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U.S. Citizenship
and Immigration
Services

Hly

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

JAN 29 2007

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]

PUBLIC COPY

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, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of the former U.S.S.R. and citizen of Russia who was admitted into the United States as a nonimmigrant visitor for pleasure on April 9, 1990, with an authorized period of stay until October 8, 1990. On October 25, 1990, the applicant filed a Request for Asylum (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On October 14, 1997, 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 served on him on October 28, 1997. On November 6, 2000, 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 January 5, 2001, in lieu of removal. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on May 21, 2001, and he was permitted to depart from the United States voluntarily within 30 days from the date of the BIA's order. The applicant failed to surrender for removal or depart from the United States within 30 days from the date of the BIA's order. The applicant's failure to depart the United States within 30 days from the date of the BIA's order changed the voluntary departure order to an order of removal. The applicant filed a Motion to Reconsider, which was denied by the BIA on December 5, 2001. A Motion to Reopen filed with the BIA was denied on February 20, 2002. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen 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 now 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 remain in the United States and reside with his U.S. citizen spouse and stepchild.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. See *Acting Director's Decision* dated January 12, 2006.

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; (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, letters from doctors regarding the applicant's spouse's medical conditions, letter from doctors regarding the applicant's medical conditions, letters of recommendation from relatives, friends and colleagues, and copies of country conditions in Russia. Counsel states that the applicant's Form I-212 should be granted because he is married to a U.S. citizen who suffers from mitral valve prolapse, tricuspid insufficiency, fibrocystic breast disease and periodontitis. In addition, counsel states that the applicant suffers from varicosis, hypercholesterolemia, insomnia and anxiety, and that the applicant's stepchild suffers from reactive airway disease. Counsel alleges that the Acting Director did not give adequate weight to the applicant's favorable factors in the United States. Counsel states that the applicant entered the United States with a valid visa and filed a request for asylum, not because he was under deportation proceedings or in order to escape removal from the United States, but, because of a realistic fear of religious persecution. Counsel further states that the applicant remained in authorized status for practically his entire tenure in the United States and has only been in unlawful status during the three years it took CIS to render a decision on his Form I-212. Counsel further states that the applicant remained in the United States and worked without authorization because of the psychological and emotional frailty of his wife, his stepson's emotional instability during his adjustment to college, and to fulfill his financial obligations to his family. Counsel points out that the existence of medical problems for the applicant, his spouse and his stepson constitute a favorable factor for the purposes of his Form I-212 as they relate to hardship. Counsel notes that the applicant's immediate family suffers from physical and emotional illnesses, which would be exacerbated if the applicant were removed from the United States. Counsel states that the applicant's spouse suffers from major depression, anxiety and insomnia and she regularly takes antidepressant medication. According to counsel all of these diseases are potentially life threatening and require continuous monitoring and frequent medical care. Counsel also states that if the applicant's spouse relocates to Russia with him, she will be deprived of the advanced medical treatment available in the United States. Counsel further states that if the applicant is not permitted to reside in the United States his stepson will be stripped of the only father figure he has ever known, which will cause psychological stress and exacerbate his medical condition in the future. Additionally, counsel states that the applicant's in-laws are elderly people who suffer from debilitating diseases and the applicant's removal from the United States would result in additional hardship to them. Counsel states that the applicant and his family have exhibited a high level of achievement in the United States and have been productive members of society. Counsel notes the applicant's and his spouse's

education and employment, and states that they own properties in the United States and have complied with the tax laws of the United States.

Counsel further states that the Acting Director exaggerated the applicant's unfavorable factors in order to justify her denial. Counsel states that although the Acting Director's statement that the applicant overstayed his authorized period of time is technically correct, it ignores the fact that the applicant filed a Form I-589 shortly after his entry and, therefore, diminishes the negativity of his overstay. In addition, counsel states that the Acting Director's finding as an unfavorable factor the fact that he applicant did not depart on or prior January 5, 2001, to be erroneous because the applicant filed a time appeal with the BIA and, therefore, the applicant was required to depart the United States 30 days after the BIA's decision. Counsel states that the applicant did not personally receive the BIA's decision nor did his previous attorney explain the decision to him. Counsel further states that the applicant's breach of his immigration bond is a direct consequence of his failure to depart after the BIA's decision and should not have been considered as an independent negative factor. Furthermore, counsel states that the fact that he married a U.S. citizen while in removal proceedings should be given equal weight as other marriages because the applicant overcame the "presumption of fraud" by submitting sufficient evidence and confirming the bona fides of his marriage. Counsel states that at the time of his marriage the applicant had a bona fide NACARA application pending with the immigration court and his spouse had reason to believe that he would receive lawful permanent residence status from this application. Counsel also states that the applicant always kept the Service advised of his current address by informing the immigration court during his removal proceedings, and by submitting Forms I-130 and I-212 to the Vermont Service Center with the applicant's correct address. Counsel further states that the applicant entered the United States with a valid nonimmigrant visa and, therefore, the Acting Director's statement that he has a lengthy presence without a lawful admission or parole is in error. Counsel points out again that the applicant's unlawful presence occurred because it took CIS approximately three years to adjudicate his Form I-212. Finally, counsel states that the applicant has been a model participant in the American community and has struggled to achieve success and advancement for himself and his loved ones, and requests that the AAO reverse the Acting Director's decision.

On appeal, counsel also requested oral argument. The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. CIS 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.

The AAO notes that the proceeding in the present case relates to the denial of the Form I-212 and the AAO will not address the backlog or the processing time it took the Service Center to adjudicate the application. In addition, the record and CIS' electronic database reflect that the applicant was granted employment authorization for seven years of his sixteen years of presence in the United States. Therefore, counsel statements regarding the applicant's achievements through his employment cannot be given great weight since most of his employment in the United States was performed without authorization.

Counsel's statement that the applicant did not receive a copy of the BIA's decision and that his previous attorney did not explain the decision to the applicant is not persuasive. The record of proceeding does not reflect that the BIA's decision was returned as undeliverable. The regulations at 8 C.F.R. § 103.5a(b) discuss service by mail and state that service by mail is complete upon mailing. In addition, except for one statement

from counsel regarding the applicant's previous attorney not explaining the decision to the applicant, no documentary evidence was provided to substantiate this claim. It was the applicant's responsibility to keep in contact with his previous attorney in order to be kept updated on his appeal's progress

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 stepchild, but it will be just one of the determining factors.

Although the record reflects that the applicant and his spouse suffer from various medical conditions, the record contains no evidence to indicate that adequate health care and medication, for the applicant and his spouse, are unavailable in Russia. In addition, no evidence was provided to show that the applicant's spouse or stepchild cannot take care of themselves and their daily needs or that it is necessary for the applicant to be present to care for them. Counsel's statement as to the future effects the separation may cause the applicant's stepson is speculative and, therefore, will be given little weight. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 his U.S. citizen spouse on April 27, 2000, two and one half years after he was placed in removal proceedings. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of his being removed. Although the applicant's Form I-130 was approved based on the bona fides of his marriage, he now seeks relief based on that after-acquired equity. Therefore, hardship to his 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, his U.S. citizen spouse and stepchild, an approved Form I-130, the prospect of hardship to his family, the letters of recommendation and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after his initial lawful admission, his failure to depart the United States after he was granted voluntary departure and after his voluntary departure order became a final order of removal, and his periods of unauthorized employment and presence in the United States.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after he was placed in removal proceedings, 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 that the applicant 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.