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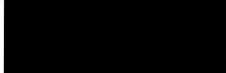
U.S. Citizenship  
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: SEP 08 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)(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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 the Ukraine who, on June 6, 1993, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past the expiration of her nonimmigrant status, which expired on December 5, 1993. On November 1, 1993, the applicant filed a Request for Asylum in the United States (Form I-589). On October 1, 1996, the Form I-589 was referred to the immigration judge and the applicant was placed into immigration proceedings. On August 21, 1997, the applicant withdrew her application for asylum and the immigration judge granted the applicant **voluntary departure until February 28, 1998**. On August 26, 1997, the applicant married her U.S. citizen spouse, [REDACTED] in Brooklyn, New York. On September 8, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On September 18, 1997, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On January 12, 1998, the Form I-130 was approved. The applicant failed to surrender for removal or depart from the United States, thereby changing the grant of voluntary departure to a final order of removal. On October 10, 2001, the applicant was informed that Citizenship and Immigration Services (CIS) did not have jurisdiction over her Form I-485 and she would need to file a motion to reopen before the immigration judge. The applicant filed a motion to reopen before the immigration judge. On December 10, 2002, the immigration judge denied the applicant's motion to reopen. The applicant filed an appeal of the immigration judge's denial of the motion to reopen with the Board of Immigration Appeals (BIA). On February 4, 2004, the BIA affirmed the immigration judge's denial of the applicant's motion to reopen. On October 12, 2005, [REDACTED] filed a second Form I-130 on behalf of the applicant, which was approved on November 7, 2005. On February 7, 2006, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside in the United States with her U.S. citizen spouse.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated August 15, 2006.

On appeal, counsel contends that the applicant has not made a willful or material misrepresentation for immigration benefits and that the positive factors outweigh the negative factors in the applicant's case. *See Counsel's Brief*, dated August 31, 2006. In support of his contentions, counsel submits the referenced brief, copies of employment authorization documents, tax records, and documentation of the applicant's spouse's medical conditions. The entire record was considered in rendering a decision in this case.

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

(A) Certain aliens 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.
- (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 who 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 on a 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.

The record reflects that [REDACTED] is a native of Russia who became a lawful permanent resident in 1979 and a naturalized U.S citizen in 1985. The applicant and [REDACTED] do not appear to have any children together. The applicant is in her 60's and [REDACTED] is in his 70's.

In his decision, the director noted as a negative factor, the applicant's previous submission of an altered birth certificate in order to gain an immigration benefit and her failure to disclose that she was in removal proceedings or had been ordered removed on the Form I-485. On appeal, counsel asserts that the altered birth certificate filed in support of the applicant's Form I-589 was submitted without her knowledge and that she was not under an order of removal at the time she filed the adjustment of status application. Counsel, alternatively asserts that the information of the Form I-485 was provided on the advice of an unscrupulous and incompetent notario.

While the applicant filed the Form I-485 on September 8, 1997, the applicant appeared at an interview in regard to the application on June 22, 1998. The applicant had failed to depart the United States, thereby rendering the voluntary departure an order of removal by the time of her interview. The applicant concealed her order of removal when questioned as to whether she had ever been ordered removed from the United States. The AAO finds that the applicant, during her adjustment of status interview, made a willful misrepresentation of a material fact in an attempt to gain immigration benefits and is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).<sup>1</sup>

On appeal, counsel asserts that the applicant's marriage cannot be a negative factor simply because she entered into it while she was in voluntary departure. The AAO notes that the director's determination that Mr.

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<sup>1</sup> The AAO notes that the applicant was given full instructions in her native language at her immigration hearing that she was not eligible to file for adjustment of status without filing a motion to reopen before the immigration court and would need to file a motion within 90 days or return to her home country or order to process her Form I-130. The AAO notes that the applicant may also be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for presenting an altered birth certificate in connection with her Form I-589, however, there is insufficient evidence before it to make such a determination at this time.

was both a positive and a negative factor reflects that he is an “after-acquired equity,” which, as discussed below, is given less weight in the exercise of discretion under section 212(a)(9)(A)(iii) of the Act.

The AAO now turns to a consideration of positive and adverse factors in the present case.

On appeal, counsel asserts that the applicant had employment authorization until 2003 and that her authorized employment should be considered a positive factor. Counsel further asserts that the negative factor of the applicant’s unauthorized employment may be minimized by her payment of federal taxes. Counsel asserts that the director erred in failing to weigh [REDACTED]’s life threatening health problems. Counsel asserts that Mr. [REDACTED] has arteriosclerosis, coronary heart disease, osteoarthritis and hepatitis B, among ten serious ailments diagnosed and treated by [REDACTED] M.D. Counsel asserts that [REDACTED] is too frail to survive without the care of his wife. Counsel asserts that [REDACTED] has no other relatives to care for him.

A letter from [REDACTED] dated December 15, 2005, states that [REDACTED] has been his patient since October 31, 2005. It states that [REDACTED] is an extremely sick person afflicted with multiple and serious and debilitating diseases that require constant observation and care. It states that [REDACTED] suffers from osteoarthritis of the cervical spine, dorsal spine and lumbo-sacral spine, advanced arteriosclerotic coronary heart disease, arteriosclerotic stenosis of the carotids that produces constant dizziness, hepatitis B with hepatomegaly, chronic obstructive pulmonary disease (COPD), moderate demineralization of the spine, lipidemia and atherosclerotic changes in the abdominal aorta, and acromioclavicular joint disease with impingement. Medical documentation in the record dated prior to this date reflects that [REDACTED] had previously been diagnosed and treated for mitrovalve regurgitation, renal cysts, spinal degeneration, atherosclerotic changes, stenosis, COPD, vascular headaches, anxiety neurosis, vertigo, osteoarthritis and an abnormal EEG.

Statements for Determining Continuing Eligibility for Supplemental Security Income Payments indicate that [REDACTED] has been receiving disability payments since April 1, 1989. In January 2006, [REDACTED] was designated \$626 per month in disability payments.

Letters of support from friends and patients and patients’ family members, state that the applicant is an honest, responsible, trustworthy, gentle, helpful, very friendly, good, professional, caring, respectful and kind person. They state that the applicant and [REDACTED] are a very nice couple that love each other very much. They state that the applicant is a terrific wife who cares for her very sick husband.

The record establishes that the applicant has paid federal taxes from 1994 through 2004. The applicant received employment authorization from December 28, 1993, until January 30, 2003. A letter from the applicant’s employer, dated December 23, 2005, states that she has been employed with them since June 24, 1997. It states that she is a dependable, trustworthy employee. It states that she has the ability to work with difficult patients and show a true understanding of their needs and her responsibility towards them.

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 in the United States 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 7<sup>th</sup> Circuit Court of Appeals 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-Munoz 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 AAO finds these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, his general hardship, his age and health problems, the applicant's payment of federal taxes; her authorized employment between 1993 and 2004, and an approved immigrant visa petition. The AAO notes that the applicant's marriage and the filing of the immigrant visa petition benefiting her occurred after the applicant was placed into immigration proceedings. The applicant's spouse and approved immigrant visa petition are, therefore, "after-acquired equities" and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's failure to comply with an order of voluntary departure that became a final order of removal; her failure to comply with an order of removal; her concealment of her prior removal order during her adjustment of status interview; her inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; and her unlawful presence and unauthorized employment in the United States.

The applicant's failure to comply with an order of voluntary departure that became a final order of removal, her failure to comply with an order of removal, her concealment of her prior removal order during her adjustment of status interview in an attempt to obtain immigration benefits, her inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act, and her unlawful presence and unauthorized employment in the United States cannot be condoned. However, the AAO finds that given all of the circumstances of 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

The AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act. To seek a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).<sup>2</sup>

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

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<sup>2</sup> The AAO notes that the applicant filed a Form I-601 that, on February 27, 2001, was denied by the director of the Vermont Service Center because he incorrectly found that she was not required to file a Form I-601.