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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

FIL[redacted] Office: ATHENS, GREECE Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (I-212 application) was denied by the Officer in Charge, Athens, Greece. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Turkey who was admitted to the United States (U.S.) as a nonimmigrant visitor on January 5, 1990. The applicant remained in the U.S. longer than authorized. A Notice to Appear was served on the applicant on September 15, 1998. He married a U.S. citizen on October 20, 1998. On November 3, 1998, an immigration judge ordered the applicant removed from the United States. He became the beneficiary of an approved Petition for Alien Relative on September 18, 2000. The applicant departed the United States on June 25, 2001.

The applicant was found to be inadmissible to the United States by a consular officer under sections 212(a)(9) of the Immigration and Nationality Act (the Act), § 1182(a)(9), for having been unlawfully present in the U.S. for an aggregate period of one year or more and for having been deported from the United States. The applicant seeks permission to reapply admission into the U.S. after deportation or removal (I-212 application) and subsequently he seeks a waiver of inadmissibility (I-601 application), in order to reside in the U.S. with his wife and family.

The officer in charge (OIC) states in his decision, dated June 25, 2002, that the applicant's I-212 application was denied by the Immigration and Naturalization Service, ("Service", now the Bureau of Citizenship and Immigration Services, "Bureau"). However, the OIC decision contains no analysis or discussion regarding the favorable and unfavorable factors in the applicant's I-212 case. Nor is there any discussion or analysis as to how the factors were balanced or weighed.

On appeal, counsel asserts that the OIC improperly adjudicated the applicant's I-212 application, and that the OIC erred in not considering legal precedent and hardship to the applicant's wife and children in its decision.

On appeal, counsel requests oral argument. 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. The Bureau has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9) states in pertinent part:

> (9) Aliens Previously Removed.-
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> (A) Certain aliens previously removed.-
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> (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 5 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
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> (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 Attorney General has consented to the alien's reapplying for admission.

Section 212.7 of the Bureau Operational Instructions (O.I.) specifies that when an alien requires both permission to reapply for admission (I-212 application) and a waiver of grounds of inadmissibility (I-601 application), the I-212 application must be **adjudicated** first. (Emphasis added). If the I-212 application is denied, the I-601 application

should be rejected, and the fee for filing the I-601 application should be refunded.

Approval of an I-212 application requires that the favorable aspects of an applicant's case outweigh the unfavorable aspects.

> In determining whether the consent required by statute should be granted, all pertinent circumstances relating to the applicant which are set forth in the record of proceedings are considered. These include but are not limited to the basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitation, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

Matter of Tin, 14 I&N Dec. 373-74 (Comm. 1973).

The Seventh Circuit Court of Appeals held in *Garcia-Lopez v. INS,* 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered.

Moreover, in *Matter of Martinez-Torres,* 10 I&N Dec. 776 (BIA 1964), the BIA held that in the case of an applicant who is **mandatorily** inadmissible to the U.S. "no purpose would be served in granting [the] application for permission to reapply for admission into the United States." A district director's action in denying an I-212 application as a matter of administrative discretion was thus found to be proper.

The present case differs from *Martinez-Torres* in that the grounds of inadmissibility in the applicant's case allow for a waiver of inadmissibility and do not render the applicant **statutorily or mandatorily** inadmissible from the United States. The director's decision to adjudicate the applicant's I-601 application without first adjudicating and granting the applicant's I-212 application was thus erroneous.

It is noted that the factors considered in an I-212 application adjudication involve the weighing and balancing of favorable and unfavorable factors. This is very different from the method by which "extreme hardship" to a qualifying relative is assessed for I-601 adjudication purposes, and normally, a case such as this would be

remanded to the OIC for proper adjudication of the I-212 application. In the present case, however, the AAO notes that the record presented on appeal clearly contains all of the evidence and information pertaining to the I-212 application. Moreover, counsel's appeal brief specifically addresses the applicant's I-212 application and its merits. As such, the AAO will review the evidence as set forth in the record and on appeal, in order to determine whether the OIC's denial of the applicant's I-212 application was proper.

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 an I-212 application for permission to reapply after deportation:

> The basis of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to the alien and others if the applicant were not allowed to return to the U.S.; and the need for the applicant's services in the United States.

The unfavorable factors for consideration in this case are that the applicant overstayed his non-immigrant visitor visa, that he resided and worked illegally in the U.S. for more than 5 years and that he was ordered deported on November 3, 1998.

The favorable factors for consideration in this case are that:

The applicant married a United States citizen (Mrs. Ozturk) on October 20, 1998, and he is the beneficiary of an approved I-130 Petition for Alien Relative, filed on May 12, 1999;

The applicant has a U.S. citizen son, born April 8, 2001, and he has three stepdaughters, ages 9 years, 16 years, and 18 years;

Mrs. [redacted] has sought psychological counseling due to the applicant's deportation, and she has been prescribed anti-depressant medicine. It is noted that the record contained no other evidence regarding the frequency of counseling received or the effects of the counseling session;

The applicant's 9-year-old stepdaughter, [redacted] has been referred for psychological counseling due to apparent abandonment issues arising from the deportation of the

applicant and abandonment by her natural father. It is noted that no evidence was submitted to indicate that Carley actually received psychological counseling, or the results of any psychological counseling;

Mrs. [redacted] states that she is currently working two jobs in order to support herself and her family financially. Based on statements in the record, the applicant is unemployed in Turkey and lives with his parents. It is noted that no independent evidence regarding either the applicant's or Mrs. [redacted] employment or financial situation was submitted.

The record contains evidence that Mrs. [redacted] home was destroyed by fire in January 2003, leaving Mrs. [redacted] and her children homeless. It is unclear how long the family remained homeless.

It is noted that all of the favorable factors listed above occurred after the applicant was placed into deportation proceedings in 1998. As a result, they cannot be given full weight. *See Garcia-Lopez v. INS, supra.*

The AAO finds that despite the diminished weight given to the favorable factors in this case, the applicant has established that the favorable factors (his bona fide marriage to a U.S. citizen; the fact that once he was ordered deported, he complied with immigration procedures of requesting stays of deportation; his own departure from the U.S. when he was no longer granted a stay of deportation; the fact that he has committed no other immigration or criminal violations; and the financial and emotional responsibilities he has to his wife and children) outweigh the unfavorable factors (unlawful presence for more than 5 years and a deportation order). The applicant's I-212 application should therefore be granted.

Because the AAO has determined that the applicant's I-212 application should be granted, the AAO must next determine whether the applicant has established that his I-601 Waiver of Inadmissibility application should be granted.

In his decision, the OIC found that the applicant married his U.S. citizen wife and had a U.S. citizen child after he was placed into deportation proceedings, and that his entire relationship with his family was established while he was under an order of deportation.

On appeal, counsel fails to discuss "extreme hardship" elements of the applicant's case. Counsel asserts instead that once an I-212 application is granted, the applicant can automatically be granted an immigrant visa. Counsel's assertion is erroneous, as discussed above, and despite the grant of the applicant's I-212 application, it is clear that

the applicant must also establish that a qualifying relative will suffer "extreme hardship" if he is not permitted to return to the United States.

Section 212(a)(9)(B)(v) of the Act provides that:

> (v) Waiver. - The Attorney General [Secretary] has sole discretion to waive clause [212(a)(9)(B)](i) in the case of an immigrant who is the **spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence,** if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

It is noted that although the applicant asserts that his children will suffer extreme emotional and financial hardship if he is not allowed to return to the U.S., based on section 212(a)(9)(B)(v) of the Act, only hardship to the applicant's wife can be considered for waiver of inadmissibility purposes in the applicant's case.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (Board) provided a list of factors it deemed to be relevant in determining whether an alien had established extreme hardship for purposes of a waiver of inadmissibility. These factors included the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The BIA noted in *Cervantes-Gonzalez,* that the alien's wife knew that he was in deportation proceedings at the time they were married. The BIA stated that this factor went to the wife's expectations at the time they wed because she was aware she might have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. The BIA found this to undermine the alien's argument that his wife would suffer extreme hardship if he were deported. *Id.*

In the present case, the record indicates that Mrs. [redacted] was aware that the applicant was in deportation proceedings

at the time that she married him. Thus, based on the reasoning set forth in *Cervantes-Gonzalez,* Mrs. [redacted] claim of extreme hardship is significantly undermined by her prior knowledge of the applicant's inadmissibility to United States. Moreover, as noted above, less weight is given to equities acquired after a deportation order has been entered. *See Garcia-Lopez v. INS, supra.*

The record contains letters indicating that Mrs. [redacted] is depressed and that she required psychological counseling and anti-depressant medication due to her husband's deportation. The applicant's wife also asserts that she must work two jobs in order to support her children and meet her financial obligations. In addition, Mrs. [redacted] asserts that in January 2003, her home was destroyed by fire, and that as a result she became homeless and in even greater need of the applicant's emotional and financial support.

The record contains no evidence or information indicating that Mrs. [redacted] would move to Turkey to be with her husband. The record additionally contains no assertions or evidence that Mrs. [redacted] would suffer extreme hardship if she moved to Turkey.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The court then reemphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that his U.S. citizen spouse would suffer extreme hardship beyond that normally experienced upon exclusion or deportation.

The medical letter contained in the record has limited probative value. The letter fails to discuss ongoing visits or treatment plans for Mrs. [redacted] and it provides no information about how the conclusions were reached. Moreover, the letter fails to establish what the author's professional qualifications are, or that the author is qualified to make an expert opinion regarding Mrs. [redacted]

mental health. *See October 10, 2002 letter by Grace A. Pesikey, LCSW, CADC.* It is further noted that no independent or detailed evidence was submitted to establish the exact nature of Mrs. [redacted] employment situation or to establish her financial obligations. Although the record contains evidence that the applicant's home was destroyed by fire and that she was authorized shelter by the American Red Cross for 7 days between January 19, 2003 and January 26, 2003, the record contains no information or evidence regarding whether the former home was owned or rented by Mrs. [redacted] whether she had insurance to cover the damages, or her financial ability to obtain alternative housing.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.