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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 19 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.

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 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 Kazakhstan who was admitted into the United States as a non-immigrant visitor for business on July 2, 1996, with an authorized period of stay until January 1, 1997. The applicant remained in the United States beyond his authorized period of stay and on March 31, 1998, he 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 May 7, 1998, 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 May 21, 1998. On January 31, 2000, an immigration judge granted the applicant voluntary departure until March 31, 2000, in lieu of removal. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on April 17, 2003, and he was permitted to depart from the United States voluntarily within 30 days of the date of the BIA's order. On July 7, 2003, the BIA dismissed a Motion to Reopen (MTR). 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 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 step-child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Director's Decision* dated February 28, 2005.

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

> (A) Certain aliens previously removed.-
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> . . .
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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
> >
> > (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 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 in which he states that the applicant's spouse suffers from depression, anxiety and insomnia and believes that the applicant's removal from the United States will result in extreme hardship to her and her son. In addition, counsel states that the applicant is afraid to return to Kazakhstan and that he has submitted overwhelming favorable documentation to support the approval of the Form I-212. Counsel further states that the Director did not mention the psychological report submitted, which is critical to the applicant's request for permission to reenter the United States after deportation, and, therefore, counsel asserts that the Director's decision is an abuse of discretion, arbitrary and capricious. Counsel states that the Director did not consider all positive factors, did not consider the fact that the applicant fled Kazakhstan because he is Jewish and feared persecution, nor the important report from a psychologist who states that the applicant's spouse suffers from Adjustment Disorder with Anxiety and Depression caused by the threat of her husband's removal. Additionally, the psychological report states that the applicant's removal from the United States "would cause extreme emotional suffering and psychological trauma to Dmitry, Inessa and Seth."

Counsel states that several factors mentioned by the Director should not be considered as negative factors. Counsel claims that the applicant's entry with a non-immigrant visa and the fact that he remained here beyond his authorized stay are not negative factors since he applied for asylum. In addition, the issuance of an NTA is not a negative factor since it was a result of his asylum interview. Counsel further refers to the applicant's right to file an appeal and an MTR with the BIA, and that the decision erroneously states that the applicant did not attend required hearings. Additionally, counsel states that the applicant's marriage to a U.S. citizen should not be considered a negative factor and the applicant's spouse was entitled to file a Form I-130. Furthermore, counsel states that the applicant is a person of good moral character evidenced by the granting of voluntary departure in January 2000, he has not shown a callous attitude toward immigration laws because he came to the United States fleeing persecution and pursued all his legal rights and appeals in applying for asylum, and filed income tax returns for every year since 1998. Counsel submits copies of the applicant's taxes from 1998 through 2004. Finally counsel asserts that the fact that the applicant is married to a U.S. citizen, has a U.S. citizen step-child, has an approved Form I-130, has no criminal record, has always paid income taxes, and that the psychological report states that separation will cause extreme emotional and psychological hardship to the family, support the approval of the Form I-212.

The AAO agrees with counsel in part. Procedures resulting from the applicant's From I-589, such as the issuance of an NTA, being granted voluntary departure, filing an appeal and an MTR with the BIA, should not have been mentioned as unfavorable factors. In addition, the record of proceedings does not support a finding of callous attitude toward violating an immigration judge's order. The applicant filed a non-frivolous asylum application and although it was subsequently denied, he was entitled to exhaust all means available to him by law in an effort to legalize his status in the United States.

The fact that the applicant entered the United States with a nonimmigrant visa is not a negative factor but the fact that he remained beyond his authorized period of stay without permission is a negative factor. Counsel repeatedly brings up the fact that the applicant left Kazakhstan because of persecution, filed an asylum application and is afraid to return to Kazakhstan. The applicant was interviewed for asylum status, his application was referred to the immigration court, an immigration judge denied his request for asylum and the BIA reaffirmed the decision. The proceedings in the present case are limited to the issue of whether or not the applicant meets the requirements to overcome the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act. The applicant was not found to have a well-founded fear of persecution upon return to Kazakhstan by the asylum office, the immigration judge and the BIA. The AAO is not in a position to reconsider these decisions.

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 seeking 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 step-child, but it will be just one of the determining factors.

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 May 7, 2003, approximately five years after he was placed in removal proceedings, over three years after an immigration judge granted him voluntary departure and after the BIA dismissed his appeal. The applicant's spouse should reasonably have been aware, at the time of their marriage, of the possibility of his being removed. 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 to U.S. citizens, his spouse and step-child, an approved Form I-130, the prospect of general hardship to his family, the absence of any criminal record and the fact that he has filed tax returns, as required by law.

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 presence and employment. 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, after his voluntary departure order had expired and after his appeal to the BIA was dismissed, 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.