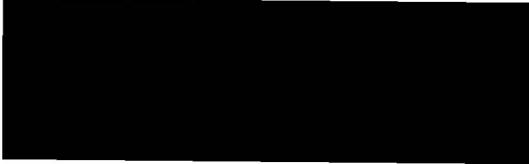




U.S. Citizenship
and Immigration
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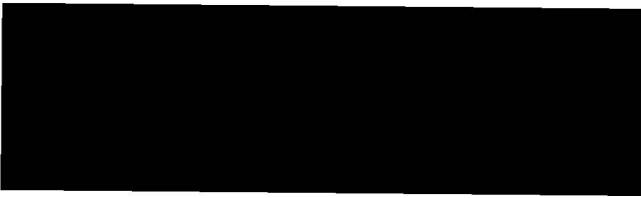
H4



FILE: Office: CALIFORNIA SERVICE CENTER Date: JUN 19 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 or about June 20, 1998. The Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and a Notice to Appear (NTA) for a removal hearing before an immigration judge was served on the applicant on June 21, 1998. On January 13, 1999, the applicant failed to appear for a removal hearing and he was subsequently ordered removed in absentia by an immigration judge, pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i) for having been present in the United States without being admitted or paroled. On July 30, 1999, an immigration judge denied a Motion to Reopen the removal order (MTR). An appeal filed with the Board of Immigration Appeals (BIA) was dismissed on March 20, 2002. On February 24, 2003 a petition for review of an order of the BIA was denied by the United States Court of Appeals for the Fifth Circuit. 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 and reside with his U.S. citizen spouse and stepchildren.

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

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens 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 . . . [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 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 did not consider the applicant's equities and did not weigh them against his minor immigration violation. In addition, counsel states that the Director disregarded and ignored pertinent facts and equities that the applicant provided with his Form I-212. Counsel states that although the applicant married a U.S. citizen while his MTR was pending with the BIA, his family equity was acquired while he was pursuing legal relief and cannot be considered as the applicant's only possible avenue of legal immigration. Counsel further states that the Director did not take into consideration the applicant's relationship with his stepchildren. In addition, counsel states that the applicant has shown respect for the laws of the United States by filing appeals and MTR's in an effort to remain in the country legally, has no criminal record, is a loving, supportive husband and stepfather, filed federal and state taxes, has maintained his credit score and helps provide for his two U.S. citizen stepchildren. Additionally, counsel states that the Director improperly analyzed the applicant's eligibility for admission as a negative factor and states that the applicant is not inadmissible under section 212(a)(9) of the Act, as the Director concluded. Counsel refers to the Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Furthermore, counsel states that the Director did not consider the extreme hardship the applicant's spouse and stepchildren will suffer if the Form I-212 is not granted. Counsel states that the applicant's spouse takes care of her mother who suffers from diabetes and heart problems, and his spouse underwent a serious back surgery, which forced her to remain in bed. According to counsel, the entire family depends on the applicant for financial and emotional support as well as physical assistance with the applicant's spouse's medical condition and if the Form I-212 is not granted the applicant's spouse may have to institutionalize her mother, and she will not have the applicant to assist her, and she and the applicant's stepchildren will suffer emotionally. Finally, counsel states that the Director erred in not granting the Form I-212 because he did not properly analyze the positive and negative equities, and requests that the decision be reversed and the Form I-212 granted.

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 for 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.

In *Perez-Gonzalez*, the court found that the Service denied the Form I-212 erroneously on the ground that permission to reapply is only available to aliens who are outside the United States, applying at a port of entry, or paroled into the United States. The court ruled that the alien, who returned to the United States following a deportation and had his deportation order reinstated, could still adjust status if his Form I-212 were granted. The applicant in the present case is in the country, was allowed to file a Form I-212, and the Director adjudicated the application pursuant to section 212(a)(9)(A)(iii) of the Act. The AAO notes that *Perez-Gonzalez* states that ". . . if permission to reapply is granted the approval of Form I-212 is retroactive . . . and therefore, the alien is no longer subject to the grounds of inadmissibility under section 212(a)(9)." The operative word is "if". In the present case, the application was denied because the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. Permission to reapply was not granted and, therefore, the applicant remains inadmissible.

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 10, 2001, approximately three years after he was placed in removal proceedings and over two years after he was ordered removed from the United States. Although the applicant had filed an appeal with the BIA, the applicant's spouse should reasonably have been aware, at the time of their marriage, of the possibility of his being removed. He now seeks relief based on that after-acquired equity. In addition, no documentation was provided to support the assertion that the applicant's spouse is dependent either physically or financially on the applicant.

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 stepchildren, the prospect of general hardship to his family, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his failure to depart the United States after a final removal order was issued, and after he exhausted all legal remedies available to him, his employment without authorization 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 removal proceedings and after a final order of removal was issued, 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.