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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

H4

[redacted]

FILE: [redacted] Office: COLUMBUS, OHIO Date: SEP 13 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 Field Office Director, Columbus, Ohio 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 the appeal. The AAO subsequently dismissed two motions to reconsider or reopen. The matter is now before the AAO on a third motion to reconsider or reopen. The motion to reconsider or reopen will be denied; however, the AAO will reopen the applicant's case *sua sponte* and the application will be approved.

The applicant is a native and citizen of Haiti who, on April 30, 2000, appeared at Miami International Airport. The applicant presented a photo-substituted Haitian passport and a counterfeit lawful permanent resident card, bearing the name [redacted] The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the documents. The applicant admitted he did not have valid documentation to enter the United States. The applicant was found inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182 (a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and being an immigrant without valid documentation. The applicant indicated that he feared returning to Haiti and, on May 5, 2000, he was placed into immigration proceedings pursuant to credible fear procedures. On February 15, 2001, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture and ordered him removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On March 27, 2002, the applicant married [redacted] a naturalized U.S. citizen. On April 29, 2002, [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 21, 2002, the BIA dismissed the applicant's appeal. The applicant failed to depart the United States. On January 5, 2006, the Form I-130 was approved. The applicant filed a motion to reopen with the BIA. On April 20, 2006, the BIA dismissed the applicant's motion to reopen. On November 23, 2007, the applicant filed the Form I-212, indicating that he continued to reside in the United States. 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 with his U.S. citizen spouse.

The field office director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated January 11, 2008.

On October 17, 2008, the AAO dismissed the applicant's appeal because the unfavorable factors in the applicant's case outweighed the favorable factors. *Decision of AAO,* dated October 17, 2008.

In his first motion to reopen or reconsider, counsel contended that he submitted additional evidence of hardship to the applicant's spouse. Counsel contended that the AAO erred in attributing less weight to the applicant's spouse because she is not an after-acquired equity. *See Form I-290B, Counsel's Motion to Reopen and Reconsider,* dated November 13, 2008. In support of his contentions, counsel submitted the referenced Form I-290B and copies of medical documentation.

On May 26, 2009, the AAO granted the applicant's motion to reopen, affirming the order dismissing the appeal and denying the application. *See AAO's Decision,* dated May 26, 2009.

On May 26, 2009, the AAO granted the applicant's motion to reopen, affirmed the order dismissing the appeal and denied the application because the unfavorable factors in the applicant's case outweighed the favorable factors. *Decision of AAO,* dated May 26, 2009.

In his second motion to reopen or reconsider, counsel submitted additional evidence of hardship to the applicant's spouse. Counsel contended that the two new pieces of evidence submitted on motion constituted significant positive factors and warranted a favorable exercise of discretion. *See Form I-290B, Counsel's Motion to Reopen and Reconsider,* dated June 24, 2009. In support of his contentions, counsel submitted the referenced Form I-290B, copies of psychological documentation and copies of country conditions.

On October 20, 2009, the AAO granted the applicant's motion to reopen, affirmed the order dismissing the appeal and denied the application because the unfavorable factors in the applicant's case outweighed the favorable factors. *Decision of AAO,* dated October 20, 2009.

In the third motion to reopen or reconsider, counsel contends that the AAO's findings were factually incorrect and that the AAO's finding that the equities did not favor the applicant constituted an abuse of discretion. Counsel contends that the severe hardships faced by [redacted] coupled with other equities, outweigh the negative factors in the applicant's case. Counsel contends that the AAO erred in finding the applicant's spouse an after-acquired equity. *See Form I-290B*, dated November 18, 2009. In support of his motion to reconsider, counsel submits the referenced Form I-290B, psychological documentation and country reports. 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.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (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. . . .
>
> (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 spouse is not an after-acquired equity because the marriage was entered into prior to the entry of a final order of removal by the BIA. The AAO finds counsel's contention unpersuasive. As discussed in the AAO's decision, the applicant's spouse is an after-acquired equity since the marriage was entered into *after immigration proceedings were initiated* 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. The AAO notes that the case to which counsel cites does not make a finding in regard to after-acquired equities and does not entail the exercise of discretion.

In his motion to reopen and reconsider, contends that the AAO's findings were factually incorrect and that the AAO's finding that the equities did not favor the applicant constituted an abuse of discretion. Counsel contends that the AAO erred in finding that the evidence did not establish that Ms. [redacted] severe depression could not be treated and that Ms. [redacted] did not appear to have continued counseling and treatment. Counsel contends that the AAO gave little weight to a country condition report, characterizing the report as too general to establish that [redacted] could not receive treatment in Haiti. The AAO finds that counsel's contentions are unpersuasive since the AAO based its findings on the documentation before it. The AAO acknowledges that the evidence counsel submits with the third motion establishes that [redacted] continues to "have contact" with a psychologist and take medication; however, the documentation does not state that the [redacted]

would be unable to receive appropriate treatment in the absence of the applicant, nor do the country condition reports with the third motion provide evidence that is any less general than the report submitted with the second motion. Additionally, the AAO notes that the country condition reports in the third motion also do not establish any new facts relevant to the applicant's case. The evidence also does not meet the requirements for a motion to reconsider since it was not available to the AAO at the time of its decision.

The applicant's motion does not meet applicable requirements; however, in light of the recent change in country conditions in Haiti since the earthquake, the AAO reopens the applicant's case *sua sponte*. The AAO makes judicial notice that, as a result of the devastating earthquake and aftershocks that occurred on January 12, 2010, Department of Homeland Security (DHS) Secretary Janet Napolitano has authorized an 18-month designation of Temporary Protected Status (TPS) for Haitians, recognizing the inability of Haitians to return safely to their country. The disastrous conditions have compounded an unstable environment and will affect the country and people of Haiti for years to come. As such, the applicant and his spouse would suffer severe hardships both physical and emotional if either [redacted] did or did not accompany the applicant to Haiti.

The favorable factors in this matter are the applicant's U.S. citizen spouse, the severe hardship due to the aftermath of the earthquake and the general hardship to the applicant and his family if he were denied admission to the United States 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 occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The unfavorable factors in this case include the applicant's attempt to enter the United States by fraud; his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; his failure to comply with an order of removal; his extended unlawful presence in the United States; and his extended unauthorized employment in the United States except for dates on which his employment was authorized.

While the applicant's attempt to enter the United States by fraud, his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act, his failure to comply with an order of removal, his extended unlawful presence in the United States and his unauthorized employment in the United States cannot be condoned, the AAO finds that given all of the circumstances of the present case, the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the application will be approved.

The AAO notes, however, that the applicant requires a waiver under section 212(i) of the Act in regard to his inadmissibility under section 212(6)(C)(i) of the Act and must file an Application for Waiver of Grounds of Inadmissibility (Form I-601).

ORDER: The motion is denied. The applicant's case is reopened *sua sponte* and the application is approved.