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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

[Redacted]

114

FILE:

[Redacted]

Office: NEW YORK ,NY

Date **DEC 06 2010**

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:

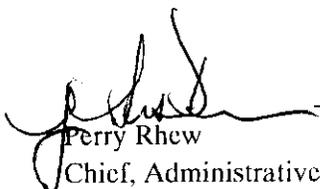
[Redacted]

INSTRUCTIONS:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


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 October 12, 1989, was admitted to the United States as a nonimmigrant. The applicant remained in the United States past her authorized stay, which expired on April 11, 1990. On January 3, 1992, the applicant married [REDACTED] a naturalized U.S. citizen. On January 17, 1992, the applicant was placed into immigration proceedings for having remained in the United States past her authorized stay. On August 19, 1992, the immigration judge granted the applicant voluntary departure until January 19, 1993. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On September 30, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on her behalf [REDACTED]. On July 30, 2004, the Form I-485 was denied. On November 30, 2004, the applicant [REDACTED] were divorced.

On May 14, 2005, the applicant married her current spouse [REDACTED]. [REDACTED] filed a Form I-130 on behalf of the applicant, which was approved on August 19, 2006. On October 15, 2009, the applicant filed a Form I-212, indicating that she resided in the United States. On January 7, 2010, the approval of the Form I-130 was revoked. 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 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 March 26, 2010.

On appeal, counsel contends that the district director's denial of the Form I-212 is an abuse of discretion. *See Form I-290B*, dated April 26, 2010. In support of her contentions, counsel submits only the Form I-290B. 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

¹ The AAO notes that the Form I-485 did not serve to halt accrual of unlawful presence because it was not filed affirmatively.

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 of an 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 of Jamaica who became a lawful permanent resident in 1979 and a naturalized U.S. citizen in 1996. The applicant and Mr. Hemmings have a six-year-old son who is a U.S. citizen by birth. The applicant has an 18-year-old son from a prior relationship who is a U.S. citizen by birth. [REDACTED] has a [REDACTED] from a prior relationship who is a U.S. citizen by birth.² The applicant is in her [REDACTED] and [REDACTED] in his 40's.

On appeal, counsel contends that the director failed to consider the totality of the applicant's circumstances in her decision. Counsel contends that the applicant is a person of good moral character who merits a favorable exercise of discretion. Counsel contends that the applicant is the mother of three U.S. citizen children and wife to a U.S. citizen. Counsel contends that the applicant does not have a criminal history and the director abused her discretion when she failed to balance the strong favorable factors in the applicant's case against overstaying voluntary departure in 1993. Counsel contends that the applicant, in her affidavit, provided strong and easily verifiable reasons for her failure to depart the United States, namely her complicated second pregnancy. Counsel contends that the denial is contrary to Congress' intent to unify families and the denial must be overturned as it is detrimental to those U.S. citizens who rely on the applicant physically, emotionally and mentally. Counsel contends that the applicant is the beneficiary of an approved immigrant petition. The AAO notes that the approval of the Form I-130 has been revoked.

² The AAO notes that the record does not contain a birth certificate for this child but we will consider her a favorable factor to be considered in rendering a decision.

The applicant, in an affidavit accompanying the Form I-212, states that she is the stepmother of her spouse's child and that she has two U.S. citizen children of her own. She states that the family has melded itself together as a close-knit traditional nuclear family. She states that even though she was supposed to leave the United States it was not medically advisable for her to travel, so she could not comply with voluntary departure. She states that by June 1992, she was seeing a doctor due to complications in her second pregnancy. She states that she was very worried and concerned because she miscarried her first pregnancy. She states that, after her first pregnancy and miscarriage, she had been completely depressed, bitter and antisocial. She states that she remembers having many mental issues regarding coping after the miscarriage. She states that, for her second pregnancy, she attended prenatal counseling and that, through this counseling she was advised by her doctors not to travel for fear of losing the fetus again. She states that she still feels very remorseful about not being able to leave the United States. She states that she is from a small town in Jamaica which is regulated by corrupt police officers and consists of tightly packed homes. She states that the people live in extreme poverty and are suppressed by a dictatorial government.³ She states that the hospital and medical services in Jamaica are horrible and that there was no way that she could have, with good conscience, left the United States to return to Jamaica while she was pregnant. She states that she feared that she would have a miscarriage or have complications. She states that she did not want to risk having her baby in a country such as Jamaica where the health care medical facilities are second rate. She states that the hardship that her children and husband would suffer goes above and beyond normal economic and social disruptions involved in deportation. She states that in the name of humanitarian relief and compelling compassion and in the name of herself and her children she begs that her application be approved.

in the affidavit accompanying the Form I-212, states that he is a person of good moral character and has never been involved in any illegal activity. He states that he is married to the applicant and she is the stepmother of his U.S. citizen daughter who was born in the United States on November 25, 1991. He states that the applicant, his daughter and he have all considered themselves to be a family since the time his daughter was very young. He states that although his daughter knows her biological mother and lives with her during the week, she frequently visits the applicant and him on weekends and holidays. He states that his daughter spends much of her time in their household where she considers the applicant to be a substitute mother. He states that this relationship is especially important at this time in his daughter's life when she is having teenage problems in reconciling herself to her mother's rules. He states that he is the stepfather of the applicant's oldest son and that he and the applicant also have a son born in the United States. He states that the family has melded itself together as a traditional nuclear family. He states that he works doing maintenance for . He states that he leaves for work every morning at 6:00 am and returns 11:30 pm. He states that on weekends he sometimes works overtime to help make ends meet financially. He states that his work is the primary source of income for the household. He states that the applicant is the primary child care provider for the family. He states that without the applicant to care for the children he would have to hire a babysitter which is something he cannot afford to do. He states that he could not survive financially if he tried to work fewer hours. He states that he and his children would suffer extreme and unusual hardship should the application of the applicant be denied. He states that if the applicant's application were denied she would not be able to live in the United States and she would have to stay permanently in Jamaica. He states that he loves his spouse dearly but circumstances do not permit him to leave the United States

³ The AAO notes that country condition reports reflect that the government of Jamaica is a democracy.

and stay permanently in Jamaica. He states that he would not be willing to uproot his entire life in order to move to Jamaica. He states that he is not willing to relinquish his legal status in the United States in order to face an uncertain life in Jamaica. He states that his wife is from a small town in Jamaica which is regulated by corrupt police officers and consists of tightly packed homes. He states that the people live in extreme poverty and are suppressed by a dictatorial government. He states that he and the applicant would have a difficult if not impossible time finding gainful employment in Jamaica. He states that as an American he would have limited or no legal right to live in Jamaica. He states that there are presently no connections for employment in Jamaica and he would be impoverished. He states the general economic conditions in Jamaica are quite bad. He states that while jobs are scarce the educational system is staffed with unqualified teachers leaving all of its children uneducated and unprepared for life outside of Jamaica. He states that his U.S. citizen children would face bad choices. He states that the children would either have to stay in the United States without him and his wife, which is not a desirable option given their age. He states that his children could live in Jamaica and be precluded from pursuing education and be condemned to a life of poorly paid and unskilled regular work. He states that if his children were to return to the United States when they are older they would be only able to find low-paid work as uneducated young men and women with limited English-speaking skills. He states that the hospitals in Jamaica are poorly equipped, understaffed and people generally die from ailments considered easily treatable in the United States. He states that if their children were to fall ill in Jamaica he would be unable to afford medical care and hospitals only take cash and medical insurance which is often reserved for the wealthy. He states that the applicant and he had planned to purchase a house in the Bronx and they would have no housing available in Jamaica. He states that he and the applicant have no way to live and have no employment prospects in Jamaica. He states that he is deeply disturbed by the fact that the applicant and his children may have to remain in Jamaica if his wife's applications are not granted. He states that the threat of having to remain in Jamaica has caused him and his children to experience a deep sense of tension, anxiety and depression, which he has only expressed to his closest friends. He states that he cannot concentrate based on his wife's pending problems which are serious problems for the entire family. He states that if the children and he were to move permanently to Jamaica they would find it very difficult to adjust and would be the target of hate should the citizens and police in Jamaica learn of their depression. He states that to seek treatment in Jamaica for his adjustment disorder and anxiety would be impossible as such problems are not dealt with in a healthy manner and will subject him to stigmatism and render him unemployable. He states that the family struggles with the fact that they may be separated from each other for many years. He states that the applicant and he share a bond of love that cannot be broken and that they plan to expand their family and want to do that in America. He states that their case is one of great actual and prospective injury. He states that he is fearful that he will lose his wife and likens such feelings to that of being a widower, the sole survivor of a catastrophe, and having his family and future taken away from him. He wants to provide a loving and fulfilling life for the applicant. He states that the applicant is a person of extremely good moral character and should not be treated like anything less than that. He states that at the time the applicant was supposed to leave the United States it was not medically advisable for her to travel. He states that, by June of 1992, she was seeing a doctor due to complications from her pregnancy. He states that the applicant was worried and concerned because she miscarried her first pregnancy. He states that the applicant had been completely depressed, bitter and antisocial after her first miscarriage and had had many mental issues regarding coping after the miscarriage. He states that the applicant through prenatal counseling was advised not to travel for fear of losing the fetus. He states that the applicant feels very remorseful about not being able to leave the United States. He states that the hardship that he

and the children would suffer goes above and beyond normal economic and social disruptions involved in deportation. He states that in the name of humanitarian relief and compelling compassion and in the name of him and his children he begs that the applicant's application be approved.

A psychological report, dated December 21, 2007, written by a licensed mental health counselor and based on a single interview with the applicant, the applicant's spouse, and the applicant's two children, opines that the prospective of a traumatizing deportation of the applicant to Jamaica is obviously affecting the family's dynamics, as it would imply either relocation of the whole family in an impoverished island-country, or an equally extreme hardship scenario of having [REDACTED] alone to care for the two children's needs. It states that the applicant and [REDACTED] reported their belief that their children's well-being, lifestyle and future opportunities will be seriously hampered in their native country and described serious economic, social, academic, health and safety problems there, and how it will become almost impossible for [REDACTED] to procure employment and provide for his family's needs as he does now. It states that the applicant and [REDACTED] report that they fear the children would be suddenly forced to adjust to a radically different lifestyle and to a culture they know only superficially through their parents. The report opines that plunging the family into such a radical change will definitively have very serious consequences for all family members, aggravated in the case of the children by the fact that the early and teenage years are, per se, ones of emotional instability, fragility and personal insecurity. The report states that there is strong clinical evidence of the emergence of major mood disturbances (i.e., major depressive disorder) conduct and/or adjustment disorders and even [REDACTED] and other psychiatric conditions stemming from one's exposure to traumatizing events, especially during childhood and adolescence and including radical changes in one's lifestyle, unusual economic or emotional hardship, the death or sudden separation from a loved one, etc. The report opines that, due to the chance of extreme hardship and major psychoemotional problems being quite elevated in this case, the removal of the applicant should be avoided as much as legally possible. The report opines that, based on the analysis of family dynamics and the interview, there is only a slim chance that Mr. Hemmings will stay in the United States with a demanding, restless child and teenage stepson while the applicant is in Jamaica. The report finds that [REDACTED] met the clinical criteria for adjustment disorder with mixed anxiety and depressed mood in regard to problems related to the applicant's immigration status, based on [REDACTED] reported dyssomnia, stress-induced sleep and concentration problems, chronic memory shortcomings and nervous sweating. In that it is based on a single interview, the AAO notes that the psychological report does not reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional. As a result, the marriage and family therapist's findings are speculative, diminishing the evaluation's value. Moreover, the AAO will not consider the therapist's opinion about the labor, educational opportunities and health and safety in Jamaica as the record does not establish his expertise in these areas.

The record does not establish that the applicant's spouse or children will be unable to receive appropriate treatment in the absence of the applicant or appropriate treatment in [REDACTED]. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *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)).

Handwritten medical documents from [REDACTED] in May 1992 the applicant was pregnant for at least the second time and she was concerned about the pregnancy, requesting to see a social worker in June 1992; however, the medical records reflect that the applicant's prior pregnancy was terminated through an induced abortion and there are no indications that she was advised not to travel or that there were any complications with the pregnancy. The record does not establish that the applicant was unable to comply with voluntary departure due to complications with her pregnancy and advice that she not travel. Additionally, the AAO notes that the applicant was aware of her pregnancy and had sought medical advice at the time she agreed to voluntary departure before the immigration court and did not make the court aware of any possible problems with the possibility of complying with voluntary departure. Furthermore, the record reflects that the applicant failed to extend her voluntary departure or reopen her immigration proceedings based on her claimed medical complications. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See [REDACTED]

While country condition reports submitted with the Form [REDACTED] indicate that there is gang violence and crime in Jamaica, that medical care is more limited than that available in the United States and there is a high unemployment rate, the record does not establish that the applicant and [REDACTED] will be unable to find employment, be unable to receive appropriate medical treatment if necessary or be subject to any particular gang violence or crime. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See [REDACTED]

The record reflects that the applicant has been employed in the United States since 1990. The record reflects that the applicant was issued employment authorization from May 11, 1999 until May 10, 2000; January 31, 2002 until January 30, 2003; October 14, 2003 until October 13, 2004; and December 2, 2004 until December 1, 2005. The AAO notes that the applicant's employment authorization terminated when the Form I-485 was denied on July 30, 2004. The record reflects that the applicant filed joint or individual taxes from 1996 until 2002.

In *Matter of Tin*, 14 I&N Dec. 571 (Reg. Comm. 1975), the Regional Commissioner stated 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.*

[REDACTED] 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.*

[REDACTED], 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 naturalized U.S. citizen spouse, her two U.S. citizen children, her U.S. citizen stepchild, the general hardship to the applicant and her family if she were denied admission to the United States, the absence of a criminal record and the filing of federal taxes. The AAO notes that the applicant's marriage, the birth of her children and establishment of the stepchild relationship benefiting her 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 overstay of her nonimmigrant status; her failure to comply with voluntary departure; her failure to comply with a removal order; her unauthorized and unlawful presence in the United States; and her unauthorized employment in the United States, except for periods of employment authorization.

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.