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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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#4

FILE:



Office: VIENNA, AUSTRIA

Date: AUG 25 2005

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:

SELF-REPRESENTED

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, Director  
Administrative Appeals Office

**DISCUSSION:** The Application for Permission to Reapply for Admission into the United States after Deportation or Removal was denied by the Officer in Charge, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Yugoslavia and citizen of Macedonia who on October 30, 1991, attempted to procure admission into the United States at J.F.K. International Airport by presenting a counterfeit Italian passport. On April 28, 1993, he applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)). On March 6, 1996, an Immigration Officer interviewed the applicant for asylum status. His application was denied and an Order to Show Cause for a hearing before an Immigration Judge was issued on March 19, 1996. The record reflects that on June 2, 1997, an Immigration Judge granted the applicant voluntary departure until June 2, 1998, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States. The applicant's failure to depart on or prior to June 2, 1998, changed the voluntary departure order to an order of deportation and on September 1, 1998, a Warrant of Removal/Deportation (Form I-205) was issued. On April 8, 2003, the applicant appeared at a CIS office to inquire about his status. Based on the Form I-205, Immigration and Customs Enforcement placed the applicant in custody and removed him from the United States on May 22, 2003. 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 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 travel to the United States and reside with his U.S. citizen spouse and father, and Lawful Permanent Resident (LPR) mother.

The Officer in Charge determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Officer in Charge Decision* dated April 7, 2004.

The AAO notes that the Officer in Charge erroneously states on the Notice of Denial (Form I-292): ". . . Application for Waiver of Grounds of Excludability (I-601) be denied for the following reasons: SEE ATTACHMENTS." The application in the present matter is for permission to reapply for admission, not a waiver of inadmissibility. The AAO finds this typographical error to be harmless since it does not affect the outcome of the decision. In the attachment and his decision the Officer in Charge adjudicated the Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' 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 for others, (2) has added a bar, with limited exceptions, to admissibility for aliens who are unlawfully present in the United States, and (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 the applicant states that he has been unsuccessfully searching for employment in Macedonia, his father has become a U.S. citizen and the separation from his spouse and family has caused him emotional and physical distress. In addition the applicant states that he has never been arrested for any crime and that he was unaware of the deportation order against him because at the time he was living in Pittsburgh.

The applicant's statement, that he was unaware of the deportation order is not persuasive. On June 2, 1997, an Immigration Judge issued an order that informed the applicant that he was granted voluntary departure until June 2, 1998, with an alternate order of deportation to Macedonia.

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 or Removal:

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 be a condonation of the alien's acts and could encourage others to enter without being admitted 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 court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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-Numoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> 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.

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 applicant in the present matter married his U.S. citizen spouse on September 19, 2003, five years after his voluntary departure order became a final order of deportation and four months after he was removed from the United States. The applicant's spouse should reasonably have been aware of the applicant's immigration violations and the possibility of his being inadmissible to the United States at the time of their marriage. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties to U.S. citizens and an LPR, his spouse, father, sister and mother, the approval of a petition for alien relative and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to enter the United States by presenting a counterfeit Italian passport, his failure to depart the United States after he was granted voluntary departure, his employment without authorization and his lengthy presence in the United States without a lawful admission or parole. 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 his removal from the United States 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 he 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.