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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services



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FILE:



Office: NEW YORK, NEW YORK

Date:

JAN 20 2011

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 \$630. 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 applicant is a native and citizen of Mexico who, on February 4, 1998, was apprehended at his place of employment and placed into immigration proceedings for having entered the United States without inspection in December 1997. On February 13, 1998, the immigration judge ordered the applicant removed from the United States. On the same day, the applicant was removed from the United States and returned to Mexico.

On an unknown date in 1999, the applicant was issued a temporary worker nonimmigrant visa.¹ On September 14, 1999, the applicant was admitted to the United States as a nonimmigrant temporary worker. On September 10, 2000, the applicant was issued a temporary worker nonimmigrant visa. On September 10, 2000, the applicant was admitted to the United States as a nonimmigrant temporary worker. On June 6, 2001, the applicant was issued a temporary worker nonimmigrant visa. On June 12, 2001, the applicant was admitted as a nonimmigrant temporary worker. On June 11, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen spouse. The Form I-485 indicates that the applicant last entered the United States on June 12, 2001 as a temporary worker nonimmigrant valid until November 10, 2001. On the same day, the applicant filed the Form I-212. On August 24, 2009, the Form I-130 was approved. On December 7, 2009, a Notice of Intent to Deny the Form I-485 was issued. 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). 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 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 August 24, 2009.

On appeal, counsel contends that the district director's decision was incorrect as a matter of law and discretion in that the applicants of favorable factors appeared not to have been considered. *See Counsel's Brief*, dated September 29, 2009. In support of his contentions, counsel submits the referenced brief and copies of medical 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.-

¹ The AAO finds that the applicant committed fraud in obtaining each nonimmigrant visa at the U.S. Consulate abroad referenced in this decision by failing to reveal his prior residence and employment in the United States as well as his removal from the United States. He also obtained admission to the United States by fraud each time he presented a nonimmigrant visa that was fraudulently obtained.

- (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.

Counsel contends that the district director's decision was incorrect as a matter of law and discretion in that the applicant's favorable factors appeared not to have been considered. Counsel contends that the district director considered only the applicant's marital relationship to a U.S. citizen.

The record reflects that, on October 1, 2005, the applicant married [REDACTED] a U.S. citizen by birth. It appears that the applicant and [REDACTED] do not have any children separately or together. The applicant and [REDACTED] are in their 40s.

Counsel states that the Form I-130 has been approved and the parties have now been married for four years. Counsel states that the applicant has resided in the United States for over ten years, has no criminal record, has been gainfully employed and has paid all his U.S. and State income taxes. Counsel states that the removal took place over eleven years ago. Counsel states that the applicant's spouse is disabled, and is at least partially dependent on the applicant for her care and support.

[REDACTED], in an affidavit dated December 23, 2009, states that she has been married to the applicant since October 1, 2005 and they have resided together as husband and wife since that time. She states that it would be a hardship on her if the applicant was forced to leave the United States. She states that she is in extremely poor health and suffering from a number of illnesses which require continuous medical supervision and treatment. She states that she suffers from epilepsy,

multiple sclerosis and fibromyalgia, as well as nerve damage to her spinal cord. She states that she is partially wheelchair-bound and is unable to walk except with the assistance of a walker. She states that since 2000 she has had surgery every year and her most recent surgery was in June of 2009 to mend the bones in her neck which were causing paralysis. She states that she is dependent upon the applicant for care and support. She states that she has been unable to work since 2008 and the applicant is the sole source of financial support for the family. She states that she needs the applicant's assistance to accomplish even the basic activities of her life and if she loses his presence and help it would be devastating. She states that she has no children and the applicant and her live together in their home. She states that her parents reside in the United States but they are elderly and unable to assist her. She states that she has no one else to provide the care and assistance that she receives from the applicant. She states that it would cause her untold suffering if the applicant was forced to leave the United States. She states that their family life would be disrupted as it would be impossible for her to accompany him to his country. She states that her medical condition makes it impossible for her to travel and even if she were to travel to the applicant's country it would be impossible for her to obtain the medical care and services that she needs and receives in the United States. She states that she has never resided outside the United States and does not speak Spanish. She states that the crime situation in Mexico is also very frightening as the drug war is causing increased violence and murders. She states that she would fear for her safety if she was forced to relocate to Mexico to accompany the applicant.

A letter from [REDACTED], dated January 4 2010, states that [REDACTED] is a female under her care with a patient active problem list with diagnoses: esophageal reflux; routine medical exam - adult; gen convul epi w/o mentn intract; lump or mass in breast; diarrhea nos; bipolar disorder nos; low back pain(lumbago); nausea with vomiting; abdominal pain unspec site; cervicalgia. [REDACTED] states that it is in [REDACTED] best interests to have a stable home situation including keeping her husband in the country. The AAO notes that the diagnoses listed by [REDACTED] do not indicate that the applicant actually suffers from these illnesses or that she has received or continued to receive treatment for these diagnoses. [REDACTED] does not indicate the prognosis or treatment required for any current conditions from which [REDACTED] suffers.

Medical documentation, dated June 5, 2009, indicates that [REDACTED] has epilepsy, a hernia problem, hysterectomy, and ectopic pregnancy in her medical history. The documentation indicates that the applicant was scheduled for surgery in the neck area. Medical documentation, dated June 29, 2009, indicates that [REDACTED] surgery was canceled and rescheduled due to the unavailability of neuro monitoring for the surgery.

Medical documentation, dated June 30, 2009, indicates that [REDACTED] underwent a successful operation with no complications. Medical documentation, dated July 1, 2009, indicates that the wound from surgery was healing nicely with no signs of infection and that [REDACTED]'s strength is improved in the arms and legs, she is able to ambulate, the drain is removed and a new sterile dressing was applied. The AAO notes that [REDACTED] was present with a "caregiver" and not her husband in regard to help with instructions. Medical documentation, dated July 9, 2009, indicates that [REDACTED] appeared for a second postoperative visit. It indicates that she reported increased strength in her right arm but was concerned with a decrease in strength in her left arm. It indicates that she reported that she still falls and is still very unsteady on her feet and is doing some minimal strengthening exercises at home. It states that the cervical incision was healing well with no signs of infection, erythema or drainage. It states that the strength in [REDACTED] right arm is improving.

Medical documentation, dated July 10, 2009, indicates that [REDACTED] strength is improving in the four extremities with decreased cervical range of motion. It notes that activity modifications and precautions were discussed and [REDACTED] had an upcoming abdominal surgery in Albany. Medical documentation, dated September 2, 2009, indicates that [REDACTED] did not have abdominal surgery as it apparently was not required. It states that [REDACTED] reported some increased neck pain recently but otherwise has been okay. It states that [REDACTED] reported she has been walking with a walker and getting out of the house quite a bit. It states that [REDACTED] strength is stable and unchanged from previous in four extremities. It notes that [REDACTED] was to start cervical physical therapy with a follow-up in six months.

The AAO notes that while the medical documentation indicates that the applicant's spouse has undergone surgery in relation to her spine and epilepsy is part of her medical history, the documentation does not indicate that she has multiple sclerosis and fibromyalgia. The AAO notes that the documentation in the record indicates that the applicant was progressing well after her surgery and was scheduled to begin physical therapy that would increase her range of motion and strength. The AAO finds that the documentation does not establish that the applicant's spouse is unable to receive appropriate treatment in the absence of the applicant or unable to receive appropriate treatment in Mexico. 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)). 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).

Financial documentation in the record indicates that [REDACTED] receives Social Security benefits to supplement her income. Financial documentation also reflects that the applicant has previously been employed in the area of child care and as a personal care attendant.

The record reflects that the applicant has been employed in the United States since 1997. The record reflects that the applicant filed joint taxes from 2005 through 2008. The AAO notes that, while the applicant was admitted as a temporary worker, he was not authorized to work since that authorization was obtained fraudulently. The applicant was issued employment authorization from September 16, 2006 until September 15, 2007; November 8, 2007 until November 7, 2008; January 5, 2009 until January 4, 2010; and July 30, 2010 until July 29, 2011.

The applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for obtaining visas and admission into the United States on three occasions by fraud. As such, the applicant requires a waiver pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). The applicant failed to concurrently file the Form I-601 with the Form I-485 and Form I-212; however, the applicant has filed a Form I-601 and it is currently pending.

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; the filing of joint tax returns; and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage and 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 unfavorable factors in this case include the applicant's original unlawful entry into the United States; his fraudulent obtainment of a temporary worker visa in 1999; his fraudulent reentry into the United States utilizing the fraudulently obtained temporary worker visa in 1999; his inadmissibility under section 212(a)(6)(C)(i) of the Act; his fraudulent obtainment of a second temporary worker visa in 2000; his second fraudulent reentry into the United States utilizing the fraudulently obtained temporary worker visa in 2000; his fraudulent obtainment of a third temporary worker visa in 2001; his third fraudulent reentry into the United States utilizing the fraudulently obtained temporary worker visa in 2001; his unauthorized and unlawful presence in the United States; and his unauthorized employment in the United States except for periods of 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.