

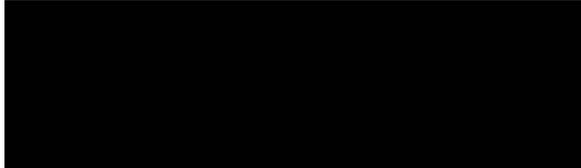
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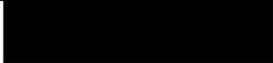
U.S. Citizenship
and Immigration
Services

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FILE:



Office: BUFFALO, NY

Date: **MAY 23 2008**

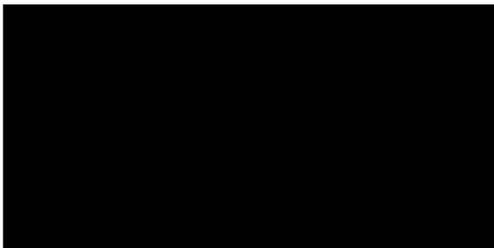
IN RE:



APPLICATION:

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

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 after removal was denied by the District Director, Buffalo, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a citizen of France who entered the United States under the visa waiver program on March 30, 2006 and was admitted until June 29, 2006. On July 1, 2006, the applicant attempted to enter Canada and was refused. She was ordered removed from the United States on July 1, 2006 for overstaying her visa waiver admission period and departed the United States on August 3, 2006. As such, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 reside in the United States.

The district director determined that the applicant had failed to establish that a favorable exercise of discretion is warranted and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). *District Director's Decision*, dated August 14, 2007.

On appeal, counsel asserts that the applicant's good moral character should not be questioned, she was illegally in the United States for only two days, she and her spouse are suffering extreme mental and emotional distress, and her spouse is facing extensive financial loss due to anxiety and distress. *Brief in Support of Appeal*, 1-3, dated September 13, 2007.

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

(A) Certain alien 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 aliens 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 [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

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.

The Regional Commissioner held in *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) 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.*

Pursuant to *Matter of Lee*, the recency of deportation will not be considered as the record does not reflect that the applicant is a person of poor moral character.

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c), waiver of deportation, discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this case include the applicant's lack of a criminal record, her good character as evidenced by numerous statements from friends, her marriage to a U.S. citizen, her approved Form I-130

(Petition for Alien Relative) and hardship to the applicant and her spouse. The applicant's physician states that the applicant has shown loss of will, loss of weight, insomnia and difficulties in engaging in professional activities; these symptoms have been aggravated by the negative decision from U.S. immigration; and these signs suggest a reactional depressive syndrome for which medication has been prescribed. *Letter from Dr. [REDACTED]*, dated September 7, 2007. The applicant's spouse's psychologist states that the applicant's spouse's symptoms include depressed mood, marked reduction in daily functioning, sleep problems and suicidal ideation; these symptoms clearly suggest a state of severe depression; and he has been treated with therapy and medication and is showing little progress. *Letter from [REDACTED] Ph.D.*, dated September 10, 2007. Counsel states that the applicant's spouse is constantly flying to France to spend time with his spouse as it is difficult for them to be apart. *Brief in Support of Appeal*, at 3. The applicant's spouse's accountant states that the applicant's spouse has suffered huge losses in his business due to his constant absences and he is going through extreme financial hardship. *Letter from [REDACTED] CPA*, dated September 6, 2007.

The AAO finds that the unfavorable factors in this case include the applicant's period of unauthorized stay. However, the record reflects that her period of unauthorized stay was only two days. In addition, the record indicates that the applicant attempted to depart the United States soon after realizing that she had overstayed her authorized period of stay. *Applicant's Statement*, at 1, dated September 7, 2007. These facts mitigate the weight of the unfavorable factor in this case.

The AAO finds that the immigration violation committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.