states that the applicant's spouse is the sole income earner for the family and he owns [REDACTED]

[REDACTED] She states that the applicant's spouse would be forced to close his business, the only source of income to support the family, because without the support of the applicant he would not be able to continue to run his business and care for his children. She states that the applicant's spouse does not have the option to move to Mexico to avoid the devastation of separation of his family because he would not be able to provide his family the financial support to meet their needs. She states that, although adequate medical care can be found in major cities and excellent health facilities are available in Mexico City, the training and availability of emergency responders may be below U.S. standards in Mexico. She states that the applicant's spouse suffers from a cardiac condition which has become worse due to the stress of his family's impending separation and he frequently suffers from chest pains and palpitations. She states that the applicant's spouse fears that his heart condition will become worse and he may suffer a heart attack and the family would be left without anyone to care for them. She states that the applicant's problems related to her immigration status have caused her spouse emotional stress and he has developed an abnormal fear of death and is unable to relax. She states that he is suffering from changes in his appetite making it difficult for him to eat adequately and as a consequence he suffers from abdominal GI discomfort. She states that the applicant's spouse feels sad most of the time, he is irritable, he has a very difficult time concentrating and he fears losing control of his life. She states that the applicant's spouse is overly concerned and worried over his family's future well-being. She states that the applicant's spouse's anxiety test results indicate that he is suffering from adjustment disorder with mixed anxiety and depressed mood, which is likely to become worse with separation of the family. She states that the applicant's children will not be able to continue to receive the quality of health care they receive in the United States. She states that the applicant's youngest child suffers from flatfoot deformity that will require an orthopedic device to help him with the pain. She states that, given the economic and healthcare conditions that currently exist in Mexico, it is unlikely that the applicant's spouse and children would be able to obtain the health care they require if they were forced to move to Mexico to join the applicant. Counsel contends that the applicant has established that the favorable factors and her equities in the United States outweigh her negative factors.

The applicant, in an affidavit accompanying the Form I-212, states that her children and spouse require her in the United States. She states that her husband has a cardiac condition for which he must receive close follow-up by his doctor. She states that, due to their impending separation, her husband is also suffering from depression and anxiety. She states that her husband has difficulty sleeping, has lost his appetite and has developed digestion problems. She states that her husband's cardiac condition has become worse due to the stress of the impending separation. She states that her husband frequently complains of chest pains and palpitations. She states that she fears his heart condition could become worse and she and her children will lose him to a heart attack. She states that her husband is the sole breadwinner in the household and only stockholder of [REDACTED]. She states that her husband relies on her to care for the children and the household. She states that the prospect of living apart from the family has affected the family. She states that, even though their children have not been told of her immigration problems, both of

them sense that there is a problem which is being reflected in their behavior. She states that her oldest child is currently enrolled in the sixth grade at Thomas J. McCann Intermediate School and her youngest child is currently enrolled in the third grade at Maurice A. Fitzgerald Elementary School. She states that, although the children are doing fairly well in school, they are having problems expressing their emotions appropriately and they have difficulty communicating with others. She states that both of the children had visited Mexico and found it very difficult to be there. She states the children lost their appetite and refused to eat. She states that her oldest child gets very stressed about being in Mexico, he misses his school and constantly states that he hates being in Mexico. She states that she does not have a criminal record and is not a danger to society. She states that irreparable harm would occur to her family if she is not permitted to return to the United States.

██████████, in an affidavit accompanying the Form I-212, states that he and his children require the applicant in the United States. He states that he has a cardiac condition for which he must receive close follow-up by his doctor. He states that, due to their impending separation, he is also suffering from depression and anxiety. He states that he has difficulty sleeping, has lost his appetite and has developed digestion problems. He states that his cardiac condition has become worse due to the stress of the impending separation. He states that he frequently experiences chest pains and palpitations. He states that he fears his heart condition could become worse and the applicant and the children will lose him to a heart attack. He states that he is the sole breadwinner in the household and only stockholder of ██████████. He states that he relies on the applicant to care for the children and the household. He states that the prospect of the applicant living apart from the family has affected the family. He states that, even though their children have not been told of the applicant's immigration problems, both of them sense that there is a problem which is being reflected in their behavior. He states that his oldest child is currently enrolled in the sixth grade at Thomas J. McCann Intermediate School and his youngest child is currently enrolled in the third grade at Maurice A. Fitzgerald Elementary School. He states that, although the children are doing fairly well in school, they are having problems expressing their emotions appropriately and they have difficulty communicating with others. He states that both of the children have visited Mexico and found it very difficult to be there. He states the children lost their appetite and refused to eat. He states that his oldest child in particular gets very stressed about being in Mexico, he misses his school and constantly states that he hates being in Mexico. He states that the applicant does not have a criminal record and is not a danger to society. He states that irreparable harm would occur to the family if the applicant is not permitted to return to the United States.

The record contains a psychological evaluation, dated April 18, 2008, for the applicant's spouse and children written by ██████████ a licensed mental health counselor and certified clinical psychopathologist, which is based on a single interview with the applicant's spouse and children. It states that the applicant's children were markedly timid boys who have age-appropriate academic performances and behavior, as well as normal developmental milestones and health. It states that, even though the applicant had inquired several times with school authorities and teachers about the possible need of speech and language therapy and socialization enhancement for the children, she has been informed that the children's level of functioning is good despite their shyness and reserve. ██████████ after analyzing the information and spontaneous disclosures by family members, opines that a forced separation of the applicant and her family will generate an extreme emotional and familial hardship and that the applicant's departure will result either in traumatizing relocation of the whole family to rural Mexico or an insurmountable challenge to the applicant's spouse, particularly in the absence of available grandparents to eventually provide

additional support. [REDACTED] noted that the applicant and her spouse denied ever suffering from psychiatric or psychopathological disorders. The applicant's spouse reported experiencing elevated anxious and depressive feelings along with various somatic symptoms of distress which included: difficulty making decisions; palpitations, chest pressure; loss of appetite and weight; worrisome, or inner tension; feeling agitated, tense, irritable; feeling "sad in most of the time"; inability to relax, nervousness; being frightened about the future; feeling "pressure in the head"; dizziness, a lump in the throat; sleep disturbances, dyssomnia; feeling anxious, sad, depressed; having the fear of the worst happening; abdominal and GI discomfort, tiredness; loss of concentration and short memory; and many worries about his family's well-being. The applicant and her spouse reported a fear that the children's well-being, education and future opportunities will be seriously hampered in their native country and described various economic, labor and safety problems. They reported that it will be almost impossible for the applicant's spouse to secure a job or set up a business and provide for his family's needs as he does in the United States. They reported that they feared the children, markedly shy and timid children already, would be forced to adjust to a radically different lifestyle, a language they do not master and a school system that is foreign to them. [REDACTED] opines that plunging the family into such a radical change will have major serious consequences for them, aggravated in the case of the children by the fact that at their age they face emotional instability, fragility and personal insecurity, not to mention the children's symptomatic level of emotional reserve and shyness. [REDACTED] notes that there is abundant clinical evidence on the emergence of major mood disturbances, conduct and/or adjustment disorders and even schizoaffective disorders stemming from exposure to traumatizing events especially during childhood and adolescence, including radical changes in lifestyle, unusual economic or emotional hardship, the death of or separation from a loved one, etc. [REDACTED] concludes that, due to the elevated chances of facing extreme emotional, familial and economic hardship and developing major psychoemotional problems in this case, the removal of the applicant should be avoided as much as it is legally possible. [REDACTED] diagnoses [REDACTED] with an adjustment disorder with mixed anxiety and depressed mood.

The AAO notes that there is no evidence to establish that the applicant's spouse or children have received treatment or counseling since this evaluation, or that they continue to require or receive treatment or counseling. In that [REDACTED]'s findings appear to be based on a single interview with the applicant's spouse and children, 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.

A letter from [REDACTED], dated May 5, 2008, states that the applicant's youngest child is currently under his podiatric care. It states that the applicant's youngest son has pain when walking and running secondary to flat foot deformity that will require an orthotic device. It states that the prognosis for the applicant's youngest son is unknown at this time. A handwritten note on a prescription pad by [REDACTED], dated May 27, 2008, states that [REDACTED] is under his care for a cardiac condition which requires close follow up.

The AAO notes that there is no evidence in the record to establish that the applicant's spouse or children would be unable to receive appropriate care or medication in the absence of the applicant or appropriate care or medication in Mexico. Also, the medical documentation does not indicate the prognosis for the applicant's spouse or child. While the country condition reports in the record indicate that Mexico's economy is suffering and it experiences crime, violence, kidnappings, corruption and extortion, there is no evidence in the record to establish that the applicant's family would be subject to

the criminal element of Mexico or would be unable to earn sufficient income. 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).

Recommendation letters from friends state that the applicant is an honest, responsible person with many plans for her future and family. They state that the applicant is a great friend and a very reliable person. A clearance letter from the City of New York, dated April 24, 2008, states and that [REDACTED] does not have a criminal history in New York. A letter from [REDACTED] of Saint Therese Church, states that the applicant informed him that she and her family have been coming to the Church for some time. He states that to the best of his knowledge the applicant is a family person and should be granted residence papers.

The record reflects that the applicant filed joint taxes from 2004 through 2007. The record reflects that the applicant has been employed in the United States at least in 1994 through 1995. The record reflects that the applicant has never been issued employment authorization.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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, her two U.S. citizen children, the general hardship to the applicant and her family if she were denied admission to the United States, her filing of joint taxes, the absence of a criminal background and the approved immigrant visa petition filed on her behalf. The AAO notes that the applicant's marriage, the births of her children 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 illegal entry into the United States; her use of a fraudulent lawful permanent resident card and social security card; her unauthorized employment in the United States; her continuing failure to comply with a removal order; 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.