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



U.S. Citizenship  
and Immigration  
Services

H4



FILE:



Office: CALIFORNIA SERVICE CENTER  
RELATES)

Date: JUN 08 2007

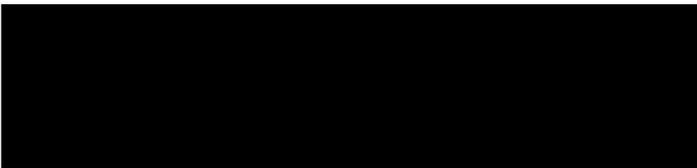
IN RE:

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:



ADULT COPY

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 Director, California Service Center denied the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. A motion to reconsider is now before the AAO. The motion will be granted. The previous decision shall be affirmed. The application will be denied.

The applicant is a native and a citizen of India who states that he entered the United States without a lawful admission or parole in November 1984. In May 1986, the applicant filed a Form I-589, Request for Asylum in the United States with the office of the immigration judge. On June 5, 1987, the applicant failed to appear for the deportation hearing. The immigration judge denied his Form I-589 for lack of prosecution and ordered the applicant deported *in absentia* pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection. On August 8, 2003, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status, based on the approved Form I-130, Petition for Alien Relative, 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 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 with his U.S. citizen spouse.

The AAO determined that the unfavorable factors in the applicant's case outweighed the favorable factors and dismissed the appeal accordingly. *AAO Decision*, dated December 19, 2006.

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 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.

On motion, counsel contends that the applicant's failure to appear at his 1987 removal hearing should not be viewed as an unfavorable factor in considering the Form I-212 and, further, that the applicant's marriage to

██████████ and the Form I-130 filed by ██████████ are not after-acquired equities to be given minimal evidentiary weight in a 212(a)(9)(A)(iii) waiver decision. Counsel states that the applicant's failure to appear for his removal proceeding is the fault of ██████████, the attorney the applicant retained to handle his immigration case when he relocated to Southern California in March 1987. ██████████, counsel contends, failed to terminate the applicant's removal proceeding as instructed or to inform the applicant that he faced removal from the United States. Counsel further asserts that, as the applicant and ██████████ were first married in 1982, their 2001 remarriage is not an after-acquired equity. Counsel also contends that the AAO should not consider the applicant's unauthorized stay in the United States following the entry of the June 5, 1987 removal order against him as a negative factor in denying the Form I-212. The applicant, counsel states, was unaware of the removal order and also believed that he was eligible for adjustment under section 245(i) of the Act.

The AAO turns first to the issue of whether the applicant on motion establishes that his failure to appear for his June 5, 1987 removal hearing was the result of the ineffective assistance of his prior counsel. It notes that in dismissing this aspect of the appeal, it relied on its findings that counsel had incorrectly indicated that the applicant's Form I-589 had been filed by ██████████ and, further, that counsel's claim that the applicant had instructed ██████████ to withdraw the Form I-589 and administratively close his removal proceeding based on the approval of his legalization application was not consistent with other documentation in the record. Based on this discrepancy, the AAO discounted counsel's claim that the applicant should not be held responsible for failing to appear at his June 5, 1987 removal hearing.

In reviewing the record in response to counsel's motion, the AAO notes that, while counsel's January 27, 2006 appeal brief does initially state that the applicant relied on ██████████ to file his asylum claim in 1986, a subsequent sentence states that the law firm of Stahl & Bach represented the applicant with regard to his asylum application. The applicant's January 11, 2006 statement submitted on appeal also indicates that he was represented by the firm of Stahl & Bach in applying for asylum. Accordingly, the AAO concludes that counsel's initial identification of ██████████ as the attorney who assisted the applicant with his asylum application was an inadvertent error. However, counsel's contention that the failure of the applicant to appear at his removal proceeding is the fault of his previous counsel continues to be undermined by the evidence of record.

On appeal, counsel asserted that the applicant would have been present at his removal hearing but for his assumption that ██████████ would withdraw his asylum application and close the proceeding based on the approval of his legalization application under the Special Agricultural Worker (SAW) Program. The applicant made this same claim in his January 11, 2006 affidavit submitted on appeal, stating that he asked ██████████ to withdraw his asylum application after he was granted temporary residence under the SAW Program. However, as noted in the AAO's dismissal of the appeal, the applicant's removal hearing preceded, rather than followed, the approval of his application under the SAW program. The record establishes that the applicant filed the Form I-700, Application for Temporary Residence as a Special Agricultural Worker on September 15, 1987 and was granted temporary resident status on March 4, 1988. Based on this inconsistency between the record's documentation and counsel's claims, the AAO found counsel's explanation for the applicant's failure to appear at his June 5, 1987 removal hearing to be unpersuasive.

On motion, counsel notes that ██████████ was "in control of when to withdraw [the applicant's] asylum application and when to file his temporary employment authorization" and that, as established by the

immigration judge's June 5, 1987 removal order, [REDACTED] contacted the immigration court in San Francisco about the filing of a continuance but failed to do so. Counsel also contends that the AAO erred in discounting the applicant's explanation of his reliance on [REDACTED], as set forth in his January 25, 2007 affidavit filed in relation to the applicant's March 20, 2007 motion to reopen before the immigration judge.<sup>1</sup> However, neither counsel's statements, nor the applicant's 2007 affidavit, resolve the previously-identified discrepancy between the filing and approval dates for the applicant's Form I-700 and the applicant's account of when he instructed [REDACTED] to withdraw his asylum claim and terminate his removal proceeding.

Counsel on motion does not address the claim made in his appeal brief that the applicant's instructions to [REDACTED] regarding the termination of his removal proceeding followed his approval under the SAW Program. The applicant, in his 2007 affidavit, no longer asserts that he instructed [REDACTED] to withdraw his asylum claim following his SAW approval. However, this second affidavit fails to offer any explanation as to why the applicant previously made such a claim or to indicate that it was made in error. The AAO notes that a January 29, 2007 letter to [REDACTED] from counsel, also included in the applicant's motion to reopen before the immigration judge, states that the applicant initially retained [REDACTED] to transfer his immigration case from San Francisco to Los Angeles but that subsequently "due to the availability of other forms of relief," Mr. [REDACTED] promised the applicant that he would terminate his immigration case and withdraw his asylum claim. However, the letter's general statements do not resolve the inconsistencies between the applicant's initial claim regarding the timing of his instructions to [REDACTED] and the record's documentation of the dates on which the applicant filed for and was granted temporary legalized status under the SAW Program.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. If such inconsistencies cannot be explained, the doubt cast upon the applicant's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In the present case, counsel's motion fails to address the concern raised by the AAO with regard to the applicant's claim that the approval of his SAW application led him to instruct his prior counsel to withdraw his asylum application and terminate his removal proceeding. This evidentiary discrepancy undermines all aspects of the applicant's claim regarding his reliance on [REDACTED] and, therefore, counsel's efforts to establish that [REDACTED] rather than the applicant, is responsible for the applicant's failure to appear at his 1987 removal hearing. With regard to counsel's contention that the AAO failed to consider the applicant's 2007 affidavit on appeal, the AAO notes that it dismissed the appeal on December 19, 2006, prior to counsel's filing of the motion to reopen before the immigration judge.

On motion, counsel also asserts that the favorable factors of the applicant's marriage to [REDACTED] and the Form I-130 should not have been considered as after-acquired equities by the AAO in reaching its decision on the Form I-212. He points to the 1982 marriage of the applicant and [REDACTED] which ended in divorce in 1986, as the beginning of their union. Counsel's reasoning is not persuasive.

The record establishes that the applicant and [REDACTED] were first married on June 6, 1982 and that this marriage ended in divorce on June 13, 1986. [REDACTED] remarried the applicant on April 19, 2001, and, as a

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<sup>1</sup> Although counsel's motion does not indicate the date of the affidavit to which he refers, the AAO concludes that it is the affidavit filed by the applicant in connection with his motion to reopen before the immigration judge. Counsel has submitted no affidavit sworn by the applicant in connection with the instant motion

lawful permanent resident, filed the Form I-130 based on the family relationship established by this second marriage. The fact that the applicant and [REDACTED] were previously married is not relevant to these proceedings. While the applicant may consider his marriage to [REDACTED] to date back to 1982, his marriage for immigration purposes is that which took place on April 19, 2001.

As discussed in the AAO's December 19, 2006 decision, the applicant's 2001 marriage to [REDACTED] took place two months after the AAO's dismissal of the appeal he filed in relation to his temporary resident status under the SAW program. Accordingly, [REDACTED] should reasonably have been aware that the applicant faced the possibility of removal from the United States. The court in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> Cir. 1991) held that less weight is given to equities acquired after a deportation order has been entered and that 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. Further, the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> 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. 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. Therefore, based on the record before it, the AAO again concludes that the applicant's marriage to [REDACTED] and the Form I-130 based on that marriage are after-acquired equities and were appropriately assigned diminished evidentiary weight in its consideration of the Form I-212 filed by the applicant.

Counsel also contends that the applicant's unauthorized presence in the United States following the entry of the June 5, 1987 removal order should not be used against him as he was unaware of the order and believed he was eligible for adjustment under section 245(i) of the Act. However, for the reasons previously discussed in relation to the applicant's prior counsel, the record does not establish that the applicant was unaware of the June 5, 1987 removal order entered against him. Moreover, as indicated in the AAO's dismissal of the appeal, the fact that section 245(i) of the Act allows for periods of unauthorized presence and employment, does not prevent CIS from considering such issues when weighing favorable and unfavorable factors in section 212(a)(9)(A)(iii) proceedings.

While the AAO notes counsel's assertions regarding the applicant's diligence in applying for extensions of work authorization and pursuing his immigration claim, as well as his compliance with U.S. tax law, it does not find the applicant to have established that its dismissal of the appeal was based on an incorrect application of law or policy. Accordingly, the AAO will affirm that decision.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden.

**ORDER:** The decision of the AAO is affirmed. The application is denied.