

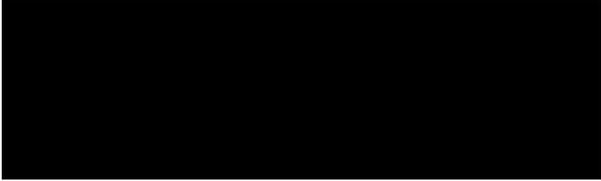
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Hu

FILE:



Office: VERMONT SERVICE CENTER

Date:

MAR 12 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:



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 Acting Director, Vermont 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, on June 22, 1994, at the J.F.K. International Airport applied for admission into the United States. The applicant was found inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(7)(A)(i)(I), for being an immigrant not in possession of a valid immigrant visa, and section 212(a)(7)(B)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(B)(i)(I), for being a nonimmigrant not in possession of a valid passport. The applicant was served with a Notice to Applicant for Admission Deferred for Hearing Before Immigration Judge (Form I-122). On October 14, 1994, the applicant filed a Request for Asylum (Form I-589) with the immigration court. On April 16, 1996, an immigration judge denied his request for asylum and withholding of deportation, and ordered the applicant excluded and deported from the United States. The record reflects that the applicant departed the United States on an unknown date and as such, self deported. 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)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 travel to the United States and reside with his U.S. citizen spouse, stepchild and child.

The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and the Form I-212 accordingly. *See Acting Director's Decision* dated January 12, 2006.

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

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years 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 deterring 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 and affidavits from the applicant and his spouse regarding extreme hardship. In his brief, counsel states that the Acting Director did not request information as to the reasons that formed the basis of her denial, depriving the applicant of the opportunity to rebut the derogatory evidence. Counsel states that the fact that the applicant remained in the United States longer than authorized should not have been a reason for denial as this is a minor reason compared to the hardship the applicant's spouse and child would suffer. Counsel further states that the denial of the applicant's Form I-589 and the fact that he was ordered excluded and deported should not have been mentioned as unfavorable factors. In addition, counsel states that the applicant is not aware that the Form I-130 was terminated and submits a copy of a Notice of Action (Form I-797) indicating that a Form I-130 has been approved on behalf of the applicant. Additionally, counsel states that the applicant is not aware of a criminal warrant of arrest having been issued against him and the Acting Director failed to provide information to the applicant before forming a basis of denial¹. Furthermore, counsel states that the applicant's employment without authorization and his lengthy presence in the United States without lawful permission or parole could have been summed up in the order of deportation because he was not legally in the United States or had no legal right to be in the United States. Counsel states that the Acting Director exaggerated the unfavorable factors and ignored the fact that it will not be possible for the applicant's spouse and child to live in the United States without him to provide, care and comfort to them. Finally, counsel states that the Acting Director failed to properly weigh the favorable factors and the decision is not consistent with the facts and pertinent law. Counsel requests that the appeal be sustained and the application approved.

In his affidavit, the applicant states that his spouse and children are U.S. citizens who have established their lives in the United States and if he is not allowed to enter the United States they will suffer extreme hardship because they will not be able to remain permanently in Pakistan. The applicant further states that separation will cause his family great emotional and psychological strain. In addition, he states that his spouse depends on him and he will not be able to support his family with a job in Pakistan and, therefore, his wife will be compelled to request public assistance. Furthermore, he states that his child's and stepchild's education and general development will suffer and they may suffer irreparable psychological damage. Finally he requests, that in the name of human compassion, that the Form I-212 be granted. In her affidavit, the applicant's spouse states that she has resided in Pakistan with the applicant since their marriage, with the exception of three months when she returned to the United States to give birth to her child. In addition, she states that she and the applicant are not financially able to take care of their children and she would like to return to the United States in order to be able to provide a better future to her children.

The record of proceeding reveals that the applicant married a U.S. citizen on September 10, 1997. A Form I-130 was filed on his behalf, and an Application to Register Permanent Residence or Adjust Status (Form I-485) filed on September 30, 1997, was automatically terminated on March 29, 2001, due to lack of prosecution. In addition, the record reflects that on June 12, 2001, the applicant may have entered into a

¹ Citizenship and Immigration Services (CIS) is not required to issue a request for evidence or a notice of intent to deny a Form I-212.

second marriage to a U.S. citizen for the purpose of evading immigration laws. On October 9, 2002, a warrant for his arrest was issued by the United States District Court, District of South Carolina, Spartanburg Division, related to the second marriage. The AAO notes that on his marriage certificate dated September 10, 1997, the applicant used a different name. The same name was used for the warrant of arrest. A review of all documents and photographs in the record indicates that despite the different name, the documents all relate to the same person, the current applicant. The AAO further notes that the applicant may be subject to section 204(c) of the Act, 8 U.S.C. § 1154(c), for having entered into a marriage in order to evade immigration laws. Since a final determination regarding section 204(c) of the Act has not been made, the AAO will weigh the discretionary factors in this case.

The AAO agrees with counsel that procedures resulting from the applicant's apprehension such as issuance of a Form I-122, the denial of his Form I-589, and being ordered excluded and deported should not have been mentioned as unfavorable factors. The applicant was entitled to file a non-frivolous asylum application and although it was subsequently denied, the denial should not be used as a negative factor.

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.

The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. *See Shoostary v. INS*, 39 F. 3d 1049 (9th Cir. 1994). The statements from the applicant and his spouse are very vague on what the hardship would be if the applicant were not allowed to return to the United States and she had to live without him. As such, this claim can be given little weight.

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 November 20, 2003, over seven and one half years after he was ordered excluded and deported and after he executed the deportation order. 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 not being allowed to reenter the United States. 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, and the potential of general hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to enter the U.S. without legal documents, his periods of 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 executed a deportation order, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility 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.