

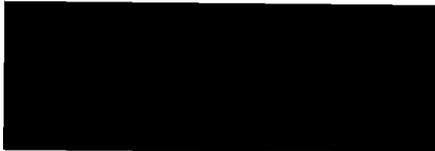
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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
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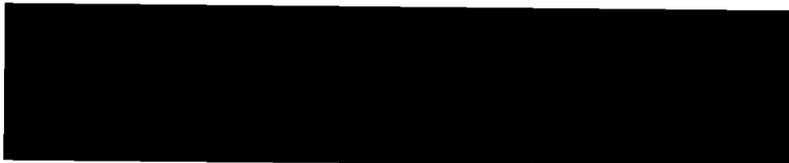
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DATE: DEC 20 2011      OFFICE: HAVANA, CUBA      FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION:    Application for Waiver of Grounds of Inadmissibility under Section 212(a)(3)(D)(iv) of the  
Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(D)(iv)

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Havana, Cuba and the applicant has appealed that decision to the Administrative Appeals Office (AAO). The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(3)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(3)(D)(i), for his affiliation with the Communist Party in Cuba. The applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(3)(D)(iv) of the Act, 8 U.S.C. § 1182(a)(3)(D)(iv), in order to reside in the United States.

The Field Office Director found that the applicant did not merit a waiver based on humanitarian grounds and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated June 13, 2011.

On appeal, counsel asserts that the Field Office Director's decision is flawed. He contends that the Field Office Director failed to address all aspects of the applicant's claim, ignored the numerous equities presented by the record and confused the section of law under which the applicant is applying for an exception. *Form I-290B, Notice of Appeal or Motion*, dated July 13, 2011.

The record includes, but is not limited to, counsel's brief; statements from the applicant, his spouse, her family members and their friends; medical documentation relating to the applicant's spouse and her brother; a 2009 tax return for the applicant's spouse; and country conditions information on repression in Cuba. The entire record was reviewed and all relevant information considered in reaching a decision on the appeal.

Section 212(a)(3)(D) of the Act states:

(i) **In general** Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) **Exception for involuntary membership** Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General [Secretary of Homeland Security] when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) **Exception for past membership** Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General [Secretary] when applying for admission) that-

(I) the membership or affiliation terminated at least-

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) **Exception for close family members** The Attorney General [Secretary] may, in the Attorney General's [Secretary's] discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

The record establishes that the applicant is a member of the Union de Jovenes Comunistas (UJC), the youth organization for the Communist Party in Cuba. Counsel acknowledges the applicant's inadmissibility under section 212(a)(3)(D)(i) of the Act and does not indicate that the applicant falls under either of the exculpatory exceptions found in sections 212(a)(3)(D)(ii) or (iii). He asserts, instead, that the applicant is eligible for an exception to his inadmissibility pursuant to section 212(a)(3)(D)(iv) of the Act, based on his marriage to a U.S. citizen.

On appeal, counsel asserts that the applicant has a particularly strong argument for family unity since his closest and most important relative is a U.S. citizen who wishes to return to the United States. He notes that the applicant's spouse's immediate family, all U.S. citizens, reside in the United States and that the applicant has also developed a strong connection with his spouse's parents and siblings. He further contends that if the applicant's spouse, who has been trained as a medical doctor, must remain in Cuba to be with the applicant, she will be deprived of the opportunity of returning home to fulfill the dreams and goals she and her family have for the future, which includes opening a medical practice with her father. Counsel also notes that the applicant's spouse's youngest brother has been diagnosed with Hodgkin's Lymphoma, which has made her desire to return to the United States even stronger. He further indicates that another of the applicant's spouse's brothers has been struggling with depression and addiction.

Counsel also contends that the applicant's spouse's health will be negatively affected if she continues to live in Cuba as she has a life-long asthmatic condition that has worsened as a result of Cuba's tropical weather, air pollution and molds. He maintains that the applicant's spouse's asthma will present a potentially life-threatening problem if she becomes pregnant while in Cuba, as there is an increased risk of asthma exacerbation during pregnancy. If the applicant's spouse returns to the United States without the applicant, counsel predicts that she will not only place a severe strain on her marriage but lose the opportunity to have children with the applicant. For all these reasons, counsel states, the applicant merits a waiver based on the principle of family unity under section 212(a)(3)(D)(iv) of the Act.

Counsel further maintains that the public interest would be served by admitting the applicant to the United States as he would be an asset to any U.S. community. Counsel notes that the applicant and

his spouse are eager to initiate projects and goals to benefit the rural Pennsylvania community in which they will live, including the applicant's spouse's opening of a medical practice in what is currently a medically-underserved area of the United States. Counsel also asserts that the applicant and his spouse plan to open a school, for which the applicant's mother has already purchased a building. In light of the applicant's and his spouse's plans, counsel contends that the applicant's admission to the United States would provide health and educational benefits to their prospective community and, thereby, serve the public interest.

Counsel also declares that the applicant's admission would not pose a threat to the United States. He reports that the applicant has a baccalaureate degree in radiochemistry, no criminal record and is viewed by his friends and colleagues as an individual with admirable values, intelligence, respect for others and a strong work ethic. Counsel also asserts that the applicant has not severed his ties to the UJC because doing so would result in a dishonorable discharge from that organization, a consequences that would negatively affect his ability to obtain an exit visa from the Government of Cuba. These facts, counsel states, offer proof that the applicant poses no threat to the United States.

In support of the waiver applicant, the record also includes a March 27, 2011 statement from the applicant's spouse in which she asserts that she has completed the educational plan she set for herself and that her time in Cuba is coming to an end. She states that her five years of medical school have taken her away from her family for far too long and that her family needs her to come home. At the same time, the applicant's spouse asserts, she cannot return home without the applicant as he is also her family. She contends that, together, she and the applicant will be able to do great things for their future children and their community.

The AAO now turns to a consideration of whether the applicant may be granted an exception to his inadmissibility pursuant to section 212(a)(3)(D)(iv) of the Act.

The applicant is married to a U.S. citizen, which makes him eligible for waiver consideration under section 212(a)(3)(D)(iv) of the Act and is seeking a waiver on the basis that his admission to the United States would both assure family unity and serve the public interest. While the AAO does not find the record to offer sufficient evidence to demonstrate that waiving the applicant's inadmissibility would be in the public interest, we have concluded that it does establish that a waiver should be granted in the interests of family unity.

In reaching our decision, the AAO has noted that the applicant's spouse has been residing in Cuba solely to obtain a medical degree at the Latin American Medical School in Havana and that her studies (and the U.S. Treasury license exempting her from the travel and trade restrictions of the Cuba Democracy Act) are now at an end. We also acknowledge the numerous statements from the applicant's spouse's friends and family members in the United States describing her exceptional commitment to improving the lives of those around her and her goal of obtaining a medical degree in order to provide health care to underserved populations in the United States. We further observe that the record contains an April 20, 2011 report from New York-Presbyterian Hospital that supports counsel's claim that the applicant's spouse's youngest brother has been recently diagnosed with Hodgkin's Lymphoma, thereby adding to the urgency of her desire to return to the United States as soon as her studies are completed. Statements from the applicant's spouse's family members and friends in the United States describe the applicant's spouse's importance to their lives.

The AAO has further found no evidence in the record that would indicate the applicant poses a threat to the United States. A copy of the applicant's baccalaureate degree establishes that he holds a degree in radiochemistry and a copy of his Certificacion de Antecedentes Penales, dated January 13, 2011, demonstrates that he has no criminal record in Cuba. Numerous statements from friends of the applicant and the family of his spouse attest to his character and integrity, as well as his and his spouse's devotion to one another. In that the applicant is eligible for a waiver based on family unity and is found to pose no threat to the United States, he is statutorily eligible for a section 212(a)(3)(D)(iv) waiver.

The AAO also concludes that the applicant merits a favorable exercise of discretion under the Act.

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-Moralez*, 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 applicant's case is his current UJC membership. The mitigating factors include his marriage to a U.S. citizen, the general hardship to his spouse that would result from the denial of the waiver, the absence of a criminal record in Cuba, his baccalaureate degree in radiochemistry, and the statements submitted by his friends and associates relating their observations of his integrity and character.

The AAO acknowledges the negative presented by the applicant's UJC membership. However, we, nevertheless, find that when taken together, the mitigating factors in the present case outweigh the adverse factor such that a favorable exercise of discretion is warranted. Therefore, the appeal will be sustained.

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In proceedings for a waiver of grounds of inadmissibility under section 212(a)(3)(D)(iv) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

**ORDER:** The appeal is sustained.