

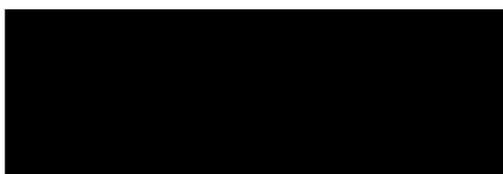


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

H4



FILE: [REDACTED]

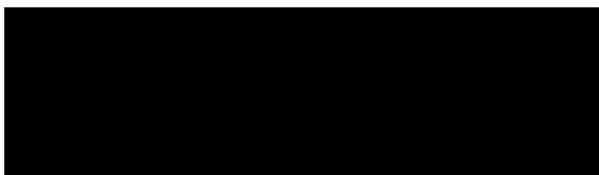
Office: TUCSON, AZ

Date: SEP 09 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:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Tucson, Arizona, 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 sustained and the application approved.

The applicant is a native and citizen of El Salvador who, on January 28, 2007, was apprehended after he entered the United States without inspection on January 26, 2008. The applicant was placed into secondary inspection. The applicant admitted that he did not have valid documentation to enter the United States. The applicant failed to provide his true identity to immigration officers by providing an alternate date of birth. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for attempting to enter the United States without inspection. On February 26, 2007, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1).

On September 5, 2007, the applicant's U.S. citizen spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on April 8, 2008. On February 6, 2009, the applicant filed the Form I-212, indicating that he resided in El Salvador. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). He 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 his U.S. citizen spouse

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 September 28, 2009.

On appeal, counsel contends that the field office director erred in finding that there were no favorable factors in the applicant's case. *See Counsel's Brief*, dated October 14, 2009. In support of her contentions, counsel submits the referenced brief, copies of immigration documents and identity documents, copies of ticket stubs and travel arrangements, financial records, a statement from the applicant's spouse and copies of multiple documents in the Spanish language.¹ 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.

¹ The AAO notes that multiple pieces of evidence are entirely in the Spanish language and are not accompanied by an English translation, as is required by 8 C.F.R. § 103.2(a)(3). This evidence includes financial documentation, medical documentation and letters. As such, this evidence cannot be considered by the AAO on appeal.

- (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 field office director erred in finding that the applicant did not have any favorable factors. While counsel contends that evidence of the bona fides of the marriage were submitted, the AAO notes that counsel and the applicant failed to submit evidence of the applicant's marriage, the bona fides of the marriage or filing and approval of an immigrant visa petition with the Form I-212. As such, the field office director was not presented with any evidence of the favorable factors in the applicant's case.

The applicant married his U.S. citizen spouse, [REDACTED] on July 25, 2007. The AAO notes that the record does not contain a copy of the applicant's marriage certificate with translation; however, this office will view the applicant's spouse as a favorable factor to be considered for purposes of this decision. The record reflects that the applicant and [REDACTED] do not have any children together. The record reflects that the applicant and [REDACTED] are in their 30's.

On appeal, counsel contends that the denial of the applicant's admission to the United States would result in hardship to [REDACTED] who has sought professional psychological help since January 2009 for anxiety disorder and separation anxiety due to the frustration and feeling of inadequacy she has experienced since her husband was denied entry. Counsel contends that the psychologist has referred [REDACTED] case to a psychiatrist and is provoking economical distress since [REDACTED] has to incur many expenses in order to maintain the long distance relationship. Counsel contends that [REDACTED] has been living and working in the United States her entire life and has stable employment and properties in the United States. Counsel contends that the financial impact of [REDACTED] relocation to El Salvador would be extreme since there are less employment opportunities. Counsel contends that [REDACTED] has traveled almost every three to four months to be with the applicant and attempt to have a healthy and normal relationship. Counsel contends that it has become very onerous and physically exhausting for the applicant and [REDACTED] to continue in a situation were they are apart. Counsel contends that, if the applicant and [REDACTED] cannot be together, they will suffer and their

family ties will diminish until a point at which it will be broken and unfixable, leaving them to never again be together. Counsel contends that the evidence clearly establishes that favorable exercise of discretion is warranted.

in her letter on appeal, states that she and the applicant love each other very much and that they try to have a good relationship despite living apart. She states that she met the applicant in Guatemala when she visited in 2007. She states that they continued to communicate through the internet and through traveling to other countries. She states that they continue to have a good relationship. She states that denying the applicant admission will cause her hardship. She states that she has been living and working in the United States her entire life and has stable employment and properties in the United States. She states that the financial impact of her relocation to El Salvador would be extreme since there are less employment opportunities, she would have to terminate her business, and her standard of living would decline. She states that if she relocates to El Salvador she will be unable to provide the same standard for her family and future children that she is able to in the United States. She states that the physical separation is causing her emotional distress and that she has been receiving psychological treatment for ten months. She states that the psychologist has referred her case to a psychiatrist and it is provoking economical distress since she has to incur many expenses in order to maintain the long distance relationship. She states that she has traveled almost every three to four months to be with the applicant in the hopes of having a healthy and normal relationship. She states that it has become very onerous and physically exhausting for the applicant and her to continue in a situation were they are apart. She states that she has responsibilities at her work and with her family in the United States that keep her from being with her family and the physical separation and financial distress that this situation provokes in her life is becoming unbearable. She states that, if she and the applicant cannot be together, they will suffer and their family ties will diminish until a point at which it will be broken and unfixable, leaving them to never again be together. She states that her mother, father and siblings all reside in the United States. She states that the situation has also affected the life and emotional wellbeing of her family. She states that her future children deserve to have all the opportunities of higher education and educational options that the United States can offer. She states that she and the applicant intend to continue to live together as husband and wife and wish to have children together. She states that they deserve the opportunity to continue their lives together. She states that the applicant is the most important person in her life and their lives are completely integrated.

While the applicant and counsel contend that the applicant's spouse has been under psychological treatment, the record does not contain evidence that she is undergoing treatment, requires continuing treatment or that she would be unable to receive appropriate treatment in the applicant's absence or in El Salvador. The AAO notes that the record does not contain evidence in regard to property or employment in the United States. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding.² 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)).

² The AAO notes that multiple pieces of evidence are entirely in the Spanish language and are not accompanied by an English translation, as is required by 8 C.F.R. § 103.2(a)(3). This evidence includes financial documentation, medical documentation and letters. As such, this evidence cannot be considered by the AAO on appeal.

The record contains evidence indicating that [REDACTED] has transferred funds to the applicant on a number of occasions. The record also contains evidence that the applicant and [REDACTED] have traveled to various countries and locations together.

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 U.S. citizen spouse, the general hardship to the applicant and his family if he were denied admission to the United States, the absence of a criminal record and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage and the filing of the immigrant visa 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 unlawful entry into the United States and unlawful presence in the United States prior to his removal.

The applicant's unlawful entry and unlawful presence cannot be condoned. However, the AAO finds that given all of 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 and the application approved.

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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.³

ORDER: The appeal is sustained and the application approved.

³ The AAO notes that, if it is later found that the applicant illegally reentered the United States *at any time* after his 2007 departure, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, the grant of permission to reapply for admission is automatically revoked and he is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).