

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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



U.S. Citizenship  
and Immigration  
Services



H4

DATE: FEB 06 2012

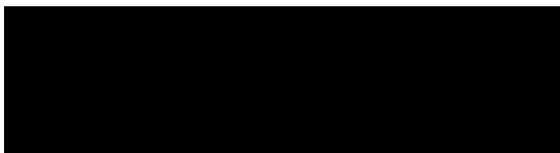
OFFICE: CHICAGO, IL

FILE: 

IN RE: 

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, Chicago, Illinois denied the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of the former Yugoslavia and a citizen of Serbia who has been found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(II) for having departed the United States while an order of removal was outstanding and applying for adjustment of status without having remained outside the United States for ten years. The applicant seeks permission to reapply for admission to 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 reside in the United States with her family.

The District Director found that the applicant had failed to establish that she merited a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision*, dated June 27, 2008.

On appeal, counsel contends that the applicant is eligible for relief as she has made numerous attempts to resolve her immigration situation, has demonstrated good moral character and has established that her removal from the United States would result in extreme hardship for her and her family. *See Form I-290B, Notice of Appeal or Motion*, dated July 24, 2008; *see also counsel's brief on appeal*.

In support of the applicant's request for permission to reapply, the record includes: counsel's brief; statements from the applicant and her spouse; letters of support from a former employer of the applicant and the family with whom she lived as an exchange student; tax returns, W-2 Wage and Tax Statements, and earnings statements for the applicant and her spouse; medical statements relating to the applicant's older daughter; letters of employment; a copy of the applicant's baccalaureate degree; an acknowledgement of a charitable contribution made by the applicant; and country conditions information on Serbia. The entire record was reviewed and all relevant evidence considered in reaching a decision in this matter.

(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 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.

The regulation at 8 C.F.R. § 212.2(a) states in pertinent part:

- (a) *Evidence.* Any alien . . . who has been deported or removed from the United States and is applying for a visa, admission to the United States, or adjustment of status, must present proof that he or she has remained outside the United States for the time period required for re-entry after deportation or removal.<sup>1</sup>

The record reflects that the applicant entered the United States as a B-2 nonimmigrant on January 20, 1990. Thereafter, she arrived as a J-1 exchange student on August 11, 1991, departing the United States following her 1992 graduation from high school in Lakeport, California. The applicant returned to the United States on August 18, 1992 to attend Oakton Community College, remaining in the United States following her completion of an Associate's Degree in Criminal Justice. On December 27, 1994, the applicant filed an affirmative asylum application, and on February 27, 1995, was placed in proceedings. On January 24, 1996, an immigration judge denied the applicant's asylum claim and ordered her removed after she failed to appear for her hearing. On the same day, the applicant departed the United States for the former Yugoslavia. She returned to the United States on May 21, 1996, as a B-2 nonimmigrant without requesting permission to reapply for admission and has remained in the United States since that time.

On appeal, counsel contends that the applicant's 1996 departure was undertaken in the mistaken belief that her immigration proceedings would be continued until she was able to return to the United States. He asserts that the applicant left a message at the office of the attorney who then represented her, advising him that she was leaving for the former Yugoslavia as her mother had had a heart attack and that she planned to return to the United States. However, the applicant's former legal representative, counsel reports, failed to request a continuance on her behalf.

---

<sup>1</sup> The AAO notes that while the applicant's departure from the United States was voluntary in nature, it is considered a self-removal as it occurred while an order of removal was outstanding.

Counsel also asserts that in applying for a nonimmigrant visa on April 29, 1996, the applicant fully explained the circumstances of her departure from the United States, as she understood them, to the consular officer who interviewed her. He further states that before she was admitted to the United States on May 21, 1996, the applicant was questioned with regard to the proceedings in her case, as well as her departure, by immigration officers at the port-of-entry.

While the AAO notes counsel's account of the circumstances surrounding the applicant's departure from the United States and her return on a B-2 visa, these circumstances do not alter the facts of the present case, i.e., that the applicant departed the United States while an order of removal was outstanding and returned to the United States within months of that departure without obtaining permission to reapply for admission. We therefore find the applicant to be inadmissible pursuant to section 212(a)(9)(A)(ii)(II) of the Act as she departed the United States while an order of removal was outstanding and is seeking adjustment of status without having remained outside the United States for the required ten years.

The AAO now turns to a consideration of the evidence of record and the extent to which it supports the applicant's request for an exception under section 212(a)(9)(A)(iii) of the Act.

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 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 United States unlawfully. *Supra*.

*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 7<sup>th</sup> Circuit Court of Appeals 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-Munoz 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 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 demonstrated by the record, the mitigating factors in this matter are the applicant's U.S. citizen spouse and children; her older daughter's autism and the developmental problems her older daughter is confronting as a result of her condition, as established by the submitted speech-language evaluations, statements from the pediatrician and the licensed clinical psychologist treating the applicant's older daughter, and statements from the organizations providing this child with occupational and speech therapy; the general hardship the applicant's family would suffer if she is removed; the significant negative impact that her absence would have on her daughter's treatment program and prognosis, as indicated by the child's psychologist; her payment of taxes; the absence of a criminal record; the letters of support from the applicant's former employer and the family with whom she lived as an exchange student, which attest to the applicant's character; her completion of a baccalaureate degree at the University of Illinois – Chicago; and a 2007 certificate of appreciation awarded her for her philanthropic contribution to St. Jude Children's Research Hospital. The applicant's marriage, the approval of the immigrant visa petition benefitting her, and the birth of her daughters occurred after the applicant was placed into proceedings in 1995. As a result, these factors are considered "after-acquired equities" and will be accorded diminished weight in exercising the Secretary's discretion in this matter.

The AAO finds that the unfavorable factors in this case to include the applicant's failure to appear for her immigration hearing on January 24, 1996; her inadmissibility pursuant to section 212(a)(9)(A)(ii) of the Act; her violation of her student status when she remained in the United States even though she was no longer attending school; her failure to depart the United States when the validity of her most recent B-2 visa expired; and her periods of unlawful employment and residence.

Though the AAO does not condone the applicant's immigration violations, based on the record, the AAO finds the factors supporting a favorable exercise of the Secretary's discretion to outweigh the negative. Accordingly, the applicant has demonstrated eligibility for an exception under section 212(a)(9)(A)(iii) of the Act.

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

**ORDER:** The appeal is sustained.