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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: OCT 23 2008

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 and the application approved.

The applicant is a native and citizen of Russia who, on December 4, 1998, entered the United States as the K-1 nonimmigrant fiancée of [REDACTED]. On February 20, 1999, the applicant married Mr. [REDACTED] a U.S. citizen. On April 14, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on her admission as a K-1 fiancée of a U.S. citizen. On March 28, 2000, the applicant was issued an Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advanced parole authorization to depart and return to the United States on July 2, 2000. On April 9, 2001, the applicant divorced Mr. [REDACTED]. On April 18, 2001, the applicant married her current U.S. citizen spouse, [REDACTED]. On July 12, 2001, the applicant filed a second Form I-485 based on a Form I-130 filed on her behalf by Mr. [REDACTED]. On August 27, 2001, both of the applicant's Form I-485s were denied. The district director denied the first because she was no longer married to Mr. [REDACTED] and the second because she was no longer seeking adjustment based on Mr. [REDACTED], the individual whose petition had brought her to the United States as a K-1 fiancée, as required by section 245(d) of the Immigration and Nationality Act (the Act). On January 31, 2003, the Form I-130 filed on the applicant's behalf by Mr. [REDACTED] was approved. On September 30, 2004, the applicant was placed into proceedings. On September 30, 2005, the immigration judge denied the applicant's application for adjustment of status and ordered her removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On April 13, 2006, the applicant filed the Form I-212. On December 6, 2006, the BIA dismissed the applicant's appeal. On December 28, 2006, the applicant filed an appeal and motion to stay removal with the Ninth Circuit Court of Appeals (Ninth Circuit). The Ninth Circuit granted the applicant's motion to stay removal. The applicant filed a motion to reopen with the BIA. On February 21, 2007, the BIA denied the applicant's motion to reopen. The applicant's appeal remains pending before the Ninth Circuit. The director found the applicant inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A) and the applicant 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 remain in the United States with her U.S. citizen spouse.

The director determined that a favorable exercise of discretion was not warranted because the applicant, once she departed the United States to process her immigrant visa through a U.S. consulate, would become inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for accruing more than one year of unlawful presence and seeking admission within ten years of her last departure from the United States. The director noted that as the applicant would be required to file an Application for Waiver of Grounds of Inadmissibility (Form I-601), she could submit the Form I-212 at that time. The director denied the Form I-212 accordingly. *See Director's Decision* dated February 20, 2007.

On appeal, counsel contends that the director erred in denying the Form I-212 because the applicant has not accrued unlawful presence in the United States. *See Form I-290B*, dated March 13, 2007. In support of the appeal, counsel submits the above-referenced Form I-290B, a brief, letters, correspondence, legal memoranda, medical documentation and documentation previously provided. The entire record was reviewed in rendering a decision in this case.

The AAO finds that the director erred in denying the applicant's Form I-212 because the applicant is potentially inadmissible under section 212(a)(9)(B)(i) of the Act if she were to depart the United States in order to process her immigrant visa through a U.S. consulate. In order for an applicant to be found inadmissible pursuant to

section 212(a)(9)(B)(i) of the Act, the applicant must have physically departed the United States after accruing the unlawful presence. As discussed below, the applicant did not begin to accrue unlawful presence until August 27, 2001.

The AAO now turns to the proceedings in the present case are for permission to reapply for admission into the United States after deportation or removal.

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

(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 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.
- (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 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 on a 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 reflects that Mr. [REDACTED] is a U.S. citizen by birth. The applicant and Mr. [REDACTED] do not appear to have any children together. The applicant has a 17-year old daughter and a 12-year old daughter, both natives and citizens of Russia, who are dependents on her application to adjust status. The applicant is in her 40's and Mr. [REDACTED] is in his 60's.

On appeal, counsel asserts that the director was mistaken in finding that the applicant had accrued unlawful presence in the United States because the time during which her adjustment application was pending, including its renewal in removal proceedings and on appeal before the BIA, is time during which she did not accrue unlawful presence as dictated by the Office of Field Operations. *See Memorandum by Johnny N.*

Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002. However, an affirmative adjustment application under section 245 of the Act, which is considered a stay authorized by the Attorney General, continues if it is denied and renewed in proceedings and through review by the BIA, only if the alien is eligible to renew the denied application and has a legal basis for renewing that application. Counsel asserts that the applicant has a legal basis for her appeal to the Ninth Circuit and is not accruing unlawful presence because (1) Congress did not intend to bar adjustments in cases when it amended section 245(d) of the Act but intended to subject such applications to the exercise of discretion under section 245 of the Act; (2) the language of section 245(d) of the Act favors the applicant's interpretation that she is still applying for adjustment of status "as a result of" her marriage to her original fiancé petitioner; and (3) adjustment regulations compel the adjudication of the application despite termination of the applicant's marriage to the original fiancé petitioner. Counsel's assertions are unpersuasive. Both the Immigration Judge and the BIA found that the applicant was not eligible to adjust status and had no legal basis for renewing the adjustment application in removal proceedings or on appeal. Therefore, the AAO finds that, from August 27, 2001 until present, the applicant has been accruing unlawful presence in the United States.

On appeal, counsel also asserts that any delay that occurred between the denial of the applicant's adjustment application and institution of removal proceedings is not the fault of the applicant. He contends that the applicant is not under an order of removal because of any misconduct but merely because she is considered an "arriving alien" as she utilized a Form I-512 to return to the United States to pursue her adjustment application. Counsel asserts that Mr. [REDACTED] is suffering from cancer, which, while it poses no imminent danger, would result in extreme hardship to Mr. [REDACTED] if the applicant had to stay in Russia for an extended period of time in order to obtain a visa.

Mr. [REDACTED], in his affidavits, states that he sincerely believes that both he and the applicant acted in good faith and in accordance with advice they received from their former attorney. He states that he was shocked when the applicant's applications were denied. He submits excerpts from email correspondence with his former attorney in regard to these applications to establish how their former attorney misled them. He states that, in June 2002, he did some research on his own and discovered that there was a law about remaining in the United States unlawfully, but was again informed by his former attorney that everything was okay. He states that his attorney finally ceased to respond to his inquiries. He states that if the applicant is not granted permission to reapply for admission to the United States, their marriage will be seriously disrupted. He states that they have been living together since April 8, 2001. He states that he has adopted the applicant's two young daughters and is providing them with support. He states that if the applicant and the girls are forced to return to Russia and cannot return quickly it will be a great hardship for them all. He states that the hardship will be especially acute for him because he has been suffering from throat cancer for the past two years. He states that even though his prognosis is hopeful, cancer is an unknown and the applicant has been a wonderful comfort and caregiver. He states that he is fearful that his condition will quickly deteriorate if he separated from the applicant. He states that he could not expect to receive good care in Russia. He states that the applicant has done nothing to violate immigration laws.

The applicant, in her declaration, states that she is living with her husband and they have a most happy life together since their marriage. She states that he has adopted her daughters and he has been their financial and emotional support. She states that if she and her daughters had to return to Russia for a long period of time, Mr. [REDACTED] would be terribly hurt by the disruption to their marriage. She states that Mr. [REDACTED] is suffering from throat cancer. She states that though she hopes he has a full recovery, she fears that a prolonged separation from her will have a serious affect on his health. She states that she has never violated any

immigration laws and it would be a great hardship for her and her husband if she were forced to remain in Russia for a long period of time.

A letter from [REDACTED] M.D., California Neurological Surgery, dated January 5, 2007, states that Mr. [REDACTED] has been under his care for treatment of a second subdural intracranial hemorrhage and is recovering from surgery for this condition. It states that there is evidence of a posterior fossa lesion, which is being investigated. It states that [REDACTED] is making an excellent recovery, but will continue to have neurological problems and there is a significant risk that he may develop further complications related to his hemorrhage or the potential lesion. It states that [REDACTED] is apparently totally dependent upon the applicant and, in her absence, would likely require institutional care. It states that from a medical point of view it appears that her presence is essential.

A letter from [REDACTED] M.D. Central California Ear, Nose & Throat Medical Group, dated January 16, 2006, states that [REDACTED] has been seen in his office for tongue cancer since December 2004. It states that he has been treated with surgery, radiation and chemotherapy. It states that he continues to require frequent follow-up for management of a swallowing difficulty secondary to his treatment. It states that it would be an enormous hardship if [REDACTED] was without some form of assistance, which has thus far been provided by the applicant.

The AAO notes that both counsel and [REDACTED] assert that the applicant was provided faulty legal advice by former counsel. However, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The applicant has not met these requirements. Moreover, even if it were established that the applicant had filed adjustment applications for which she was ineligible due to ineffective assistance of counsel, she would still require permission to reapply for admission to the United States because she has an outstanding removal order.

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 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 AAO finds these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, the general hardship to the applicant and her family members in the event of her removal, her spouses' medical conditions and an approved immigrant visa petition.

The AAO finds that the unfavorable factors in this case include the applicant's failure to comply with an order of removal; and her unlawful presence in the United States.

The applicant's failure to comply with an order of removal and her unlawful presence in the United States cannot be condoned. However, the AAO finds that given all of the circumstances of the present case, the record establishes 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she 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.

The AAO notes that the applicant is ineligible to adjust her status in the United States. While the applicant has filed an appeal with the Ninth Circuit to contest the finding that she is ineligible to adjust her status, if it is

found that she is ineligible to adjust status, she will have to depart the United States to benefit from the family-based visa petition approved on her behalf. At that time, she will become inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, for accumulating more than a year of unlawful presence. To seek a waiver of inadmissibility under section 212(a)(9)(B)(v) the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the applicant will need to file an Application for Waiver of Ground of Inadmissibility (Form I-601) with the U.S. consulate having jurisdiction over her place of residence.

ORDER: The appeal is sustained and the application approved.