U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
20 Massachusetts Avenue NW
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 0 3 2013 Office: VIENNA, AUSTRIA FILE: [redacted]

IN RE: [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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by Field Office Director, Vienna, Austria, 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.

The applicant is a native and citizen of Albania who entered the United States without inspection in 2001, applied for asylum, but was ultimately denied and ordered removed from the United States on April 7, 2007. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside in the United States with his U.S. citizen spouse and child.

In a decision, dated August 2, 2011, the field office director found that there would be no purpose in granting the applicant's application for permission to reapply for admission as he was not eligible for a waiver of his inadmissibility under section 212(a)(9)(B) of the Act and denied the application accordingly.

On appeal, counsel states that the applicant has established that his spouse would suffer extreme hardship as a result of his inadmissibility. Counsel also submits additional documentation regarding country conditions in Albania.

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

> (A) Certain aliens previously removed.-
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> (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.
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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 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 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 Secretary has consented to the alien's reapplying for admission.

The record indicates that the applicant entered the United States without inspection in 2001. On December 5, 2001 the applicant applied for asylum. His asylum case was referred to an immigration judge and after failing to attend his removal hearing, the applicant was ordered removed in abstentia on March 14, 2002. The applicant filed a Motion to Reopen this removal order, which was granted on March 28, 2002. On April 9, 2003, the immigration judge denied the applicant's asylum application and he was ordered removed. The applicant appealed his removal to the Board of Immigration Appeals (BIA), who affirmed the immigration judge's decision on July 23, 2004. The applicant then petitioned the Second Circuit Court Appeals to review the decision in his asylum case. The Second Circuit denied his petition for review on May 19, 2006. The applicant was removed from the United States on April 7, 2007. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

The record includes: a letter from counsel, country conditions documentation, medical documentation, financial documentation, photographs of the applicant's life in Albania, a statement from the applicant's spouse, and statements from the applicant's spouse's family members.

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 7th Circuit Court of Appeals 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-Munoz 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 a discretionary determination. 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 AAO finds these legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The AAO notes that the applicant and his spouse married on September 10, 2004. Thus, his marriage to a U.S. citizen and his U.S. citizen daughter are after acquired equities. Nevertheless, we find that the favorable factors in the applicant's case outweigh the unfavorable factors.

The AAO finds that the applicant's spouse is suffering extreme emotional and financial hardship as a result of the applicant's removal. The record indicates that the applicant's spouse is currently raising her four year old daughter in her parents' house where she and her daughter live in the basement. The record indicates that the applicant's spouse is participating in Michigan welfare programs, including Medicaid and the Women, Infants, and Children program (WIC), works in retail, and earns approximately $300 every two weeks. The record indicates that in 2010 the state of Michigan seized the applicant's spouse's tax return to pay toward the student loans she had been unable to pay. The applicant's spouse states that she has been offered better paying positions at her work, but cannot accept because of the working hours and her inability to find child care for her daughter during that time. The record also indicates that before the applicant's arrest and removal the applicant and his spouse were renting an apartment of their own and the applicant's income was helping to support them.

In addition to the applicant's spouse's financial suffering, she is also suffering emotionally. Numerous medical documents in the record refer to the applicant's spouse suffering depression; the applicant's spouse has seen a licensed counselor in 2007, 2008, and 2010 for her anxiety and depression; the applicant's spouse's gynecologist has diagnosed her with post-partum depression; and the record includes documentation of her being prescribed a psychotropic medication. The applicant, her mother, and her sister describe the applicant's spouse as a very happy person before her husband was removed and that now she is depressed, has no energy, experiences anxiety, and cannot control her anger.

We also find that the applicant's spouse would face hardship if she were to relocate to Albania to be with the applicant. The record established that the applicant's spouse was born in the United States, cannot speak Albanian, and, except for the applicant, has no ties to Albanian culture. The record shows that the applicant has significant family ties to the Michigan area, where her family resides, with her mother, father, siblings, and nieces, and nephews all living in close proximity. The applicant's spouse states she would suffer emotionally if she were to separate from them and move to Albania with her daughter. The record also indicates that as a sales clerk the applicant's spouse has very little skills to find employment in Albania, especially because she does not speak the language. Medical documentation in the record establishes that the applicant's spouse and daughter suffer from eczema and psoriasis, which the applicant's spouse describes as very painful. The applicant's spouse also suffers from a blood condition that can be dangerous during a pregnancy .The applicant's spouse states that she is very concerned about the medical care that would be available to her in Albania. Country conditions documentation in the record indicates that Albania is one of the poorest countries in Europe, that per capita income is approximately $4,200 per year, and that the unemployment rate is 13.52%, with almost 60% of the workforce employed in agriculture. The documentation also indicates that medical care is below western standards and medical facilities outside the capital have very little capabilities. The country conditions information, the applicant's spouse's statements, and photographs submitted as part of the record also indicate that the applicant is living in poverty in Albania, with no running water and sporadic electricity. Another hardship facing the applicant and his daughter are that they have never met. The applicant's daughter is now four years old and has never met her father.

Other favorable factors in the applicant's case include his lack of any criminal record in the United States, that his removal was not recent, occurring over 5 years ago, and as attested to by his spouse and his mother-in-law, the applicant's attributes as a loving husband and generous person.

The unfavorable factors include the applicant's unlawful entry into the United States, his unlawful residence in the United States, his unauthorized employment in the United States, and his failure to comply with his final removal order.

The AAO recognizes that the applicant's familial ties to the United States are after-acquired equities and that he has committed numerous violations of immigration law, but the hardship to the applicant, his wife, and his child is extreme, the applicant has no criminal record, and statements in the record establish that the applicant is a loving and support member of his family.

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.

ORDER: The appeal is sustained.