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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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U.S. Citizenship  
and Immigration  
Services

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Date: **JAN 20 2012**

Office: SAN FRANCISCO, CA

File:



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.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, San Francisco, California, 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 Nicaragua who, on November 23, 2003, was placed into removal proceedings after she entered the United States without inspection on the same day. The applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) in proceedings. On July 10, 2006, the immigration judge denied the applicant's applications for asylum and withholding of removal and ordered her removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On September 7, 2007, the BIA dismissed the applicant's appeal. The applicant filed a petition for review with the U.S. Ninth Circuit Court of Appeals (Ninth Circuit). On November 28, 2007, the applicant married her U.S. citizen spouse in Redwood City, California. On February 13, 2008, 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 December 11, 2008. On January 5, 2010, the Ninth Circuit dismissed the applicant's petition for review.

On March 1, 2010, the applicant filed the Form I-212, indicating that she resided in the United States. The applicant is inadmissible under 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 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 December 27, 2010.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated February 18, 2011. In support of his contentions, counsel submits the referenced brief, a statement from the applicant's spouse and medical, financial and psychological documentation. The entire record was reviewed in rendering a decision in this case.

On September 8, 2011, the AAO issued a request for further evidence since the record indicated that the applicant had departed the United States on December 20, 2009 and the Form I-212 indicated that she was residing in the United States. On November 4, 2011, the applicant submitted statements from multiple individuals, financial records and copies of identity and immigration documents to establish that she had departed the United States on December 20, 2009 and has not since reentered the United States.

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 applicant's spouse is a U.S. citizen by birth. The record reflects that the applicant and her spouse do not have any children together. The record reflects that the applicant is in her twenties and her spouse is in his forties.

On appeal, counsel contends that the applicant's spouse is suffering from physical and mental health problems which are aggravated by the applicant's departure. He states that the applicant's duties as cook helped to monitor her spouse's food intake and he has now gained weight due to her absence, which has elevated his glucose and lipid levels. He states that the applicant's spouse is considered pre-diabetic. He contends that financial hardship has also created a serious issue because the applicant's spouse must support her in Nicaragua since the applicant is unemployed. He states that the applicant's spouse has had to withdraw substantial funds from his retirement plan for this financial support and in association with legal fees. He states that the applicant is not covered by her spouse's medical insurance while she is in Nicaragua and any medical expenses will be out-of-pocket. He states that the applicant's spouse is suffering from depression and excessive irritability which he cannot control.

Counsel states that the applicant's spouse is unfamiliar with Nicaragua and moving to Nicaragua would not be a solution. He states that, in 2009, unemployment was at 8.2% and underemployment was 46.5% with per capita income at \$2,900 in 2010. He contends that, at age 40, the applicant's spouse would be competing for employment with a population whose median age is 22.5. Counsel contends that it is difficult to see how the applicant's spouse would be able to obtain health care for

his ongoing issues even if he were to obtain employment. He states that if the applicant's spouse moved to Nicaragua he would have to sell his house at a loss.

The applicant, in her statement, dated December 17, 2009, states that her husband has been diagnosed as pre-diabetic. She states that she has been with her husband for five years but that his diet did not change until she moved into his house in December 2007. She states that she was able to control his diet and her husband was able to lose over 30 pounds. She states that if she cannot return to the United States she is worried that her husband will return to his old dietary habits. She states that if her husband joined her in Nicaragua she fears that his food choices would be limited and he would eat the greasy high cholesterol foods that Nicaraguans eat on a daily basis. She states that her husband previously lived a reckless life and had problems with alcoholism and finances. She states that they wish to start a family together. She states that her spouse was able to purchase a home due to her assistance with the finances. She states that if she is unable to return to the United States she fears that her husband will return to his reckless life. She states that if she is able to return to the United States she would like to continue her education. She states that she has earned sufficient credits to receive a certificate for pre-school teacher assistance and that her goal is to become a pre-school teacher and open a daycare. She states that she volunteered at a friend's daycare while she resided in the United States. She states that she needs to return to the United States to be the rock in her husband's life and to help him with his pre-diabetic condition.

The applicant's spouse, in his statement, dated December 17, 2009, indicates that moving to Nicaragua is not an option for him because of his family, profession, safety and health concerns. He states that the applicant has not been a drain on U.S. resources and that together they add to the economy and American society. He states that he met the applicant in July 2004 through his mother. He states that they moved in together on December 15, 2007. He states that he has been working in the legal field since he attended college and works as a paralegal. He states that the profession of paralegal is one that mainly exists in the United States, Canada and the United Kingdom and that he would be unable to work as a paralegal in Nicaragua. He states that he hopes to continue the career in which he has flourished and that he would be unable of achieving a comparable position in Nicaragua. He states that Nicaragua is the second poorest country in the Western Hemisphere and his employment options would be slim. He states that if he were to move to Nicaragua he would lose his salary and benefits, such as money for retirement and social security benefits. He states that he was recently diagnosed as pre-diabetic, which means if he is unable to control his diet he will develop diabetes and have to take medication. He states that his father suffered from diabetes and passed away in 2007. He states that, due to his family history, he is at greater risk of developing diabetes. He states that the applicant has been instrumental in assisting him in changing his diet and losing 25 pounds. He states that the diet in Nicaragua consists of a lot of red meat and food cooked in vegetable oil. He states that his mother's family has a history of depression. He states that he has become an emotional wreck since the applicant's problems with immigration. He states that he has been having trouble sleeping and is so concerned over his wife that he is a complete mess. He states that he realizes that he is exhibiting early signs of depression and he hopes that this will not develop further. He states that his entire maternal family resides in the United States and that the responsibility of caring for his mother falls to him. He states that his mother has become too "Americanized" to live in a foreign country at her age. He states that the possibility of leaving his family and country behind really scares him. He states that he is also concerned for his safety in a country in which socialist/communist ways are being implemented and he is a person who is deeply

involved in politics by reading and discussing current events. He states that not only does the U.S. Embassy warn citizens of some poor areas in Managua but also more upscale neighborhoods are not safe from crime and gang activity. He states that unemployment has risen and tensions with the U.S. government have become worse since 2007. He states that his wife escaped terrible circumstances in Nicaragua and is working hard to achieve her dreams and improve their lives in the United States. He states that the applicant wishes to become a pre-school teacher and open a daycare. He states that the applicant has shown him the value of balancing his savings and becoming fiscally responsible. He states that, with the guidance of the applicant, he was able to buy his first house. He states that he and the applicant will be positive role models to his children and for their community.

The applicant's spouse, in his statement dated February 18, 2011, indicates that his health has become worse since the applicant departed the United States and he has gained 25 pounds in the last year. He states that if the applicant is not permitted to return to the United States and he has to move to Nicaragua he will lose his health benefits and, without an income, he would be unable to pay for healthcare in Nicaragua. He states that he does not have any family members in Nicaragua and he would be leaving behind his mother who just turned seventy and will soon need care. He states that he would be unable to care for his mother in Nicaragua. He states that he and the applicant have not yet started a family because of the current situation. He states that the applicant's immigration issues have not been easy financially. He states that he had to make withdrawals from his retirement account to pay attorney's fees. He states that he has also had to send money to his wife to support her in Nicaragua. He states that he worries that he will be unable to fight his health, weight and pre-diabetic issues without the discipline and nurturing of his wife.

A letter from the applicant's mother-in-law, dated December 12, 2009, indicates that the applicant's spouse has become very emotional since he realized that the applicant was required to depart the United States and that he is exhibiting early signs of depression. She states that she has tried to help the applicant's spouse with control of his emotions but that she is also battling her own symptoms of diabetes. She states that if her son is forced to move to Nicaragua it will not be good for his health and her own. She states that the applicant's spouse is her only child and she would have to follow him to Nicaragua. She states that she is almost seventy and cannot imagine living without her son being around.

Letters from co-workers, friends and family members urge consideration of the request for permission to reapply for admission. They state that they know from experience what a separation can trigger and that the family history of depression is concerning. They state that the applicant's spouse is smitten with the applicant and that they are very much in love. They state that the applicant and her spouse hope to start a family and the applicant talks of her dreams to start a daycare and raise her own children. They state that the applicant's spouse is severely depressed about the idea of being separated from the applicant. They state that the applicant's spouse has not been sleeping and the stress is affecting him at work. They state that they fear the applicant's spouse will lose his job and neglect his health in the absence of the applicant. They state that the applicant's spouse became a changed man after meeting the applicant, no longer consuming alcohol and taking care of his health through diet and exercise. They state that the applicant's spouse supplements his mother's State medical and social security benefits. They state that the applicant's presence quiets symptoms that suggest bipolar illness and depression of her spouse. They state that the applicant's spouse has struggled with his weight since he was a teenager and that the applicant has been instrumental in

providing the support he needs to change his behaviors to healthy habits. They state that the applicant has chosen to improve her life by going to college, taking English classes and working toward a degree in child care development. They state that the applicant does not have any support system in Nicaragua. They state that the applicant has been a positive influence on her spouse in the area of financial responsibility. They state that the applicant has volunteered to work with some developmentally challenged children at a child care center while she resided in the United States. They state that the applicant is an active member of her community.

Medical documentation in the record indicates that the applicant's spouse's uncle has been treated for bipolar depression.

A letter written by [REDACTED], dated December 2, 2009, indicates that the applicant's spouse has been diagnosed with pre-diabetes and obesity. It states that weight loss and diet control is recommended for his condition. It states that the applicant's spouse has been able to achieve weight loss and improvement in his health and cites the support of the applicant as the main factor. It states that separation of the applicant and her spouse could potentially be a factor in the applicant's spouse's health if he regains weight and does not adhere to his diet plan. A lab result, dated August 26, 2009, indicates that the applicant's spouse's fasting glucose was impaired and is a form of pre-diabetes.

A letter written by [REDACTED], dated November 16, 2009, and, as indicated in a subsequent letter, based on two interviews with the applicant's spouse, indicates that the applicant's spouse reported psychological symptoms of moderate to high severity in response to the loss of a girlfriend at the age of 25 which included anxiousness, insomnia and loss of concentration. The applicant's spouse reported that he resorted to substance abuse as a means of avoidance and denial. [REDACTED] opines that the applicant's response to such a loss evidences his poor coping mechanisms and low resilience with a tendency to react with symptoms rather than adapt. He opines that an imposed separation from his wife would lead the applicant's spouse to develop psychological symptoms such as anxiety and its ramifications: insomnia, cognitive impairments (i.e. poor concentration), feelings of hopelessness and possibly a recurrence of substance abuse. He opines that the symptoms are likely to be even more severe given the degree of emotional closeness that the applicant's spouse has with his wife and that these symptoms would probably lead to longer-lasting psychological disorders, causing extreme emotional hardship. In that the report is based on two interviews in 2009, it does not reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional. As a result, [REDACTED] findings are speculative, diminishing the evaluation's value. There is also no evidence in the record to establish that the applicant's spouse has previously received treatment, has received further treatment or that he presently suffers from any illnesses or psychological problems for which he would be unable to receive appropriate treatment in the absence of the applicant or in Nicaragua.

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 U.S. Seventh 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 U.S. 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.

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 her family if she were denied admission to the United States, the absence of a criminal record and the approved immigrant visa petition filed on her behalf. The applicant's marriage and the filing of the immigrant visa petition benefiting her 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.

The applicant's unlawful entry into the United States 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 she 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.<sup>1</sup>

**ORDER:** The appeal is sustained and the application approved.

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<sup>1</sup> The AAO notes that, if it is later found that the applicant illegally reentered the United States *at any time* after her 2009 departure, she 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 she is ineligible for permission to reapply for admission until she 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).