

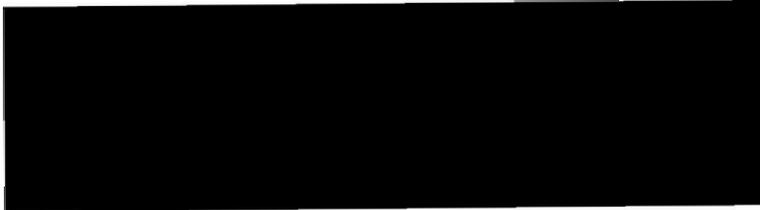


U.S. Citizenship  
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FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 19 2006

IN RE:

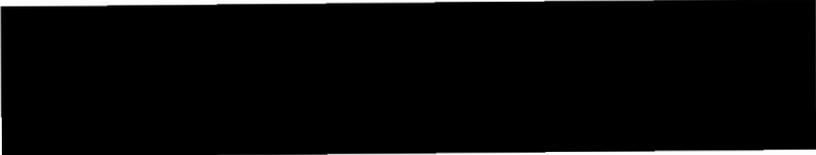
Applicant:



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:

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 and a citizen of Albania who entered the United States without a lawful admission or parole on June 27, 2000. On the same date the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant. Consequently, a Notice to Appear (NTA) for a hearing before an immigration judge was served on him and he was released on a \$5,000 bond. On February 7, 2002, an immigration judge denied his Application for Asylum and for Withholding of Removal (Form I-589) and an application for relief under the Convention Against Torture (CAT). The applicant filed an appeal with the Board of Immigration Appeals (BIA), which affirmed the immigration judge's decision on September 1, 2003. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on December 16, 2003. Consequently, the applicant was apprehended on February 25, 2004, and was removed from the United States on March 17, 2004. The applicant is the beneficiary of a 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 travel to the United States and reside with his U.S. citizen spouse.

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.-

. . . .

(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 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 and an affidavit from the applicant's spouse that had been submitted with the filing of the Form I-212. In his brief, counsel states that the Director did not mention anything about the extreme hardship the applicant's spouse would experience if the application were not approved. Counsel states that this alone outweighs and takes precedence over the reasons given for denial and it was never considered or discussed in the decision. Counsel further states that several factors mentioned by the Director are just "nitpicking" in order to come to a conclusion that the applicant is not worthy of favorable discretion. In addition, counsel states that the Service has no evidence to prove that the applicant's only intention in marrying was to obtain legal status. Additionally, counsel states that the Director did not issue a Notice of Intent to Deny or a Request for Evidence prior to making a decision. Furthermore, counsel states that the denial is an abuse of discretion and is against the laws and the facts. Finally, counsel requests that the appeal be sustained and the Form I-212 be approved.

The AAO agrees with counsel in part. Procedures resulting from the applicant's apprehension such as the issuance of a NTA, change of venue, withdrawal of his previous attorney, denial of a Form I-589 and filing an appeal of the immigration judge's decision with the BIA should not have been mentioned as unfavorable factors. 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 AAO notes that the Director is not required to issue a request for evidence or a notice of intent to deny a Form I-212.

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, but it will be just one of the determining factors.

In her affidavit, the applicant's spouse states that she has known the applicant since 2002 and she depends on him both psychologically and emotionally. If he is not allowed to return to the United States she would face extreme hardship. The applicant's spouse further states that she is accustomed to life in the United States and that she would not be able to work in Albania if she were to relocate with the applicant, and he would not be able to find a suitable job in Albania to support her. In addition, she states that if she stays in the United States she and her spouse would have to maintain two households, and traveling back and forth to Albania would be very costly and difficult. Finally, the applicant's spouse states that the applicant is a hard working law-abiding person and she requests that the Form I-212 be approved.

There are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See *Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994). The statement from the applicant's spouse is very vague on what her hardship would be if the applicant were not allowed to return to the United States and she had to live without him. As such, this claim can be given little weight.

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 (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-Nunoz 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. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> 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 5, 2004, approximately four years after he was placed in removal proceedings, over one and one half years after the BIA affirmed the immigration judge's removal order, and approximately two months after he was removed from the United States. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of his not being allowed into the United States. 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 tie in the United States, his U.S. citizen spouse, the filing of a Form I-130, the prospect of general hardship to his spouse and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States on June 27, 2000, his failure to depart the United States after a final removal order was issued by an immigration judge and after the BIA reaffirmed the order, 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 he was placed in removal proceedings and after he was removed 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 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.