U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

H4

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 2 6 2008

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]

PUBLIC COPY

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native of the former U.S.S.R. and citizen of Russia who was admitted into the United States as a non-immigrant visitor on December 14, 1998, with an authorized period of stay until February 12, 1999. On August 2, 1999, 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 August 31 1999, 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 September 14, 1999. The record of proceeding reflects that the applicant departed the United States on March 6, 2002, and has been residing in Russia since that time. On July 16, 2002, the applicant failed to appear for the removal hearing and he was subsequently ordered removed *in absentia* by an immigration judge 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. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. He 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 travel to United States and reside with his U.S. citizen spouse.

The Director determined that the applicant was inadmissible pursuant to section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182 (a)(6)(A)(i) for having been present in the United States without being admitted or paroled. In addition the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated April 17, 2006.

The AAO finds that the Director erred in finding the applicant inadmissible pursuant to section 212(a)(6)(A)(i) of the Act. As noted above, the applicant was inspected and admitted into the United States as a nonimmigrant visitor. Although the applicant is not inadmissible pursuant to section 212(a)(6)(A)(i) of the Act, he is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

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

> (A) Certain aliens 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 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 deterring 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 she states that the Director's decision is based on incorrect application of law and ignores the evidence in the file. Counsel further states that "boilerplate" language was used for legal reasoning and that a single negative factor (four months overstay) was unreasonably overstressed. In addition, counsel states that multiple positive factors and extreme hardship to the applicant's U.S. citizen spouse were ignored. In her brief, counsel refers to case law regarding extreme hardship in an effort to show that the applicant's spouse would suffer extreme hardship if the applicant is not permitted to enter the United States. Counsel further refers to the decision in *Salcido-Salcido v. INS,* 138 F.3d 1292(9th Cir. 1998), which states that separation from family may be the most important single hardship factor. Additionally, counsel states that the applicant's spouse suffers from recurrent episodes of major depression exacerbated by the country conditions in Russia. Counsel submits articles regarding the rising tide of anti-Semitism, anti-Americanism and crime in Russia. Counsel further states that the applicant's spouse does not have family ties in Russia except for the applicant, fears having a child in Russia because of her age, and she is not willing to raise a child alone in the United States. Furthermore, counsel states that the applicant's spouse is missing out on employment and educational opportunities in the United States.

In her brief, counsel further states the applicant submitted his Form I-212 in December 2005 and, therefore, the Director's statement that "The Administrative Appeals Unit remanded the appeal to the Director for further action and consideration after the Director denied that application on September 22, 2004" is incorrect and shows the Director's failure to consider the facts of the case. Counsel further notes that the Director's statement that the applicant did not appear for an immigration hearing on October 19, 1999, is erroneous, and states that the applicant attended several hearings with the exception of his final hearing of July 16, 2000, because he already had departed the United States. Counsel further alleges that the Director's statement that: "The applicant did not appear for removal as scheduled on January 2, 2003," is inaccurate because there was no removal hearing after July 2002, nor a "bag and baggage" letter, since the applicant was already in Russia. Counsel also states that the Director condemns the applicant's spouse's extreme hardship as an after acquired equity based on the fact that she married the applicant five months after he was ordered removed. Counsel states that the applicant and his spouse's marriage resulted from a relationship that started in March 2001 and, therefore, their marriage should not be devalued as an after acquired equity. Finally, counsel states that the

applicant has demonstrated his numerous positive equities and requests that the decision be reversed in order for the applicant to be able to join his U.S. citizen spouse in the United States.

The AAO notes that the applicant's overstay is 170 days (from February 13, 1999, the date his authorized period of stay expired, until August 2, 1999, the date he filed a Form I-589) and not four months as stated by counsel. However, it is still less than the 180 days that would render him inadmissible under section 212(a)(9)(B) of the Act.

Salcido-Salcido, supra, as well as other case law referred to by counsel dealt with suspension of deportation where extreme hardship is taken into consideration. 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 will consider the hardship to the applicant's spouse, but it will be just one of the determining factors.

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 married his U.S. citizen spouse in Russia on December 6, 2002, after he was placed in removal proceedings and after he was ordered removed. The applicant's spouse should reasonably have been aware, at the time of their marriage, of the applicant's immigration violations and the possibility of him being inadmissible. He now seeks relief based on that after-acquired equity. It was only through his marriage that he gained this equity. Any relationship prior to his marriage cannot be considered. Therefore, hardship to his spouse will not be accorded great weight.

The AAO agrees with counsel in that the Director erroneously stated in his decision that the AAO had remanded the appeal to the Director for further action and consideration. This office finds this error to be harmless since it did not affect the outcome of the decision. The record of proceeding reflects that a Notice to Deportable Alien (Form I-166), a "bag and baggage" letter as referred to by counsel, was forwarded to the applicant on November 22, 2002, requesting that he appear at the San Francisco, District Officer in order to be removed from the United States. Neither counsel nor the applicant or his spouse had informed the Service that he had departed the United States on March 6, 2002.

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.*

In his decision, the Director determined that the applicant's unauthorized presence in the United States from February 12, 1999, to August 20, 1999, outweighs all favorable factors and denied the application accordingly.

As noted above, the applicant filed a Form I-589 on August 2, 1999, and, therefore, the applicant's unauthorized presence was from February 12, 1999, to August 2, 1999, and not August 20, 1999, as mentioned by the Director.

The applicant had the right to file a non-frivolous asylum application, and although it was subsequently referred to the immigration court he was allowed to remain in the United States awaiting the immigration judge's decision.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse, an approved Form I-130, the potential of general hardship to his spouse, the favorable recommendations attesting to his good moral character, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's period of unauthorized presence after his initial lawful admission. The fact that he departed the United States prior to the issuance of an *in absentia* removal order cannot be considered an unfavorable factor

While the applicant's actions cannot be condoned, 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.

ORDER: The appeal is sustained and the application approved