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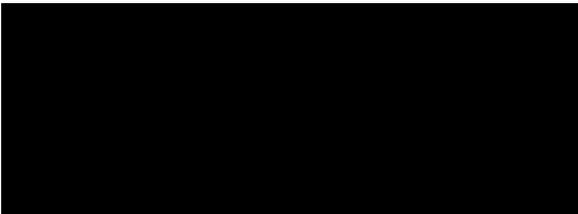


FILE:  Office: CALIFORNIA SERVICE CENTER Date: **AUG 28 2006**

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

ON BEHALF OF APPLICANT:



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, Chief
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India who entered the United States without a lawful admission or parole on December 8, 1992. On December 30, 1992, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On March 19, 1993, the applicant was interviewed for asylum status. On May 12, 1993, his Form I-589 was denied and an Order to Show Cause (OSC) for a hearing before an immigration judge was issued. On April 20, 1995, an immigration judge found the applicant deportable pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection and granted him voluntary departure until December 20, 1995, in lieu of deportation. The applicant failed to surrender for removal or depart from the United States on or before December 20, 1995. The applicant's failure to depart the United States on or before December 20, 1995, changed the voluntary departure order to an order of deportation. On July 3, 1996, a Warrant of Removal/Deportation (Form I-205) was issued, and a Notice to Deportable Alien (Form I-166) was forwarded to the applicant. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 remain in the United States to reside with his U.S. citizen spouse and children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. See *Director's Decision* dated July 22, 2005.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

. . . .

(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 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 aliens 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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (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 in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has 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 from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief in which she states that the Director failed to give proper weight to the applicant's equities. Counsel states that the Director failed to consider the applicant's U.S. citizen spouse and children, the hardship the family would suffer if the applicant was removed, the letters of recommendation regarding his good moral character, the need of his services in the United States and his family responsibilities. Counsel further states that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act as an alien who has accrued unlawful presence in the United States of one year or more. In addition, counsel states that the applicant's failure to depart the United States and his unlawful presence are not bars to the granting of a Form I-212. Counsel states that the applicant was granted voluntary departure, which requires a finding of good moral character. In addition, she states that the applicant has no criminal record, is a hardworking businessman, a devoted father and husband, and submits letters from friends and business associates. Counsel states that the applicant's favorable factors outweigh his immigration violations. Additionally, counsel states that the applicant is responsible for the financial and emotional needs of his family. Furthermore, counsel states that if the applicant were removed from the United States, he, his spouse and children, as well as his extended family network, his employees and his local community would suffer severe hardship. His spouse would become a single parent, required to care for and support their children who would be deprived of affection, guidance and care from their father. Counsel further states that if the applicant were to return to India he would not be able to find work because of the high unemployment in that country and, therefore, would not be able to properly support his wife and children in the United States. Counsel states that if the applicant's family decides to leave the United States and relocate with the applicant to India they would suffer hardship due to India's country conditions, such as poverty, unemployment, violence, lack of proper healthcare and education, and pervasive violence and discrimination against women. Finally, counsel states that the applicant owns several businesses in the United States and his presence is needed in order to operate the businesses and support members of the community.

In his decision, the Director did not state that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for unlawful presence as alleged by counsel. He considered the applicant's unlawful presence in the United States as a factor when weighing all factors in decision.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant seeking permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's spouse and children, but it will be just one of the determining factors. There are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we

believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States.”

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 U.S. 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 unlawfully. *Id.*

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 court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th 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-Nunoz v. INS*, 627 F.2d 1004 (9th 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 (5th 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 applicant in the present matter married his U.S. citizen spouse on April 4, 1994, approximately one year after he was placed in deportation proceedings. The applicant’s spouse should reasonably have been aware, at the time of their marriage, of the applicant’s immigration violations and the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant’s family ties in the United States, his U.S. citizen spouse and children, an approved Form I-130, the prospect of general hardship to his family, the

absence of any criminal record, and the letters of recommendation submitted regarding his good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States on December 8, 1992, his failure to depart the United States after he was granted voluntary departure, and after his voluntary departure order became a final order of deportation, his unauthorized employment, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only 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 to a U.S. citizen, gained after he was placed in deportation proceedings, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.