U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: ATHENS, GREECE Date: OCT 07 2004

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and 8 U.S.C. § 1182(a)(9)(B)(v).

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, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The waiver application was denied by the Officer in Charge, Athens, Greece and is now before the Administrative Appeals Office (AAO) on a motion to reopen. The Officer in Charge's decision will be withdrawn and the matter remanded to him for further consideration and action.

The applicant is a native of Latvia and citizen of Israel who was admitted into the United States several times as a visitor for pleasure. On March 26, 2001, at the J.F.K. International Airport Port of Entry the applicant applied for admission as a visitor for pleasure. She was found inadmissible under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa or lieu document. The applicant was permitted to withdraw her application for admission and was given permission to depart the United States on the same day. On August 12, 2002, the applicant was interviewed for an immigrant visa at the Consulate Section at the American Embassy in Tel Aviv, Israel, based on an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. The applicant was found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) for having sought to procure a nonimmigrant visa by fraud and willful misrepresentation of a material fact. She seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 8 U.S.C. § 1182(i) in order to travel to United States and reside with her spouse.

The AAO finds several errors in the Officer in Charge's decision. On an attachment to Form I-292 it is stated: "Application: Application for Permission to Reapply for Admission into the United States after Deportation or Removal (I-601)." In his decision the Officer in Charge states: "The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(B)(II) "Unlawful Presence" and 212(a)(6)(C)(i), "Fraud, Misrepresentation" of the Immigration and Nationality Act (INA)." He then cites section 212(a)(9)(A) of the Act, which relates to aliens previously removed from the United States who are required to apply for permission to reapply for admission. In his decision the Officer in Charge weighs the favorable and unfavorable factors and refers to caselaw that addresses cases that deal with permission to reapply for admission. The Officer in Charge's final order states: ". . . . Application for Permission to Reapply for Admission After Deportation or Removal for Victoria Tesler be denied." *See Officer in Charge Decision* dated July 13, 2003

Counsel filed a motion to reopen the Application for Waiver of Grounds of Excludability and states that the applicant is not inadmissible under section 212(a)(9)(A) of the Act since she was never removed from the United States.

The AAO agrees with counsel, the applicant was never removed from the United States and does not need permission to reapply. As noted above, on March 26, 2001, the applicant was found inadmissible to the United States pursuant to section 212(a)(7)(A)(i)(I) and was permitted to withdraw her application for admission. A final order of removal has never been issued on behalf of the applicant. An applicant who withdraws his or her application for admission is not considered formally removed and therefore does not require permission to reapply for admission to the United States.

The applicant in the instant matter was found inadmissible under sections 212(a)(6)(C) and 212(a)(9)(B)(i)(II) of the Act. Sections 212(i) and 212(a)(9)(B)(v) of the Act provide that a waiver of the bar to admission resulting from sections 212(a)(6)(C) and 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member.

The Officer in Charge did not properly adjudicate the Form I-601 pursuant to sections 212(i) and 212(a) (9) (B)(v) of the Act. In view of the foregoing, the decision of the Officer in Charge will be withdrawn. The application is remanded to the Officer in Charge for adjudication of the Form I-601, including examination of the extreme hardship that would be imposed on the applicant's spouse if her application were denied. Once the Form I-601 has been adjudicated, a new decision shall be entered, which, if adverse to the applicant, shall be certified to the AAO for review accompanied by a properly prepared record of proceedings.

ORDER: The decision of the Officer in Charge withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.