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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

H4

FILE:

Office: BALTIMORE, MD

Date:

MAY 18 2010

RELATES)

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 \$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, Baltimore, Maryland, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of El Salvador, who on July 28, 1995, was placed into immigration proceedings for having entered the United States without inspection the day before. On October 12, 1995, the immigration judge granted the applicant voluntary departure until April 12, 1996. 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 May 7, 1996, the applicant married [REDACTED], a lawful permanent resident, in Arlington, Virginia. On September 27, 1996, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On May 29, 1997, the Form I-130 was denied for failure to appear for an interview.

On June 26, 2000, the applicant married her current spouse, [REDACTED] in Rockville, Maryland.¹ On July 2, 2007, 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 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 April 23, 2009.

On appeal, counsel contended that the district director erred in giving less weight to the equities the applicant acquired after having been ordered removed. Counsel contended that the favorable factors in the applicant's case outweigh the unfavorable factors. *See Counsel's Brief*. In support of his contentions, counsel submitted the referenced brief and copies of documentation submitted in response to a request for further evidence.²

¹ The AAO notes that the record does not contain a divorce record reflecting that the applicant was divorced from [REDACTED]. The record also does not contain evidence to establish that [REDACTED] has filed a Form I-130 on behalf of the applicant, or that the applicant has another immigrant visa petition that would benefit her. Furthermore, testimony in the applicant and [REDACTED] letters contradict marriage records reflecting that the applicant was married to [REDACTED] at the same time she was being courted by and living with [REDACTED].

² The AAO notes that the applicant's response to the request for further evidence was not received by the adjudicating officer in regard to the Form I-212 because counsel forwarded the documentation to an A-file under which the applicant had applied for Temporary Protected Status (TPS). The A-file to which counsel forwarded the documentation had not been consolidated into the applicant's A-file containing the Form I-212 and removal order. The record reflects that the request for further evidence was issued under the applicant's main A-number as reflected on the cover page of this decision and counsel had been instructed to reference that A-number in his response. Counsel failed to reference the appropriate A-number.

On September 15, 2009, the AAO dismissed the applicant's appeal because she did not warrant a favorable exercise of discretion. *Decision of AAO*, dated September 15, 2009.

In the motion to reconsider, counsel contends that the AAO erred in dismissing the applicant's appeal and stating that the favorable factors are outweighed by the unfavorable factors. *See Counsel Brief*, dated October 14, 2009. In support of his motion to reconsider, counsel submits only the referenced brief, copies of medical documentation, copies of divorce and birth records and copies of financial documentation. 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 of Homeland Security] has consented to the alien's reapplying for admission.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition

denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) Requirements for motion to reconsider.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In his motion to reconsider, counsel contends that the applicant's children are not after-acquired equities because these children are qualifying relatives who should not be equated with employment or the passage of time. *See Counsel's Brief*. The AAO finds counsel's contention unpersuasive. As discussed in the AAOs' decision, the applicant's children are after-acquired equities and the AAO provided case law to support such a finding in regard to relatives. *See Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985); *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991); *Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980); *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992). Counsel fails to cite any pertinent precedent decisions that establish the AAO's findings to be an incorrect application of law.

In his motion to reconsider, counsel contends that the AAO was incorrect in giving such weight to the applicant's unauthorized employment and unlawful presence. Counsel contends that the applicant has been in the United States for a period of eight years lawfully under TPS and the applicant's authorized employment and lawful presence should be given more weight.³ *See Counsel's Brief*. The AAO finds counsel's contentions unpersuasive. Counsel fails to cite any pertinent precedent decisions that establish the AAO's findings to be an incorrect application of law.

In support of his motion to reconsider, while counsel contends that there was an incorrect application of law, as discussed above, counsel's contentions are unpersuasive and are contrary to relevant case law. Accordingly, the AAO finds that counsel failed to state reasons for reconsideration that were

³ The AAO notes that the record only establishes that the applicant was granted TPS for six years (in 2002, 2005, 2006, 2007, 2008 and 2009).

supported by any pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law.

In his motion to reconsider, counsel contends he has submitted evidence that addresses the evidentiary deficiencies cited by the AAO. *See Counsel's Brief*. As set forth in 8 C.F.R. § 103.5(a)(3), a motion to reconsider must, when filed, also establish that the decision was incorrect based on the evidence on record at the time of the initial decision. The evidence submitted by counsel in support of the motion to reconsider was not available to the AAO at the time the decision was issued and cannot, therefore, form the basis of a motion to reconsider.⁴

The applicant's motion does not meet applicable requirements. The regulation at 8 C.F.R. § 103.3(a)(3) states that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law. Accordingly, the motion must be dismissed for failing to meet applicable requirements.

ORDER: The motion is dismissed. The order dismissing the appeal will be affirmed.

⁴ While counsel has not filed a motion to reopen, the AAO notes that the documentation submitted with the motion to reconsider was available, but not submitted, at the time the applicant filed the appeal on June 15, 2009, and, therefore, would not form the basis of a motion to reopen because such documentation does not represent new facts that have arisen since the filing of the appeal.