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FILE: [REDACTED] Office: VIENNA, AUSTRIA Date: OCT 25 2006

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, 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 Officer in Charge, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Hungary who was admitted into the United States as a non-immigrant visitor for pleasure on September 17, 1991, with an authorized period of stay until March 16, 1992. The applicant remained in the United States beyond her authorized period of stay and on January 3, 1995, she filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On March 30, 1995, the applicant was interviewed for asylum status. On April 3, 1995, her asylum application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an immigration judge was served on the applicant. On November 18, 1996, an immigration judge found the applicant removable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having remained in the United States longer than permitted, and granted her voluntary departure until October 18, 1997, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States on or before October 18, 1997. The applicant's failure to depart the United States on or before October 18, 1997, changed the voluntary departure order to an order of deportation. On October 23, 1997, a Warrant of Deportation (Form I-205) was issued and a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that she appear at the Los Angeles, California District Office in order to be removed from the United States. The applicant failed to surrender for deportation or depart from the United States. On May 16, 2002, an immigration judge denied the applicant's Motion to Reopen (MTR) her deportation proceedings. The record reveals that the applicant departed the United States in September 2003, and as such self-deported. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of 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 travel to the United States and reside with her U.S. citizen spouse and child.

The Officer in Charge determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Officer in Charge's Decision* dated August 24, 2004.

The AAO notes that the Notice of Denial (Form I-292) indicated "... Application for Waiver of Grounds of Excludability (I-601) be denied for the following reasons: SEE ATTACHMENTS." The application in the present matter is for permission to reapply for admission, not a waiver of inadmissibility. The AAO finds this error to be harmless since it does not affect the outcome of the decision. In the attachment and in his decision the Officer in Charge adjudicated the Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act. The I-601 waiver application was rejected based on the denial of the Form I-212.

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 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 deterring 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 in which he states that the applicant is seeking permission to reapply for admission into the United States based upon section 212(a)(9)(B)(v) of the Act and an approved Form I-130. Counsel states a waiver of section 212(a)(9)(B) of the Act may be granted if the applicant can establish that extreme hardship would be imposed on a qualifying relative. Counsel further refers to case law regarding extreme hardship in an effort to show that the applicant's spouse would suffer extreme hardship if the applicant is not permitted to enter the United States. Counsel states that the applicant's spouse is a U.S. citizen, he does not speak Hungarian and would not be able to find employment in Hungary. In addition, counsel states that because Hungary is geographically remote from the United States it would be financially unaffordable for the applicant to travel to Hungary or communicate with his spouse by telephone. Additionally, counsel states that the applicant's child does not speak or understand Hungarian and will be at a disadvantage at school. Furthermore, counsel states that upon arrival in Hungary the applicant's child developed chronic bronchitis and the cost of medical treatment for this condition in Hungary will be a tremendous financial hardship. Moreover, counsel states that the applicant's spouse has met the standard of "extreme hardship" and the applicant has demonstrated that her application merits favorable consideration. Finally, counsel requests granting the applicant a waiver of the 10-year bar pursuant to section 212(a)(9)(B)(v) of the Act.

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for a period of one year or more or her eligibility for a waiver based on her marriage to a U.S. citizen, pursuant to section 212(a)(9)(B)(v) of the Act. Those are issues related to a waiver of inadmissibility through the filing of a Form I-601. As previously noted, the applicant's Form I-601 was rejected. These proceedings are

limited to the Form I-212 and the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived. That is the only issue that will be discussed.

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. The AAO will consider the hardship to the applicant's spouse and child, but it will be just one of the determining factors.

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 (7th 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 (9th 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 (5th 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 her U.S. citizen spouse on February 5, 2001, approximately six years after deportation proceedings were initiated and over three years after her voluntary departure order became a final order of deportation. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of her being deported. She now seeks relief based on that after-acquired equity. Therefore, hardship to her spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her U.S. citizen spouse and child, an approved Form I-130, and the prospect of general hardship to her family.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after her initial lawful admission, her failure to depart the United States after she was granted voluntary departure and after her voluntary departure order became a final order of deportation, her unauthorized employment and her lengthy presence in the United States without a lawful admission or parole. 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. Her equity, marriage to a U.S. citizen, gained after she was placed in deportation proceedings, and after her voluntary departure order became a final order of deportation, can be given only minimal weight. 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 eligibility 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.