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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:

Office: PANAMA CITY, PANAMA

Date: MAR 03 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:

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.

Perry Khew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Field Office Director, Panama City, Panama and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having departed the United States while an order of removal was outstanding and seeking readmission within ten years of that departure. The applicant is married to a United States citizen and seeks a waiver of inadmissibility in order to reside in the United States with her spouse.

The Field Office Director denied the Form I-212 as a matter of discretion based on her denial of the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility. *Decision of the Field Office Director*, dated August 26, 2009.

On appeal, counsel states that the applicant's case merits a favorable exercise of discretion. *Form I-290B, Notice of Appeal or Motion; Attorney's brief*.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

. . .

(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 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 aliens 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The record indicates that the applicant gained admission to the United States on August 3, 2001 with a B-2 visa valid until February 2, 2002. *Form I-94, Departure Card*. The applicant remained in the

United States, and, on July 5, 2003, was apprehended at the Rainbow Bridge, Niagara Falls, New York after being refused entry into Canada. *Form I-213, Record of Deportable/Inadmissible Alien*. The applicant was placed into proceedings and an immigration judge ordered her removed on September 5, 2003. *Order of the Immigration Judge, Immigration Court*, dated September 5, 2003. The applicant appealed and, on October 20, 2004, the Board of Immigration Appeals dismissed the appeal. *Decision of the Board of Immigration Appeals*, dated October 20, 2004. The applicant departed the United States on January 9, 2005. *Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal*. In that the record establishes that the applicant departed the United States on January 9, 2005 while an order of removal was outstanding, she is inadmissible to the United States under section 212(a)(9)(A)(ii)(II) of the Act.

The record establishes that the applicant's spouse was diagnosed with prostate cancer and had a prostatectomy in December 2007. *Medical records, Radiology Report, Brigham & Women's Hospital*, dated October 9, 2008. His prostate cancer is recurrent despite surgery and subsequent radiation. *Statement from [REDACTED]*, dated June 26, 2009. The applicant's spouse notes that the applicant is the only caregiver he has, as his mother is 83-years-old and incapable of assuming the responsibilities of caring for him and his brother has four children and lives in Boston. *Statement from the applicant's spouse*, dated November 15, 2009. The record also contains documentation showing the applicant's spouse to have received continuous psychological therapy from 1993 to the present time. *Statement from [REDACTED]* dated September 28, 2009. The applicant's spouse has been treated for severe refractory Obsessive-Compulsive Disorder (OCD) and Major Depressive Disorder (MDD). *Id.* He has been given serotonin reuptake inhibitors such as Prozac, atypical neuroleptics and has had cognitive behavior therapy in an effort to improve his condition. *Id.* The applicant's spouse's psychiatric condition has worsened secondary to his inability to live with the applicant. *Id.* According to his psychiatrist, the positive effects of the applicant's presence in the United States would be that the applicant's spouse's Major Depressive Disorder, as it is worsened by feelings of loneliness, would be ameliorated and his general psychiatric and physical health would dramatically improve. *Id.*

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 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 Seventh 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-Nunoz 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 considering discretionary weight. 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 cited legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The AAO finds that the favorable factors in this case are the applicant's U.S. citizen spouse; her spouse's significant medical problems, physical and mental; and the absence of a criminal record.

The AAO finds the unfavorable factors in this case to include the applicant's prior unlawful presence, as well as her unauthorized employment while in the United States.

While the applicant's actions cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.