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U.S. Department of Homeland Security
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Washington, DC 20529

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**U.S. Citizenship
and Immigration
Services**

H9

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: NOV 05 2004

IN RE:

Applicant:

[Redacted]

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:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous June 5, 2003, AAO order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Bangladesh who was admitted to the United States as a nonimmigrant visitor on May 17, 1996, with authorization to remain until November 7, 1996. The applicant remained longer than authorized without applying for or obtaining an extension of his stay. The applicant was subsequently placed into removal proceedings. He did not appear at his immigration court hearing and the applicant was ordered removed from the United States, in absentia on January 20, 1998. The applicant failed to surrender for removal on October 19, 1998, and the record contains no evidence to establish that the applicant has left the United States.¹

On March 21, 2000, the applicant divorced his wife [REDACTED] through whom he had been a beneficiary of a Petition for Alien Relative. The applicant married his present wife, Sumana Ahmed, a native of Bangladesh, on April 24, 2000. The applicant's present wife became a naturalized U.S. citizen on November 16, 2001, and the applicant is the beneficiary of an approved Petition for Alien Relative filed by his present wife. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), and 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).

The director determined that the favorable factors in the applicant's case were outweighed by the unfavorable factors. The application was denied accordingly. The AAO affirmed the director's decision on appeal. The AAO found the applicant had been properly served with a Notice to Appear at his removal proceedings, and that the AAO was bound by the 1998, removal order against the applicant. The AAO found further that precedent legal decisions and Congressional intent demonstrate that, in the exercise of discretion and in the determination of hardship, less weight is accorded to favorable factors gained after the commencement of deportation or removal proceedings. The AAO then balanced the favorable and unfavorable factors in the applicant's case and determined that the favorable factors were outweighed by the unfavorable factors. The appeal was dismissed accordingly.

8 C.F.R. § 103.5(a) states in pertinent part:

- (3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.
- (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

¹ The AAO notes that on December 24, 2002, counsel submitted a copy of an airline ticket issued to the applicant for a December 21, 2002 flight to Toronto, Canada. The record contains no other evidence or information relating to the applicant's departure from the United States. The AAO finds that the copy of the applicant's airline ticket fails to establish, in and of itself, that the applicant departed the United States, or that he resides outside of the United States.

In the present motion to reconsider, counsel asserts that neither the legal precedent cases cited by the AAO in its June 5, 2003 decision, nor Congressional intent supports the AAO finding that less weight should be accorded to the applicant's post-removal order marriage and the birth of his child. Counsel asserts an alternative interpretation of the Congressional intent and an alternative, fact-specific interpretation of the legal cases referred to in the AAO's decision. Counsel asserts further that the AAO abused its discretion by failing to follow the legal policies set forth in *Matter of Tin*, 14 I&N Dec. 371 (Comm. 1973), and *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978).

The AAO finds counsel has stated the reasons for his motion to reconsider, and that he has referred to pertinent precedent legal decisions. The AAO will therefore grant the motion to reconsider. Nevertheless, the AAO finds that counsel has failed to establish that the June 5, 2003, AAO decision was based on an incorrect application of the law, or that the decision was incorrect based on the evidence of record. The AAO therefore affirms its previous decision, dated June 5, 2003.

Counsel asserts on motion, that the AAO misinterpreted legal rulings pertaining to the treatment of equities acquired after the commencement of removal proceedings ("after-acquired equities"). Counsel concedes that courts have accorded diminished weight to favorable factors, or equities, acquired after the commencement of deportation or removal proceedings. Counsel asserts, however, that the applicant's case is factually distinguishable from the precedent legal cases cited in the AAO's decision, and that the rule regarding "after-acquired equities" does not apply to Application for Permission to Reapply for Admission cases under section 212(a)(9)(A) of the Act.

The AAO finds counsel's assertions to be unpersuasive. The AAO notes that the legal decisions referred to in the June 5, 2003, AAO decision involved cases in which the applicant sought discretionary relief from deportation or removal, and in which the courts weighed favorable equities or factors against unfavorable factors, and thereby determined whether to grant discretionary relief. The AAO notes further that the applicant's Application for Permission to Apply for Readmission after being ordered removed from the United States, involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief. Moreover, the AAO finds that the legal decisions referred to in the June 5, 2003 AAO decision, and in counsel's subsequent motion to reconsider, have repeatedly upheld the *general principal* that less weight is given to *equities* acquired by an alien after an order of deportation or removal order has been issued ("less weight principle").

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an Order to Show

Cause had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980), the Ninth Circuit Court of Appeals (Ninth Circuit) reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds). In *Wang*, the alien sought discretionary relief and a finding of extreme hardship through a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang*, that, "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country."

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c), waiver of deportation, discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing hardship to a spouse *and* for purposes of assessing favorable equities in the exercise of discretion.

The AAO finds further that the June 5, 2003, AAO decision properly applied the principles set forth in *Matter of Tin*, 14 I&N Dec. 371, 374-75 (Reg. Comm. 1973) and *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978).

The Regional Commissioner held, in *Matter of Tin, supra*, that in determining whether an application for permission to reapply for admission should be granted:

[A]ll pertinent circumstances relating to the applicant which are set forth in the record of proceedings are considered. These include but are not limited to the basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitation, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

The pre-IIRIRA, *Tin* decision found that an alien's unlawful presence in the United States was evidence of disrespect for the law. In addition, the Regional Commissioner noted in *Tin*, that the alien had gained his equity while being unlawfully present in the United States. The Regional Commissioner stated that through his illegal actions, the alien had obtained an advantage over aliens who properly sought visa issuance abroad or who abided by the terms of their admission while in this country. In denying the applicant's application, the Regional Commissioner concluded that the unfavorable factors outweighed the favorable factors in the applicant's case and that approval of the application would be a condonation of the alien's acts, which could encourage others to enter the United States unlawfully.

In *Matter of Lee, supra*, the Commissioner held that a record of immigration violations alone did not conclusively establish a lack of good moral character. *Matter of Lee* also modified *Matter of Tin, supra*, in holding that the recency of an alien's deportation can only be considered an adverse factor for Application for Permission to Reapply for Admission purposes, if the alien is found to lack good moral character based on moral turpitude in his or her conduct and attitude which evinces a callous conscience toward the violation of immigration laws. *Matter of Lee* clearly stated, however, that a record of serious immigration violations would still be considered an adverse factor against an alien, and that a "[c]allous attitude toward violating the immigration laws without a hint of reformation of character should be considered as a heavily weighted adverse factor." See *Matter of Lee* at 278.

The AAO finds that the June 5, 2003, AAO decision properly listed and balanced the favorable and unfavorable factors in the applicant's case, in accordance with the legal guidance set forth in *Matter of Tin* and *Matter of Lee, supra*. Moreover, the AAO finds that the applicant's marriage and the birth of his child occurred after a removal order was issued against the applicant in January 1998. The AAO finds that these factors were properly analyzed and found to be "after-acquired equities" in the previous AAO decision, and that any favorable weight derived from the applicant's marriage and the birth of his child was properly accorded diminished weight. The AAO notes further that the evidence in the record fails to establish that the applicant has departed the United States, and the AAO finds that its previous decision properly discussed and concluded that the totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the immigration laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors. The previous AAO decision will therefore be affirmed.

ORDER: The previous AAO decision, dated June 5, 2003, is affirmed.