U.S. Department of Homeland Security
Office of Administrative Appeals
20 Massachusetts Ave. N.W. MS 2090
Washington, D.C. 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 07 2013 OFFICE: VIENNA, AUSTRIA FILE:

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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission into the United States was denied by the Field Office Director, Vienna, Austria, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native of and citizen of Romania who was found to be inadmissible to the United States 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), for having been ordered removed from the United States and seeking admission within the proscribed period since the date of removal. The applicant, through counsel, does not contest this finding of inadmissibility. Rather, 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 reside with his spouse and son in the United States.

The Field Office Director denied the Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) as a matter of discretion as no purpose would be served in granting permission to reapply as the remained otherwise inadmissible. *See Decision of the Field Office Director*, dated August 4, 2011.

On appeal, counsel for the applicant asserts that the U.S. Citizenship and Immigration Services (USCIS) erred in denying the applicant's waiver application as USCIS failed to conduct a thorough evaluation of the documentary evidence and statements that demonstrate the hardship that the applicant's U.S. citizen spouse would suffer because of the applicant's inadmissibility. *See Notice of Appeal or Motion* (Form I-290B), dated August 31, 2011.

The record includes, but is not limited to: briefs from counsel; statements from the applicant, and his spouse; letters of support; identity, psychological, medical, employment, and financial documents; photographs; and country condition information. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides, in relevant part:

> (A) Certain aliens previously removed.-
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> ...
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> (ii) Other aliens.- Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> ...
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> 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 the Secretary of Homeland Security (Secretary)] has consented to the alien's reapplying for admission.

The record reflects that the applicant entered the United States as a stowaway on or about December 14, 1992 and applied for asylum after his apprehension by legacy Immigration and Naturalization Service Officers. The applicant's case was denied after appeal to the Board of Immigration Appeals on March 26, 1999, and a Warrant of Deportation was issued on October 12, 1999. The U.S. Fifth Circuit Court of Appeals dismissed the applicant's petition for review on January 26, 2000. The applicant remained in the United States after his appeal was denied, and was removed from the United States on November 25, 2008. The record reflects that he has remained outside the United States to date. Accordingly, the applicant is inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

In a separate decision on the applicant's Form I-601 waiver application, the AAO found that the applicant established that the bar to his admission pursuant to section 212(a)(B)(i)(II) of the Act would result in extreme hardship to his qualifying relative. The AAO now turns to a consideration of whether the applicant is eligible for permission to reapply for entry as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's unlawful presence in the United States, for which he now seeks a waiver and a 1996 criminal conviction for tampering with a government record. The mitigating factors include the applicant's U.S. citizen spouse and child, the extreme hardship to his spouse and child if the waiver application is denied, the applicant's length of stay in the United States, proof of community service, and numerous letters from church members and friends attesting to the applicant's good character.

The AAO finds that the immigration violation and criminal conviction are serious in nature and cannot be condoned. Nevertheless, when taken together, the mitigating factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.