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U.S. Citizenship  
and Immigration  
Services

H4

[REDACTED]

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: SEP 27 2006

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

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Pakistan who was admitted into the United States on January 4, 1991, as a non-immigrant visitor for pleasure. On March 8, 1993, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On May 20, 1993, the applicant was interviewed for asylum status. On July 30, 1993, his application was denied and an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was issued on September 15, 1993. The applicant withdrew his Form I-589 and on September 25, 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 remained in the United States longer than permitted and granted him voluntary departure until June 30, 1996, in lieu of deportation. On June 27, 1996, the District Director denied an application for extension of voluntary departure. On July 7, 1996, a Notice to Deportable Alien (Form I-166) was forwarded to the applicant requesting that he appear on August 6, 1996, at the San Francisco, California district office in order to be removed from the United States. The applicant failed to surrender for deportation or depart from the United States. The applicant filed a Motion to Reopen (MTR) deportation proceedings in order to seek adjustment of status, and a request for stay of deportation. The applicant's request for stay of deportation was granted on October 8, 1996. On October 25, 1996, his MTR was denied and on May 30, 1997, the Board of Immigration Appeals (BIA) dismissed an appeal. On May 23, 2002, the BIA rejected a MTR. On April 8, 2002, the applicant was apprehended and consequently on May 21, 2002, he was deported from the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen 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 now 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 travel to the United States and reside with his U.S. citizen spouse, children and step-children.

The Director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated September 29, 2005.

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for a period of one year or more and his eligibility for a waiver based on his marriage to a U.S. citizen. These proceedings are limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived. That is the only issue that will be discussed.

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, 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 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 for others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (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 deterring aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief, a copy of the applicant's spouse's birth certificate, a copy of his marriage certificate, a copy of a Notice of Action (Form I-797) regarding the approval of a Form I-130, copies of the applicant's children's birth certificates and a statement by the applicant's spouse. In his brief, counsel states that the applicant's favorable and humanitarian factors are overwhelming and surely offset any negative factors present. Counsel further states that the applicant is a person of good moral character, has four U.S. citizen children whom he must support financially and emotionally and a spouse who is suffering without his assistance. In addition, counsel states that the applicant's spouse and his children are suffering greatly as a result of his removal. Counsel further states that the Director abused his discretion and failed to analyze case law and overlooked the significant equities and hardships involved in the applicant's case. Counsel refers to *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) which held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. Counsel refers to *Matter of Carbajal*, 17 I&N Dec. 272 (BIA 1978) in which the applicant had entered the United States illegally on four occasions without inspection or parole. Additionally, counsel states that the applicant married a US. citizen and is the father of U.S. citizen children and, therefore, he merits a favorable adjudication of his application. Counsel states that since the applicant resided in the jurisdiction of the Ninth Circuit Court of Appeals the precedent decisions cited by the Director from other Circuit Court are not binding in this case. Furthermore, counsel states that the Ninth Circuit case referred to by the Director, *Carnalla-Nunoz v.INS*, 627 F.2d 1004 (9<sup>th</sup> Cir. 1980), is not applicable here because it dealt with suspension of deportation in which the "after acquired equity" was that the daughter adjusted status after the petitioners were placed in removal

proceedings. Counsel further refers to *Matter of Acosta*, 14 I&N Dec. 361, in which the BIA acknowledged that the hardship faced by the applicant's family outweighed any negative factors present. Counsel also refers to the decision in *Salcido-Salcido v. INS*, 138 F.3d 1292(9<sup>th</sup> Cir. 1998) that states that separation from family may be the most important single hardship factor.

As noted above, *Matter of Lee, supra*, held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character and in *Matter of Carbajal, supra*, the Board of Immigration Appeals (BIA) determined that the individual's immigration violations did not constitute a lack of good moral character. In the present case, the Director did not find that the applicant lacked good moral character. The Director denied the Form I-212 after determining that the unfavorable factors outweighed the favorable ones.

Although the applicant in the present case resided within the jurisdiction of the Ninth Circuit Court of Appeals, the published decisions of the other Circuits are considered persuasive evidence regarding issues not directly decided by the Ninth Circuit. Therefore, the AAO finds that the Director properly used case law from other Circuits.

*Salcido-Salcido*, referred to by counsel, dealt with suspension of deportation where extreme hardship is taken into consideration. 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. The AAO will consider the hardship to the applicant's spouse and children, but it will be just one of the determining factors.

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 be a condonation of the alien's acts and could encourage others to enter without being admitted and work in the United States unlawfully. *Id.*

The court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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. Moreover, in *Ghassan v. INS*, 972 F.2d 631,

634-35 (5<sup>th</sup> 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 November 25, 1995, over two years after deportation proceedings were initiated and approximately two months after an immigration judge found him deportable. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of his being deported. 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, children and step-children, an approved Form I-130, 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 overstay after his initial lawful admission, 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, and after he was found deportable, 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