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U.S. Citizenship
and Immigration
Services

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DEC 30 2004

FILE: [REDACTED] Office: MADRID, SPAIN 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)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Assistant Officer in Charge, Madrid, Spain and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of [REDACTED] who was admitted into the United States on August 5, 2001, as a non-immigrant visitor under the Visa Waiver Pilot Program (VWPP) by presenting a fraudulent French passport. The applicant was authorized to stay until November 3, 2001. On January 13, 2003, he was found removable under section 237(a)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(1)(B) for having remained in the United States longer than permitted. On March 8, 2003, he was removed to Algeria pursuant to section 235(b)(1) of the Act. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). He married a U.S. citizen on October 6, 2001, and is the beneficiary of an approved Petition for Alien Relative (Form I-130) and an approved petition for a K-3 nonimmigrant visa filed on Form I-129F as the spouse of a U.S. citizen. The applicant 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 travel to the United States to reside with his U.S. citizen spouse.

The Assistant Officer in Charge determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Assistant Officer in Charge's Decision* dated May 14, 2004.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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.

.....

(iii) Exception. - Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief, affidavits from the applicant, his spouse, family and friends. In the brief counsel states that the Service failed to consider the equities weighing in favor of the applicant. Counsel

states that the applicant has resided in the United States for about 2 years, has a U.S. citizen spouse, has no criminal record and is a person of good moral character. In addition counsel states that the Service erred in finding that the applicant failed to pay federal income tax on earnings. Counsel states that the applicant was helping out his in-laws with farm chores for which he never received any monetary benefits.

The affidavits submitted by the applicant, his spouse, family and friends address the applicant's character and the hardship his spouse would suffer if he were not permitted to enter the United States. In addition the applicant and his spouse state that it would be difficult for her to relocate with him because her immediate family members reside in the United States and because of the overall country conditions in Algeria.

There are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represent the type of inconvenience and hardship experienced by the families of most aliens being deported. See *Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied.

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 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 if the applicant were not allowed to return to the U.S.

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 favorable factors in this matter are the applicant's family tie to a U.S. citizen, his spouse, the approval of a petition for alien relative, the absence of any criminal record and the favorable recommendations from family and friends.

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The unfavorable factors in this matter include the applicant's admission into the United States by fraud and willful misrepresentation of a material fact, his overstay of his authorized period of stay and his lengthy presence in the United States without authorization. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she 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.