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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
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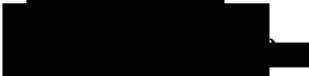


FILE:

Office: NEWARK, NJ

Date: **DEC 27 2010**

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:

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 Field Office Director, Newark, New Jersey, 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 the [REDACTED] who, on December 10, 1997, was admitted to the United States as a nonimmigrant visitor. On December 2, 1998, the applicant filed an Application for Asylum and Withholding of Removal (Form I-589). The applicant remained in the United States past her authorized stay, which expired on December 9, 1998. On June 10, 1999, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into removal proceedings for having overstayed her nonimmigrant status. On May 5, 2000, the applicant married [REDACTED] a naturalized U.S. citizen. On June 2, 2000, 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 by [REDACTED]. On September 21, 2000, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States.

On July 23, 2001, the applicant filed a motion to reopen proceedings with the immigration judge. On August 3, 2001, the motion to reopen was denied. The applicant filed an appeal of the denial of the motion to reopen with the Board of Immigration Appeals (BIA). On November 18, 2002, the BIA dismissed the applicant's appeal. On November 5, 2003, the Form I-485 and Form I-130 were terminated. On May 14, 2003, [REDACTED] filed a second Form I-130 on behalf of the applicant, which was approved on October 2, 2003. On October 23, 2003, the applicant filed a second Form I-485 based on the approved Form I-130. On December 20, 2007, the Form I-485 was terminated. The applicant filed a motion to reopen before the BIA. On November 24, 2008, the BIA denied the applicant's motion. The applicant filed another motion to reopen with the BIA. On June 15, 2009, the BIA denied the applicant's motion. On July 15, 2009, the applicant filed the Form I-212. 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, naturalized U.S. citizen adult daughter and lawful permanent resident adult son.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated May 6, 2010.

On appeal, counsel contends that the applicant had reasonable cause for failing to appear for her immigration hearing. Counsel contends that the field office director failed to weigh the substantial equities presented in the applicant's case and the applicant merits a favorable exercise of discretion. *See Counsel's Brief*, undated. In support of his contentions, counsel submits the referenced brief; copies of correspondence; letters from the applicant's family members; recommendation letters; financial, employment and identity documentation; and copies of documentation already in the record. 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 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.

Counsel contends that the applicant had reasonable cause for failing to appear for her immigration hearing because prior counsel failed to advise her that a hearing had been scheduled. He states that the applicant's prior counsel also failed to appear for the immigration hearing. Counsel contends that prior counsel's representation of the applicant is being investigated by [REDACTED]. Counsel submits documentation that he contends has been submitted in connection with the disciplinary review which describes prior counsel's purported ineffective representation. Counsel contends that the strongest evidence of counsel's ineffectiveness is the immigration judge's decision finding that prior counsel received notice from the court of the hearing but failed to advise the applicant of the hearing and did nothing to determine the status of the applicant's case until after the applicant had informed prior counsel of the receipt of a warrant for removal. Counsel contends that the field office director has virtually ignored the paper trail establishing that the applicant had reasonable cause for her failure to appear for her immigration hearing.

Current counsel has failed to establish the requirements under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) for a finding of ineffective assistance of counsel. While counsel contends that a complaint was filed by the applicant against prior counsel, the record does

not contain any evidence that such a complaint was filed or investigated, nor does it contain any responses from prior counsel or the investigating body. The record only contains letters and arguments that were purportedly submitted by current counsel in support of the applicant's purported complaint. Moreover, while counsel contends that the applicant's failure to attend the hearing was reasonable because counsel failed to inform her of the hearing date, counsel has failed to establish that the applicant herself did not receive notice of the immigration hearing through the immigration court's correspondence, which was sent to her new address in New Jersey.

Counsel contends that the field office director failed to adjudicate the Form I-212 on the merits because the applicant will become inadmissible under section 212(a)(6)(B) of the Act when she is required to depart the United States and found that no purpose would be served in adjudicating the application. Although counsel contends that the field office director disregarded evidence of the applicant's family members' existence, the field office director correctly found that the applicant had failed to establish her relationship to the individuals for whom she had submitted identity documentation.¹ While the field office director did state that the applicant will become inadmissible under section 212(a)(6)(B) of the Act when she is required to depart the United States and that no purpose would be served in adjudicating the application, the record reflects that the field office director also weighed the favorable and unfavorable factors presented by the applicant in this case and found the applicant's case to not warrant a favorable exercise of discretion.

The record reflects that [REDACTED] is a native of Hungary who became a naturalized U.S. citizen in 1965. The applicant has a 38-year-old daughter and 24-year-old son from a prior relationship. The applicant's daughter is a native of the [REDACTED] who became a lawful permanent resident in 2001 and a naturalized U.S. citizen in 2007. The applicant's son is a native and citizen of the Ukraine who became a lawful permanent resident in 2005. The applicant and [REDACTED] do not appear to have any children together. The applicant is in her 60's and [REDACTED] is in his 70's.

Counsel states that he is submitting evidence that the applicant's daughter is a U.S. citizen and her son is a lawful permanent resident. Counsel states that he is submitting documentation relating to the applicant's son-in-law who is a U.S. citizen and the applicant's two U.S. citizen grandchildren. Counsel states that he is submitting a good moral character letter from the applicant's Reverend. Counsel states that the applicant and her spouse have consistently filed federal income taxes. Counsel states that he is submitting an affidavit from the applicant's spouse in regard to the hardship he will suffer if the applicant is removed. Counsel states that the applicant has never been arrested or convicted of a crime and merits a favorable grant of discretion in view of her exceptional moral character. Counsel states that sending the applicant back to the Ukraine would be unconscionable in view of the substantial equities.

While counsel contends that there is severe discrimination directed towards ethnic Hungarians in the Ukraine to which the applicant would be subject, the AAO finds that the country condition reports submitted by counsel do not establish that the applicant will be subject to the claimed discrimination. The country condition reports submitted by counsel only indicate that the government has ceased to finance or supply schools with books in the Hungarian language. The AAO notes that [REDACTED] official language is Ukrainian. The country condition reports do not reflect that the applicant would

¹ The applicant submitted immigration documentation for these individuals but failed to submit other documentation to establish her familial relationship to these individuals.

be subject to persecution or discrimination that the government would be unwilling or unable to investigate and prosecute. 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. [REDACTED], 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); [REDACTED]

[REDACTED] in an affidavit, states that he has been living a nightmare. He states that these are his golden years and that he and the applicant should be enjoying them by traveling, going out with friends and celebrating a good time with their family. He states that, instead, the applicant and he are both depressed and the applicant in particular is overwhelmed by the stress of the situation. He states that the applicant is not a young woman and he fears that all the stress has taken a terrible toll. He states that it pains him that his wife cannot simply relax and enjoy life. He states that he and the applicant live with the fear that she will be removed at any time. He states that he and the applicant have not had a good night's sleep since the denial of the waiver. He states that the applicant's son is an intelligent and cheerful young man who often stays with them in New Jersey. He states that he sponsored the applicant's son to come to the United States. He states that he and the applicant also reside with his U.S. citizen son who works for the New Jersey Division of Taxation as an Accountant and the applicant treats him as her own son.² He states that the applicant's daughter resides in Brooklyn with her spouse and children. He states that the applicant's daughter is expecting her third child. He states that the applicant is very close to her daughter, son-in-law and grandchildren and speaks with her daughter every other day. He states that the applicant's daughter is having a difficult pregnancy and depends more and more on the applicant to help with the children and with meals. He states that the applicant worked in the United States as a home health attendant and obtained her certificate from Caring Professionals in Queens and loves the work. He states that the applicant now works as a part-time housekeeper. He states that the applicant has lived and worked in the United States continuously for many years and they have always filed federal tax returns. He states that the applicant's entire family is in the United States and she is at an age where she would be unable to support herself in the [REDACTED]. He states that the applicant would have nowhere to live in the Ukraine and no means of support. He states that his health is not good and that he is suffering from prostate problems and is scheduled for cataract surgery on June 29, 2010. He states that the applicant cooks, cleans, shops and takes him to the doctor. He states that the applicant signed them up for a gym membership and he now attends the gym regularly. He states that the applicant often cooks for his son and makes sure that they are well cared for. He states that he could not manage without the applicant. He states that it would be a travesty if his wife was removed at his age. He states that he has never been to the Ukraine and does not speak [REDACTED]. He states that he was born in Hungary and has lived in the United States for 50 years. He states that it would be impossible for him to relocate to the [REDACTED]

The applicant's daughter, in a letter, states that she and her family were very fortunate to have the opportunity to come to the United States in 2001. She states that her family came to the United

² The AAO notes that the record does not contain a U.S. birth certificate for [REDACTED] U.S. citizen son; however, the AAO will consider the applicant's adult U.S. citizen son a positive equity in the applicant's case for the purposes of adjudicating this application.

States to build a happy childhood for their children. She states that she is very thankful to her mother and [REDACTED] for their help when the family came to the United States. She states that the applicant and [REDACTED] helped the family find an apartment and gave them furniture. She states that the applicant helped her watch her children when they came to the United States and due to the applicant's assistance she was able to study and obtain her nursing license. She states that she is pregnant with her third child, with a delivery due date of October 5, 2010. She states that she will be very happy to have the applicant with her at that time because she loves her so much and wants her to be a happy mother and grandmother.

The applicant's son, in a letter, states that he came to the United States in August 2005 and he is very thankful to the applicant and [REDACTED] for giving him the opportunity to attend college and become a surgical technician. He states that the applicant and [REDACTED] supported him financially, which enabled him to graduate from Chubb Institute, which in turn resulted in his profession and job today. He states that the applicant's presence in the United States is very important to him, especially emotionally.

Employment verification letters indicate that the applicant's daughter, son-in-law and son are employed in the United States. School records indicate that the applicant's grandchildren are enrolled in school in the United States.

A doctor's note indicates that the applicant's daughter was pregnant and due to deliver on October 5, 2010.

A letter from Reverend [REDACTED] indicates that he has known the applicant to be a congregant of the [REDACTED] for one-and-a-half years. He states that during this time he has had the chance to get to know the applicant and he is convinced she would be a good asset to the United States. He states that the applicant is law abiding, hard working, honest and kind. He states that the applicant is highly dedicate to her family, friends and her congregation. He states that he feels that if the applicant is removed from the United States she will have various difficulties. He states that the applicant will have to leave her husband and his son, as well as her own son, daughter, son-in-law and grandchildren. He states that the applicant's family is very much in need of her presence and help, partly due to [REDACTED] health problems and also because of the needed support for her son and daughter's family. He states that the applicant will also face serious financial problems in the Ukraine. He states that she might also endure difficulties in the Ukraine due to her national background as a Hungarian. The AAO notes that it will not consider the Reverend's opinions about the discrimination and financial difficulties he believes the applicant will face in the Ukraine, or [REDACTED] health problems, as the record does not establish his expertise in these areas.

The AAO notes that there is no evidence in the record to establish that [REDACTED] suffers from any illnesses or that he would be unable to receive appropriate treatment in the absence of the applicant or in the Ukraine. 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)).

The record reflects that the applicant was employed in the United States in 2009. The record reflects that the applicant filed joint taxes from 1997 through 1998; from 2000 through 2007; and in 2009. The applicant was issued employment authorization from March 27, 2008 through March 26, 2011.

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 [REDACTED], 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 naturalized U.S. citizen daughter; her lawful permanent resident son; her U.S. citizen step-son; the general hardship to the applicant and her family if she were denied admission to the United States; the absence of a criminal record; filing of joint tax returns and the approved immigrant visa petition filed on her behalf. The AAO notes that the applicant's marriage, establishment of the step-son relationship, the adjustment of status to that of a lawful permanent resident and naturalization of the applicant's daughter, the adjustment of status to that of a lawful permanent resident of the applicant's son and the filing of the immigrant visa petition benefitting 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 attend an immigration hearing; her 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.