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

U.S. Citizenship and Immigration Services

DATE: NOV 0 1 2013 Office: CLEVELAND FILE:

IN RE: Applicant:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Cleveland, Ohio, denied the Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) and the matter 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 was found to be inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for seeking admission to the United States within ten years of being ordered removed. He seeks permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

In a decision dated June 7, 2013, the field office director found that the applicant had not demonstrated eligibility as a matter of discretion. The field office director concluded that although the applicant's U.S. citizen spouse suffers from mental health problems, the applicant's immigration status and his decisions to purchase a home and restaurant after being ordered removed "precipitated [his] spouse's mental health conditions." The field office director found, therefore, that the applicant's spouse's mental health status could not be considered a favorable factor in the applicant's case. Additionally, the field office director noted that although the applicant's U.S. citizen son would likely receive an inferior education in Albania, the applicant and his spouse "are both products of the Albanian educational system, and [they] both appear to have adapted well." Furthermore, the field office director found that the applicant would not have to face the possibility of relocating his family to Albania if he had waited for the visa petition his wife had filed for him to be processed rather than entering the United States unlawfully. The field office director also noted that while the applicant had purchased a home and was the owner and manager of a successful restaurant, those factors could not weigh in the applicant's favor because he was aware of his potential removal at the time he undertook those responsibilities. Additionally, the field office director found that the applicant could sell his restaurant and could work in a restaurant in Albania. Finally, the field office director concluded that the applicant's long residence in the United States was an unfavorable factor because he had entered unlawfully and failed to depart pursuant to a voluntary departure order. The field office director further found that the applicant's decision to appeal the denial of his asylum application rather than return to Albania, the finding that he lacked credibility during his asylum hearing, and his large purchases after being ordered removed "are indicative of [his] lack of respect for immigration law." Accordingly, the field office director denied the applicant's Form I-212.

On appeal, counsel for the applicant alleges that the field office director's decision is erroneous. In particular, counsel asserts that the field office director improperly interpreted positive factors in the applicant's case – including his spouse's mental health conditions, his son's reliance on the applicant and educational opportunities in the United States versus Albania, his community ties, and his ownership of a home and a restaurant – as negative factors. Counsel notes that the applicant's spouse suffered significant abuse in Albania, that she depends on the applicant for assistance in managing her mental health and daily responsibilities, and that she would be unable to support her son in the applicant's absence. Additionally, counsel asserts that the applicant's son exhibited signs of stress at school during the applicant's immigration detention and that he

would suffer additional hardship if the applicant were removed. Furthermore, counsel notes that the applicant employs 16 people at his restaurant, which would likely close without the applicant's management. Counsel also points out that according to community representatives, the applicant and his restaurant play an important role in maintaining the economy and culture in his neighborhood. Finally, counsel asserts that the denial of the applicant's asylum application and the finding that he lacked credibility do not support a finding that he lacks good moral character. To the contrary, counsel notes that the applicant has no criminal history, pays taxes, is the primary financial supporter for his family, and contributes to his community.

The record contains, but is not limited to: a statement from the applicant's spouse; two psychological evaluations of the applicant's spouse; information regarding mental health services in Albania; a letter from the principal at the applicant's son's school; documentation regarding the applicant's son's education and the educational system in Albania; records relating to the applicant's restaurant in Cleveland, Ohio; financial records; letters of support from members of the applicant's community; and country conditions information. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

Aliens previously removed.-

(A) Certain aliens previously removed.-

(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 5 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.

(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 aliens 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 continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the alien's reapplying for admission.

On May 4, 2010, an immigration judge denied the applicant's asylum application and granted his request for voluntary departure. He failed to depart by July 3, 2010 as ordered, but filed an appeal with the Board of Immigration Appeals (Board). The Board dismissed the applicant's appeal on November 29, 2011, on which date the voluntary departure order became an order of removal. Therefore, the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. In *Matter of Tin*, 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:

> [T]he basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitations, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

14 I&N Dec. 371, 373-74 (Reg. Comm. 1973).

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the United States. 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 country unlawfully. *Id.*

Matter of Lee held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. 17 I&N Dec. 275, 278 (Comm. 1978). *Lee* additionally held:

> [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. In such circumstances, there must be

> a measurable reformation of character over a period of time in order to properly assess an applicant's ability to integrate into our society. 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 AAO considers the applicant's spouse's mental health conditions to be a strong favorable factor in this case. The record reflects that the applicant's spouse suffered physical and sexual abuse at the hands of family members in Albania as a child and that she now experiences mental health difficulties due to those experiences and to her anxiety relating to the applicant's removal. In a letter dated March 27, 2013, psychologist reports that she diagnoses the applicant's spouse with moderate to severe Post-Traumatic Stress Disorder and Dysthymic Disorder based on her flashbacks to violent experiences in Albania, fears that her life would end if she were to return there, nightmares, and other symptoms of extreme anxiety. Dr. also notes that the applicant's spouse suffers physical illness due to her fear that the applicant will be removed and that she is experiencing "a sense of helplessness, inability to function, to take care of herself, her home and her child." As a result, Dr. concludes that the applicant's spouse "would decom[p]ensate even further and need psychiatric hospitalization if her husband is deported with a poor, long prognosis for her recovery, and endangering the wellbeing of her child." In a letter dated March 20, 2013, a second psychologist, Dr. confirms that the applicant's spouse has struggled to work and to care for herself and her son due to anxiety about the applicant's possible removal. Dr. also notes that the applicant's spouse has experienced serious and ongoing physical illness which is likely the result of stress. Dr. concludes that if the applicant is removed, his spouse will likely "deteriorate totally and be unable to function at her current level—working and caring for her son. . . . [I]t will be some time—if ever—that [she] will develop the skills and strength to function and raise her son alone." The reports of both psychologists indicate that the applicant's spouse struggles in areas of basic functioning due to her past and current emotional difficulties, that she relies heavily on the applicant's emotional and financial support in order to manage what she cannot do alone, and that her mental health conditions would prevent her from meeting her own needs and those of her son in the applicant's absence. The AAO therefore finds that the applicant's spouse would face significant hardship if the applicant were removed, and that this is a major favorable factor in his case.

Another favorable factor is the effect the applicant's removal would have on his son, In a letter dated March 26, 2013, , the principal of school, notes that while the applicant was in immigration detention, demeanor changed significantly; he became "sullen and quiet", put his head down on his desk, and stopped socializing with his friends. Ms. also states that receives extra assistance at school and that "[a] change in his home life would only distract from the hard work he and his teachers are doing . . . ." The applicant has also submitted a report indicating that the deportation of a parent negatively influences the education, economic opportunities, and mental and physical health of a child.

The applicant's ownership of a successful restaurant in Cleveland, Ohio is also a favorable factor. The field office director correctly noted that the personal financial implications of restaurant ownership on the applicant cannot be a strong favorable factor because the applicant bought the restaurant after being ordered removed. We acknowledge that this factor, as well as some of the other positive factors in this case, may be considered, at least in part, "after-acquired" equities to which we afford less weight. Nevertheless, the applicant's role with the restaurant is also indicative of his value to his community, which is a positive discretionary factor. Community leaders and business owners in Cleveland have noted that the applicant's restaurant is a popular destination at the heart of the Little Italy neighborhood which attracts visitors to the area, thereby encouraging economic activity for all local businesses. Other business owners in the area note in their letters of support that the applicant also assists neighboring businesses in development efforts and is known to provide support to others as needed. Furthermore, the applicant provides employment for 16 people and the evidence suggests that the restaurant may close in the applicant's absence. The applicant's spouse was unable to manage the restaurant on her own during the applicant's immigration detention and she struggled to find an appropriate substitute manager, so profits declined in only a short period of time. Additional favorable factors include the applicant's payment of taxes and lack of a criminal record.

The unfavorable factors in this case include the applicant's unlawful entry into the United States, his periods of unlawful presence in this country, and his order of removal.

The applicant's violations of immigration law are serious and cannot be condoned. However, the totality of the evidence demonstrates that the unfavorable factors in the present matter are outweighed by the favorable factors. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has established that a favorable exercise of the Secretary's discretion is warranted, permitting the applicant to reapply for admission to the United States. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.