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

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAR 09 2007

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, 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 and citizen of Albania who entered the United States without a lawful admission or parole on September 4, 1995. On October 25, 1995, 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 December 1, 1995, the applicant was interviewed for asylum status. On December 20, 1995, his asylum application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an immigration judge was served on the applicant. On September 16, 1996, an immigration judge denied his request for asylum and withholding of deportation. On the same date, the immigration judge found the applicant deportable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection and granted him voluntary departure until January 31, 1997, in lieu of deportation. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on September 28, 1998, and he was permitted to depart from the United States voluntarily within 30 days from the date of the BIA's order. On October 24, 2000, a petition for review of the BIA's order, filed with the United States Court of Appeals for the Ninth Circuit, was denied. On May 11, 2001, the applicant filed a Motion to Reopen (MTR) with the BIA and on May 21, 2001, the BIA granted the applicant's request for stay of deportation pending further order of the BIA. On April 13, 2003, the BIA denied the applicant's MTR. On November 22, 2004, the Ninth Circuit Court of Appeals denied a petition for review of the BIA's order. On February 14, 2005, the Ninth Circuit Court of Appeals denied the applicant's petition for panel rehearing. On June 3, 2005, a Warrant of Deportation (Form I-205) was issued. Consequently, on June 6, 2005, the applicant was deported to Albania. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. 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 to 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 January 20, 2006.

On appeal, counsel submits a brief in which she states that the applicant's spouse suffers from poor health and she feels that the applicant's presence is required. In addition, counsel states that although the applicant's marriage is technically an after-acquired equity, the applicant was very young when he entered the United States and if he had married immediately after his entry that would have the appearance of a sham marriage. Counsel further states that the applicant's parents and brother obtained lawful permanent residence status as a result of the same asylum claim the applicant made, and that similarly situated claims had the same results. Additionally, counsel states that the applicant has met the balancing of equities set forth by statute, regulations and precedent decisions. Counsel states that the fact that the applicant has not shown a serious disregard for U.S. law, has no criminal history and that there are concerns regarding his spouse's health, are all favorable factors. Furthermore, counsel states that the applicant filed a timely asylum application after he

entered the United States, upon final denial he reported for deportation and has not reentered the United States. Finally, counsel requests that the Director's decision be overturned and the Form I-212 be granted.

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 for 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.

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 be a condonation of the alien's acts and could encourage others to enter without being admitted and 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 (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 in the present matter married his U.S. citizen spouse on December 23, 2004, approximately nine years after he was placed in deportation proceedings. 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 his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will be accorded appropriate weight.

The AAO finds that the applicant has not shown a continued disregard for the laws of the United States. The AAO notes that the applicant had the right to file an 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. His appeal, MTR's and petitions for review with the Ninth Circuit Court of Appeals conferred on him a status that allowed him to remain in the United States while they were pending. The Ninth Circuit Court of Appeals made a final decision on his case on February 14, 2005, and the applicant was removed from the United States on June 6, 2005.

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 and Lawful Permanent Resident parents, an approved Form I-130, the potential of general hardship to his family, the letters of recommendation from family and friends, the absence of any criminal record, and the fact that he did not attempt to reenter the United States after his removal.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry, his failure to depart the United States after the Ninth Circuit Court of Appeals denied his petition for panel rehearing, and periods of unauthorized presence and employment.

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.