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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

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[REDACTED]

FILE:

[REDACTED]

Office: NEW YORK, NY

Date:

JUL 15 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:

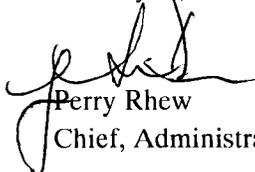
[REDACTED]

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 \$585. 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 record reflects that the applicant is a native and citizen of Guatemala who, on February 24, 1993, filed a Request for Asylum in the United States (Form I-589). On February 23, 1998, the Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings for having entered the United States without inspection in November 1992. On August 3, 2001, the immigration judge denied the applicant's applications for asylum and withholding of removal. The immigration judge granted the applicant voluntary departure until October 2, 2001. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On September 13, 2002, the BIA dismissed the applicant's appeal and granted him thirty days of voluntary departure. 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 June 2, 2006, the applicant's spouse filed a Form I-589, on which the applicant was included as a dependent. On September 19, 2006, the Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On November 14, 2007, the immigration judge terminated proceedings against the applicant because he had previously been ordered removed from the United States.

On November 30, 2007, the applicant's lawful permanent resident spouse filed a Petition for Alien Relative (Form I-130) on the applicant's behalf. On March 26, 2009, the applicant filed the Form I-212, indicating that he resided in the United States. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant seeks a waiver 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 his lawful permanent resident 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 June 17, 2009.

On appeal, counsel contends that the district director's decision should be revoked for plain and substantial error, due process infringement and abuse of discretion. *See Form I-290B*, dated June 26, 2009. In support of his contentions, counsel submits the referenced Form I-290B, a statement from the applicant, copies of financial information 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.

On appeal, counsel contends that the district director failed to enter into a "required evaluation/analysis of the totality of the circumstances and consequential balancing of factors conclusion." The AAO notes that the district director fully weighed the factors in the applicant's case.

Counsel contends that documents submitted in support of the Form I-212 were ignored, such as medical letters and an evaluation report in regard to the applicant's U.S. citizen child's hardship. Counsel contends that the district director ignored the underlying basis of the applicant's spouse's lawful permanent resident status, which is based on cancellation of removal requiring extreme, unusual and exceptional hardship. The AAO notes that the record reflects that the applicant's spouse did not have a prior removal order and, as such, comparison of the two cases is unwarranted.

Counsel contends that the district director ignored country conditions reports and precedent cases issued by this office. The AAO finds that counsel failed to provide any country conditions reports to support his specific claims. Going on record without supporting documentary evidence 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO also finds that the case to which counsel cites involves an applicant from El Salvador seeking temporary protected status (TPS) and has no bearing on the present case.

The record reflects that the applicant married his spouse, [REDACTED], on January 25, 1998. Ms. [REDACTED] is a native and citizen of Guatemala who became a lawful permanent resident in 2007. The applicant and Ms. [REDACTED] have a 17-year-old son and a 14-year-old daughter who are both U.S. citizens by birth. The applicant and Ms. [REDACTED] are in their 30's.

In a statement on appeal, the applicant states that he has shown that his spouse and children will suffer hardship if he returns to Guatemala. He states that his son suffers from chronic ear problems and is still under medical supervision. He states that he provides financial and moral support to his family. He states that if he moves to Guatemala he will be at risk of future persecution as a result of being married to the applicant. He states that he could be kidnapped, tortured or disappeared. He states that his father-in-law was a member of the G-2 in Guatemala who committed suicide. He states that even though his spouse was granted permanent residence through cancellation he previously filed an asylum application based on the ground of past persecution. He states that the country conditions in Guatemala are underdeveloped. He states that healthcare and education are particularly bad, especially for people like him who have limited resources. He states that there is a high unemployment rate. He states that Guatemala does not provide help for children with disabilities and it does not provide health care or special education. He states that if these services are available it is only for the children of rich families. He states that it would be a manifest injustice to compel his spouse and children to remain in the United States without him. He states that it would be a manifest injustice to compel his spouse and children to accompany him to Guatemala.

In statements submitted with the Form I-212, Ms. [REDACTED] states that she has been residing with the applicant in the United States since 1992. She states that she and her children will suffer hardship if the applicant returns to Guatemala. She states that her son suffers from chronic ear problems and is still under medical supervision. She states that the applicant provides financial and moral support to his family. She states that if the applicant moves to Guatemala he will be at risk of future persecution as a result of being married to her due to the knowledge she has imparted to him about the torture activities of the G-2. She states that the applicant could be kidnapped, tortured or disappeared. She states that her father was a member of the G-2 in Guatemala who committed suicide. She states that even though she was granted permanent residence through cancellation she previously filed an asylum application based on the ground of past persecution. She states that the country conditions in Guatemala are underdeveloped. She states that healthcare and education are particularly bad, especially for people like her who have limited resources. She states that there is a high unemployment rate. She states that Guatemala does not provide help for children with disabilities and it does not provide health care or special education. She states that if these services are available it is only for the children of rich families. She states that it would be a manifest injustice to compel her and the children to remain in the United States without the applicant. She states that it would be a manifest injustice to compel her and the children to accompany the applicant to Guatemala. She states that she was persecuted by Guatemalan government agents as a result of her father's death. She states that the family was watched as they moved from place to place by plain clothes officers called G-2. She states that the government accused the family of killing her father because they did not want to believe that he committed suicide. She states that her mother and sister were arrested, but released after a month when her father's death was ruled a suicide. She states that the family has been followed since then because the government believes that they found out something secret and knew about their torture activities.

A letter from Dr. [REDACTED], dated August 19, 2007, indicates that the applicant's son has been treated for a chronic ear problem for the last few years. He states that the applicant's son is stable, but flying would adversely affect the condition. He states that any members of the applicant's son's family who are necessary for his care should not be forced to fly any distances for any prolonged periods, as it would be precarious for the applicant's son to undergo changes in air pressure in his ear involved in air travel. A prescription, dated July 27, 2007, indicates that the applicant's son was prescribed nasonex, a nasal spray.

A letter from [REDACTED], dated June 26, 2007, indicates that she is a certified speech-language pathologist. She states that, in 1997, she made the applicant's spouse aware of the possibility that the applicant's son may have a hearing loss which might negatively impact his development of speech and language and ultimately on his academic success. She states that an Ear Nose and Throat (ENT) specialist determined that the applicant's son had a middle ear hearing loss and tubes were inserted. She states that ear drops were also prescribed to administer when a middle ear infection occurred. She states that the applicant's son needs to be monitored very closely by the ENT. She states that her personal opinion is that middle ear hearing losses are not dealt with in a serious way in many countries with underdeveloped medical facilities. She states that educational support is often absent in those countries, which is not the case in the United States. She states that the applicant's son has been academically successful and will continue to do so with appropriate medical attention and educational support.

The AAO notes that there is no evidence in the record to establish that the applicant's son would be unable to receive appropriate care in the absence of the applicant for his ear condition. Furthermore, there is no evidence in the record to establish that the applicant's son suffered a permanent hearing loss, that he required educational services or that he now continues to require medical or educational services. 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 contains an evaluation report, dated December 15, 2006, for Ms. [REDACTED] written by [REDACTED], a **biligual social worker, which is based on a single interview** with Ms. Martinez. During the interview, Ms. [REDACTED] reported that she was raped in the backyard of the house at which her family was residing. Ms. [REDACTED] reported that, as a result of the rape she internalized her experience and felt ashamed, becoming depressed and sad about her traumatic experience. Ms. [REDACTED] reported that, since she arrived in the United States, her maternal family has been very emotionally supportive and her religious beliefs have helped her to face her personal history. Ms. [REDACTED] reported that her mother still resides in Guatemala. Ms. [REDACTED] reported that she believes her family's safe return to Guatemala would be questionable. Ms. [REDACTED] reported that she feels that the political and social situation in Guatemala does not advocate for human rights and, at the same time, the government does not protect its citizens nor practice justice for all. Ms. [REDACTED] reported that poverty and overpopulation would stagnate her family's growth and financial independence. Ms. [REDACTED] reported that the threat of removal means the avoidable return to the poverty that defined her childhood and from which she so fervently wished to escape. Ms. [REDACTED] expressed concerns about her children's future and education. She reported that, if the family returns to Guatemala the children will be condemned to become unskilled workers because education continues to be a privilege for the accommodated social class only. Ms. [REDACTED] feels that the

quality of education her children receive in New York will not be available in Guatemala and the children will be unable to develop their potential, nor fulfill their dreams to become professionals.

Ms. [REDACTED] opines that due to the ongoing stress experienced by Ms. [REDACTED], she has developed Post Traumatic Stress Disorder (PTSD), depression and generalized anxiety. Ms. [REDACTED] opines that if the family is removed to Guatemala they will be emotionally devastated and physically dismantled. Ms. [REDACTED] opines that in order for the family to continue to function effectively in a safe environment, the family should remain intact in the United States. Ms. [REDACTED] opines that relocation of any member of the family to Guatemala will negatively affect the possibility for self-improvement, religious affiliation, freedom of speech and a better future. Ms. [REDACTED] opines that the United States is providing the family with opportunities and resources unavailable in Guatemala. Ms. [REDACTED] opines that the possibilities for the applicant and Ms. [REDACTED] to find employment in Guatemala will be very difficult, if not impossible. Ms. [REDACTED] opines that, as a result, the family will be condemned to the negative consequences of political persecution, poverty, oppression and the possibility of death is high. Ms. [REDACTED] concludes that, in order to maintain the psychological and emotional wellbeing of the family, the family should remain intact in the United States.

The AAO notes that there is no evidence to establish that the conditions counsel, the applicant, Ms. [REDACTED] and Ms. [REDACTED] claim the applicant, Ms. [REDACTED] and the children will face in Guatemala exist. While Ms. [REDACTED] indicates that Ms. [REDACTED] suffers from PTSD, depression and generalized anxiety, she does not indicate that Ms. [REDACTED] requires treatment or counseling. There is no evidence to establish that Ms. [REDACTED] has sought additional counseling or treatment at any other time. In that Ms. [REDACTED] findings appear to be based on a single interview with Ms. [REDACTED] 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.

Furthermore, the AAO notes that there is no evidence in the record to establish that Ms. [REDACTED] and the children would be unable to receive appropriate care in the absence of the applicant for any psychological diagnoses incurred due to the removal of the applicant from the United States. 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)).

Documentation in the record establishes that the applicant has been employed in the United States from 1993 until present. The record reflects that the applicant was issued employment authorization from March 5, 1993 until March 5, 1994; February 8, 1996 until February 8, 1997; February 8, 1998 until February 7, 1999; and March 5, 1999 until March 4, 2001.¹

¹ The AAO notes that, since the applicant has engaged in unauthorized employment while the Form I-589 and appeals were pending, he has accrued unlawful presence in the United States since April 1, 1997, the date on which unlawful presence provisions were enacted. The AAO notes that the applicant did not accrue unlawful presence from August 3, 2001 until October 2, 2001 and September 13, 2002 until October 12, 2002, the periods during which he was granted voluntary departure.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The 7th Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in a discretionary determination. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper. The AAO finds these legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

As established by the record, the favorable factors in this matter are the applicant's lawful permanent resident spouse, his two U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, his otherwise clear background and the pending immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage and the filing of the immigrant petition benefiting him 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; his failure to comply with voluntary departure; his failure to comply with a removal order; his unauthorized and unlawful presence in the United States; and his unauthorized employment in the United States, except for the periods during which he was issued 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 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, the appeal will be dismissed.

ORDER: The appeal is dismissed.