

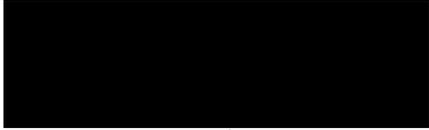


U.S. Department of Justice

Immigration and Naturalization Service

H4

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



FILE



Office: Vermont Service Center

Date:

MAR - 7 2001

IN RE: Applicant:



APPLICATION:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:



**PUBLIC COPY**

...to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Pakistan who was paroled into the United States on November 16, 1990 pending an exclusion hearing and he was released after posting an exclusion bond. The applicant was charged with being excludable under former §§ 212(a)(19) and (20) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(19) and (20), for having attempted to procure admission into the United States by fraud or misrepresentation and for not being in possession of a valid visa or lieu document. On March 8, 1991, the applicant was ordered excluded and deported from the United States *in absentia* based on the above charges. Therefore he is inadmissible under present §§ 212(a)(6)(C)(i) and 212(a)(9)(A)(ii) of the Act, 8 U.S.C. 1182(a)(6)(C)(i) and 1182(a)(9)(A)(ii), for having attempted to procure admission into the United States by fraud or willful misrepresentation and for having been ordered removed from the United States.

The applicant immediately traveled to New Jersey after his release on bond and alleges that he was not aware of the hearing. The applicant married a native of Guyana and lawful permanent resident on August 11, 1993 and he is the beneficiary of an approved petition for alien relative. The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to remain with his wife.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, it is alleged that the applicant did not know about the hearing and counsel states that a motion to reopen deportation proceeding and motion to change venue are pending before the Board of Immigration Appeals. Therefore, that matter is being decided in another proceedings. Counsel states that the applicant departed the United States for Pakistan on December 27, 1999. The record is silent as to whether he is still in that country.

On appeal, counsel states that the applicant has not been convicted of any crimes and discusses the hardship that his wife would experience resulting from his removal, his family responsibilities and his length of time in the United States.

Section 212(a)(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(ii) OTHER ALIENS.-Any alien not described in clause  
(i) who-

(I) has been ordered removed under § 240  
of the Act 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 has consented to the alien's reapplying for admission.

The immigration judge's decision in March 1991 also rendered the applicant inadmissible to the United States under § 212(a)(6)(A) of the Act, 8 U.S.C. 1182(a)(6)(A), for having been ordered excluded and deported. This section was in effect until April 1, 1997. However, §§ 212(a)(6)(A) and (B) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and are now jointly codified as § 212(a)(9)(A)(ii). Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former §§ 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former § 236 of the Act, 8 U.S.C. 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

A review of the 1996 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, (2) added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) 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 reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have violated immigration laws. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Matter of Lee, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

In Matter of Tin, the Regional Commissioner held that such an unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following Tin, an equity gained while in an unlawful status can be given only minimal weight.

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a (removal)

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 (removal) deportation proceedings, with knowledge that the alien might be deported. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993).

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as "after-acquired family ties" in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter was paroled into the United States in November 1990 using a false name, he failed to appear for a hearing, he was ordered excluded and deported for having attempted to procure admission by fraud, he married his spouse in August 1993 and engaged in unauthorized employment. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family tie, the absence of a criminal record, the approved visa petition, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's attempted entry by fraud, his failure to appear for the removal hearing, his failure to depart upon being found inadmissible, his employment without Service authorization, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, *supra*, that he could only relate a positive factor of residence in the United States where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law, would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity (marriage) gained while being unlawfully present in the United States (and entered into while in deportation (removal) proceedings) can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full 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); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.