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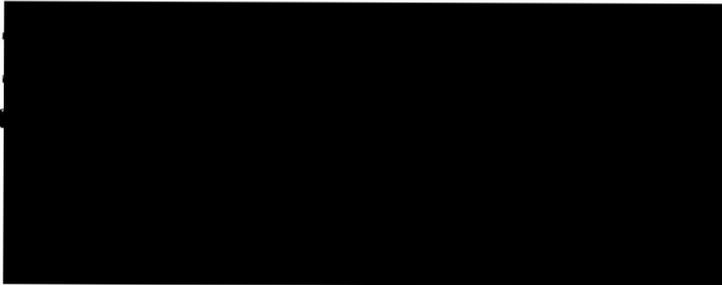
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUL 18 2006

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:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Acting Director, Nebraska Service Center, and 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 Romania who was admitted into the United States as a non-immigrant visitor for pleasure on December 20, 1991, with an authorized period of stay until June 19, 1992. On February 10, 1992, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On April 9, 1998, the applicant was interviewed for asylum status. His application was referred to the immigration court and a Notice to Appear (NTA) for a hearing before an immigration judge was issued on April 13, 1998. On December 19, 2001, an immigration judge found the applicant removable pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act (the Act), for having remained in the United States longer than permitted and granted him voluntary departure until April 18, 2002, in lieu of removal. On January 18, 2002, the applicant filed a Motion to Reopen (MTR), which was denied by the immigration judge on March 1, 2002. An appeal of the immigration judge's decision filed with the Board of Immigration Appeals (BIA) was dismissed on May 19, 2003. The applicant failed to surrender for removal or depart from the United States and a Warrant of Removal/Deportation (Form I-205) was issued on August 14, 2003. On August 26, 2003, the applicant appeared at a CIS office requesting reinstatement of his voluntary departure order. His request was denied and the applicant departed the United States on September 15, 2003, executing the immigration judge's removal order. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of 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 travel to the United States to reside with his U.S. citizen spouse.

The Acting Director determined that the applicant was inadmissible under section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), as an alien unlawfully present after previous immigration violations. In addition, the Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Acting Director then denied the Form I-212 accordingly. *See Acting Director's Decision* dated April 4, 2005.

Section 212(a)(9)(C) of the Act states in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general. -Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

The AAO finds that the Acting Director erred in finding that the applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act. The applicant did not have “unlawful” presence after April 1, 1997, because at the time of the director’s decision he had not departed the United States and then reenter or attempt to reenter the United States, which is necessary find unlawful presence under section 212(a)(9)(C)(i)(I) of the Act. The AAO finds this error to be harmless since the Acting Director used the analysis required for a discretionary decision pursuant to section 212(a)(9)(A)(iii) of the Act.

Although the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act, he is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

. . . .

(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 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 [now Secretary, Homeland Security, “Secretary”] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (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 brief in which she states that the Acting Director abused his discretion and failed to consider the entire record presented with the Form I-212. Counsel states that the decision did not mention the basis of the applicant’s removal, his good moral character, his reformation and rehabilitation, the hardship

he and his family would suffer if he is not permitted to reenter the United States, and the need of his services in the United States. Counsel further states that the applicant has not shown a complete disregard for immigration law as stated in the decision. The applicant was legally admitted into the United States, filed an application for asylum, was issued employment authorization, filed timely appeals and appeared two weeks prior to the designated removal date in possession of tickets in order to depart the United States. In addition, counsel states that the applicant was never arrested and did not abscond from the Immigration and Customs Enforcement's (ICE) request to appear for removal. Additionally, counsel states that the applicant provides emotional and financial support to his family, filed tax returns, is a skilled tradesman, but because of the high unemployment in Romania he will not be able to find work. Furthermore, counsel states that the applicant and his U.S. citizen spouse suffer from various medical ailments that require constant attention by a physician. Finally, counsel states that the applicant has substantial equities that warrant a favorable exercise of discretion and requests that the appeal be sustained and the Form I-212 granted.

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 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 court 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-Nunoz 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 considering discretionary weight. 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 applicant in the present matter married his U.S. citizen spouse after he was placed in removal proceedings and after his voluntary departure order had expired. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

In his decision, the Acting Director determined that the applicant had shown a complete disregard for immigration laws. In addition, the Acting Director stated that the unfavorable factors in the applicant's case included his illegal presence in the United States for a period of more than 10 years, his employment without authorization during that period, his failure to depart the United States on or prior to April 18, 2002, and his marriage to a U.S. citizen after his voluntary departure order had expired. The Acting Director concluded that these factors outweighed the fact that the applicant has family ties in the United States.

The AAO does not find that the applicant has shown a continued disregard for the laws of the United States. As noted above, the applicant was admitted in possession of a non-immigrant visa and was authorized to stay until June 19, 1992. On February 10, 1992, before the expiration of his authorized period of stay, the applicant filed a Form I-589. The applicant had the right to file a non-frivolous asylum application, and although it was subsequently denied, he was entitled to exhaust all means available to him by law in an effort to legalize his status in the United States. The AAO does not find that the applicant had been living in the U.S. illegally for over 10 years. His various applications and appeals conferred on him a status that allowed him to remain in the United States while they were pending. In addition, a search of the electronic database of CIS reflects that the applicant was issued seven Employment Authorization Cards (EAD) starting on June 23, 1992, and, therefore, the Acting Director's statement that the applicant resided and worked illegally in the United States for more than 10 years is not accurate.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse, an approved Form I-130, the prospect of general hardship to his family, the absence of any criminal record and the letters of recommendation attesting to his good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's failure to depart the United States immediately after his appeal was dismissed and his periods of unauthorized presence and employment.

While the applicant's periods of unauthorized presence and employment cannot be condoned, the AAO finds that given all of the circumstances in 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.

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