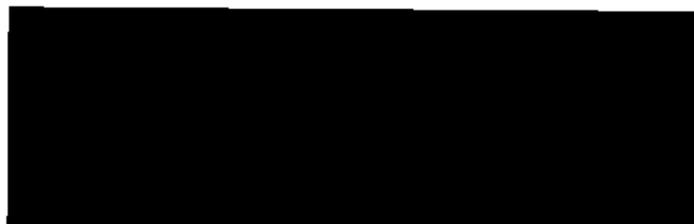


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
PUBLIC COPY



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



H4

DATE: OFFICE: ROME, ITALY

FILE:

OCT 21 2011

IN RE: APPLICANT:

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, Rome, Italy, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). A subsequent appeal was dismissed by the Administrative Appeals Office (AAO), and is now before the AAO on a motion to reopen and / or a motion to reconsider. The motion to reopen will be granted, and the AAO's April 29, 2009 decision dismissing the appeal will be affirmed. The application remains denied.

The applicant is a native and citizen of the People's Democratic Republic of Algeria who was ordered removed from the United States on March 21, 2003. The applicant left the United States on April 14, 2004. The applicant was found to be 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 and children.

The Acting Chief, Administrative Appeals Office, concluded because the applicant remained inadmissible to the United States under section 212(a)(9)(B)(II) of the Act, no purpose would be served in granting permission to reapply for admission and thus dismissed the appeal. See *Decision of Acting Chief* dated April 29, 2009.

On the motion to reopen and / or reconsider, counsel reiterates the factual history of the present case, the factors contributing to a finding of extreme hardship, as well as the previously presented positive equities in support of a favorable exercise of discretion. *Brief in support of appeal*, May 27, 2009. Counsel indicates the applicant's spouse "continues to live alone with the two minor children in public housing, totally dependent upon welfare and food stamps." *Id.* The spouse, counsel adds, has experienced depression, migraines, and severe disabling back pain. As a result, counsel explains the applicant's spouse has been approached by child protective services, and she is struggling with physical therapy and doctor's appointments. *Id.* The applicant also submits affidavits from himself and his spouse as evidence of reformation, as well as an updated letter from his former employer. See *affidavits and letter*.

The record includes, but is not limited to, briefs in support of the motions and appeals, the above-mentioned documents, letters from physicians, family, friends, U.S. State Department reports on Algeria, another affidavit from the applicant's spouse, another letter from the applicant's former employer, a letter from the shelter where the applicant's spouse resided, previous applications and petitions, records of proceedings on his criminal history, police reports, and records of immigration proceedings before the Executive Office for Immigration Review as well as the First Circuit Court of Appeals. The entire record was reviewed and considered in rendering a decision on the motion to reopen / motion to reconsider.

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 has consented to the alien's reapplying for admission.

The record indicates that the applicant entered the United States as a stowaway in April of 1995. He married his former spouse, [REDACTED] on [REDACTED]. On September 25, 1997 the applicant's former spouse filed a Form I-130, Petition for Alien Relative, on behalf of the applicant. That same date, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status. The record further reflects on October 6, 1998, the former spouse withdrew the I-130 Petition, stating her withdrawal was "because of the fact our marriage was terminated on grounds of abuse." *Notice of Withdrawal of Alien Relative Petition*, October 6, 1998. During that time, the former spouse reported an incident between her and the applicant to the police, which resulted in a restraining order and formal charges being brought against the applicant on [REDACTED]. The applicant pled guilty to charges of assault and battery as well as threatening to commit a crime. *Record of conviction*. The applicant pled guilty, and was in fact found guilty and convicted as charged on [REDACTED]. The applicant filed a motion to revise and revoke these convictions with the state court. The Judge allowed the motion, ordering charge "A revised to 364 days in the House of Corrections suspended for a period of 364 days. Count B revised to 6 months [in the] House of Corrections suspended for a period of 6 months. Sentence on Count B to run from + After sentence on Count A." [REDACTED]

[REDACTED] The record does not indicate that the state court allowed replacement of the guilty plea with a Continued Without a Finding Plea. *Id.* Thus, although the sentences were revised, the applicant remains convicted of these crimes.

After the applicant was convicted, but before the sentences were revised, the former Immigration and Naturalization Service (INS) learned the applicant had entered the United States as a stowaway, but charged him on the Notice to Appear as an alien who entered without inspection. *See Notice to Appear*, March 12, 1999. On May 26, 1999 the applicant applied defensively for asylum and also requested voluntary departure. On October 22, 1999, an immigration judge found the applicant was ineligible for asylum, withholding of removal, or relief under the U.N. Convention Against Torture. The Immigration Judge also denied the applicant's request for voluntary departure, stating the applicant "entered the United States in violation of the law, made no attempt to legalize his status until he was married to a United States citizen, terrorized his United States citizen spouse, and has been convicted of an extremely serious offense, involving violence against his United States citizen spouse... at this time, the respondent cannot convince me that he is a person of good moral character for the last five years, as required in the Immigration and Nationality Act, Section 240(b)(1)(B)." *Oral decision of immigration judge*, October 22, 1998.

The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA), who affirmed the immigration judge's decision in an opinion dated March 21, 2003. Therein, the BIA further found the asylum application was barred because it was not filed within a year of his arrival in the United States, and the applicant failed to show any extraordinary circumstances such that the application could be considered despite the untimeliness. *BIA decision*, March 21, 2003, *citing* INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B). Moreover, the BIA noted even had the applicant established he was statutorily eligible for asylum, his convictions warranted a discretionary denial of the asylum application. *BIA decision*, March 21, 2003, *citing Matter of Jean*, 23 I&N Dec. 373, 385 (A.G. 2002). The BIA also denied the motion to remand for consideration of the application for adjustment of status. *Id.* The BIA explained the applicant admitted he was a stowaway on board a freight vessel, and was therefore inadmissible to the United States pursuant to section 212(a)(6)(D). *Id.* The BIA's decision was the applicant's final order of removal. INA § 101(a)(47), 8 U.S.C. § 1101(a)(47).

The applicant then filed a petition for review of removal as well as a motion for a stay of removal with the First Circuit Court of Appeals (First Circuit), which were both denied on July 29, 2003. Thereafter, a warrant of removal was issued on September 4, 2003. The applicant filed a second motion for a stay of removal. However, he was notified twice by the First Circuit that if he failed to file a brief by December 9, 2003, his appeal would be dismissed. The applicant did not file a timely brief, and the appeal was dismissed on January 12, 2004. The applicant was removed from the United States on April 14, 2004. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

As new hardship with respect to the applicant's spouse, counsel contends the spouse was hospitalized for a week for left lumbar radiculopathy. *Id.* In support, the applicant submits a letter from [REDACTED]. Therein, [REDACTED] confirms:

██████████ was recently hospitalized from 4/24/09 – 4/30/09 for left lumbar radiculopathy. She is currently suffering from low back pain and migraines, which has been challenging for her as she has two children to take care of as well. She expresses that she needs the support of her husband, who has been deported, to help with the caregiving. Currently, she is being treated with medications and physical therapy, and she is also being followed by an orthopedic specialist and neurologist.

*Letter from ██████████* May 20, 2009. Moreover, the applicant's spouse indicates when she was in the hospital, a "case manager told [her] that the Department of Social Services representative had told them that they were thinking of taking [her] children away from [her]. [She] was relying upon neighbors and people close to [her] in ██████████ to [take] care of the kids... But now, [she] fear[s] even more any sickness which might put [her] in the hospital. [They] are very vulnerable... The Department did not take them from [her] but they understandably are concerned." *Affidavit of applicant's spouse*, May 22, 2009. The applicant submits letters from ██████████ and ██████████, two people who helped her during and after the hospital stay. ██████████ explains he and ██████████ helped take care of the spouse's children while she was in the hospital, and that he helps out with chores. *Letter from ██████████* May 21, 2009. He further reports the spouse "has very active children and she simply does not have the physical energy to keep up with them... I do hope she and her husband can be united. She is depressed and needs help." *Id.* ██████████ confirms she picked up the children and took care of them while the applicant's spouse was in the hospital, and states "her pain is so severe that she can't even walk up stairs or take a shower. She calls me and tells me about how terrible her migraines are." *Letter from ██████████* May 22, 2009.

Counsel explains the applicant's spouse "continues to live alone with the two minor children in public housing, totally dependent upon welfare and food stamps." *Brief in support of appeal*, May 27, 2009. The applicant's verifies she has not been able to find work, and is completely dependent upon "public housing... monthly food stamps in the [amount] of \$485.00 and cash in the amount of \$428.00 from the ██████████ Department of Transitional Assistance." *Id.*

The applicant has submitted evidence of his spouse's new medical conditions and the difficulties arising from these conditions, as well as assertions of continued financial hardship. The AAO finds that the evidence submitted with the motion to reopen / motion to reconsider establishes the applicant's spouse experiences cumulatively more hardship than was previously evident in the record. Based upon the newly submitted evidence as well as the evidence previously on record, the AAO affirms the finding of extreme hardship to the applicant's spouse upon relocation to Algeria as well as separation from the applicant.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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.

The AAO notes that the Field Office Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) as well as the applicant's I-601 Waiver of Grounds of Inadmissibility (Form I-601). The AAO upheld both decisions on April 29, 2009, and affirmed its own April 29, 2009 decision denying the Form I-601 pursuant to a motion to reopen / reconsider. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the

application. As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act no purpose would be served in granting the applicant's Form I-212. Accordingly, although the motion to reopen is granted, the AAO's prior decision is affirmed. The application remains denied.

**ORDER:** The motion to reopen is granted, and the AAO's prior decision is affirmed.