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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: DENVER, COLORADO Date APR 07 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.

Ellen C. Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of the U.S.S.R. and citizen of Georgia who was admitted into the United States as a non-immigrant visitor for pleasure on May 18, 1996, with an authorized period of stay until December 17, 1996. On May 19, 1997, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On July 30, 1997, the applicant was interviewed for asylum status. On August 21, 1997, he was referred to an immigration judge for a court hearing. On September 28, 1998, 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 November 28, 1998, in lieu of removal. The applicant filed a Motion to Reconsider (MTR) which was denied on October 23, 1998. On October 26, 1998, he filed an appeal with the Board of Immigration Appeals (BIA). On December 3, 2002, the BIA affirmed the immigration judge's decision and the applicant was permitted to depart the United States voluntarily within 30 days from the date of the BIA's order. A request for an extension of the voluntary departure period was denied by the District Director on December 30, 2002. The applicant filed a Motion for a Stay of Removal with the United States Court of Appeals for the Tenth Circuit which was denied on April 15, 2003. In addition, on April 8, 2004, the Tenth Circuit Court of Appeals denied the applicant's Petition for Review and his Motion to Remand to the BIA. According to counsel, neither she nor the applicant received notices from Immigration and Customs Enforcement (ICE) regarding the applicant's departure plans due to a severe blizzard and because one of the notices was forwarded to the wrong address. On June 18, 2004, the applicant appeared at a CIS office for a scheduled interview regarding a Petition for Alien Relative (Form I-130) field by his U.S. citizen spouse. The applicant was taken into custody and a Warrant of Deportation (Form I-205) was issued. The applicant was released from custody and on July 26, 2004, he departed the United States. 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 travel to the United States and reside with his U.S. citizen spouse and children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See District Director's Decision* dated October 26, 2004.

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

> (A) Certain aliens previously removed.-
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> (ii) Other aliens.- Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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.
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> (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 in 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 reducing and/or stopping 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 condition, copies of documentation regarding the financial situation of the applicant's family, 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, has a U.S. citizen child, and is the stepfather of a U.S. citizen child. In addition, counsel states that the applicant's parents-in-law reside with him and his spouse, and are Lawful Permanent Residents (LRP) of the United States. Counsel further states that if the applicant is not permitted to enter the United States he and his family will experience severe hardship. Counsel submits evidence that the applicant's spouse suffers from severe stress and depression, and evidence that she is unable to meet the family's monthly expenses. In addition, counsel states that the applicant's spouse and children are not able to relocate to Russia with the applicant because they are not Russian citizens and because the applicant's spouse needs to remain in the United States to take care of her elderly LPR parents. Furthermore, counsel states that the majority of the applicant's presence in the United States was with permission of CIS. He never entered United States illegally, never intentionally failed to report to ICE, never absconded, never failed to attend a CIS interview or immigration court hearing and he is a person of good moral character. Finally, counsel states that the favorable factors in the applicant's case outweigh the negative ones and the Form I-212 should be granted.

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.

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 after he was placed in removal proceedings and after an immigration judge granted him voluntary departure. The applicant's spouse should reasonably have been aware of the possibility of his being removed at the time of their marriage. He now seeks relief based on that after-acquired equity.

The District Director's decision states that the applicant failed to demonstrate that his family has incurred extreme hardship over and above the normal economic and social disruptions as a result of his removal. In addition, the District Director's decision states that the recency of his removal coupled with his disregard for United States immigration laws does not warrant a favorable consideration of his request.

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 finds that the favorable factors in this case are the applicant's family ties to U.S. citizens, his spouse and children, an approved Form I-130, the prospect of general hardship to his family and the absence of any 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 deportation, his periods of unauthorized employment and his illegal presence in the United States. 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. 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.