



U.S. Citizenship
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Services

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MAR 26 2007

FILE: [REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: [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:



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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 inspection on March 1, 1996. On September 12, 1996, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589). On November 4, 1996, the applicant's asylum application was referred to an immigration judge and the applicant was placed into proceedings. On May 16, 1997, the immigration judge denied the applicant's application for asylum and withholding of removal and granted the applicant voluntary departure until July 16, 1997. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On August 31, 1998, the BIA dismissed the applicant's appeal and granted him 30 days to voluntarily depart the United States. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. The applicant filed an appeal with the Ninth Circuit Court of Appeals (Ninth Circuit). On March 15, 1999, the Ninth Circuit dismissed the applicant's appeal for lack of prosecution. In April 1999, the applicant married his spouse, [REDACTED]. On September 20, 1999, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. The applicant filed a motion to reopen before the BIA. On July 14, 2000, the BIA denied the applicant's motion to reopen. On October 11, 2000, the applicant returned to India, where he has since resided. On August 18, 2005, the applicant filed the Form I-212. The applicant was found inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) for seeking admission within ten years of departing the United States after being ordered removed. The applicant 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 children.

The director determined that the applicant was inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for seeking admission within ten years of departing the United States after being ordered removed. The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The director denied the Form I-212 accordingly. *See Director's Decision* dated October 18, 2005.

On appeal, counsel contends that the applicant is not subject to the requirement of permission to reapply for admission and that, in the alternative, the director erred in finding that the unfavorable factors outweighed the favorable factors in the applicant's case. *See Applicant's Brief*, dated December 3, 2005. In support of the appeal, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Counsel contends that the applicant does not require permission to reapply for admission because imposing a ten-year bar of inadmissibility was a result of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996) and that, pursuant to section 309 of IIRIRA, aliens placed in immigration proceedings prior to enactment of IIRIRA are only subject to a five-year bar. However, the transition rule to which counsel refers is not relevant to whether the applicant is subject to a five or ten-year bar pursuant to section 212(a)(9)(A)(ii) of the Act. Rather, the transition rules refer to any relief the applicant may be pursuing at the time of enactment of IIRIRA, such as suspension or cancellation of removal or voluntary departure. In analyzing whether an applicant who was placed into removal proceedings pre-IIRIRA with a post-IIRIRA removal order constitutes inadmissibility pursuant to section 212(a)(9)(A) of the Act, the Department of State has issued guidance:

New 212(a)(9)(A)(i) and (ii) roughly correspond to former 212(a)(6)(A) and (6)(B), relating to aliens previously excluded/deported. The main change from the previous law is that the periods of inadmissibility have been substantially lengthened:

Arriving aliens denied admission and removed (excluded), who were previously ineligible for one year, are now generally ineligible for either: five years, if the removal order was issued on/after April 1, 1997, or ten years, if the removal (exclusion) order was issued prior to 4/1/97; *aliens ordered removed after having been admitted or after having entered without inspection, who were previously ineligible for five years, are now generally ineligible for ten years . . .* (emphasis added)

INA Section (Class Code)

Applies to:

212(a)(9)(A)(ii) (92A or 92B or 92C) other aliens previously ordered removed

whether the order was issued before, on, or after 4/1/97

Department of State Cable (R 040134Z APR 98), P.L. 104-208 Update No. 36: 212(a)(9)(A)-(C), 212(a)(6)(A) and (B), (April 4, 1998), Ref: 96-State-239978, 97-State-62429, 97-State-235245, 98-State-51296.

The AAO acknowledges that the applicant was placed into proceedings prior to enactment of IIRIRA on April 1, 1997, and that the changes made to grounds of inadmissibility by IIRIRA would not have affected the administration of the applicant's proceedings, i.e., the immigration judge, in finding the applicant eligible for voluntary departure would have applied pre-IIRIRA standards in determining eligibility for that relief. However, the applicant was granted voluntary departure, his voluntary departure became an order of removal and he self-executed his order of removal after April 1, 1997. As such, the applicant is subject to section 212(a)(9)(A)(ii) of the Act.

The AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

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 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.

The record of proceedings indicates that the applicant entered the United States without inspection and, when granted voluntary departure, failed to voluntarily depart the United States. The voluntary departure became a final order of removal with which the applicant failed to comply until October 11, 2000. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that [REDACTED] is a native of India who became a lawful permanent resident in 1997 and a naturalized U.S. citizen in 2004. The applicant and [REDACTED] have a four-year old son and a three-year old daughter who are U.S. citizens by birth. The applicant's sister, [REDACTED], is a native of India who became a lawful permanent resident in 1994 and a naturalized U.S. citizen in 2002. The applicant's mother and father are natives and citizens of India who became lawful permanent residents in 2005.

On appeal, counsel asserts that the applicant's voluntary departure was extended until August 14, 2000 and that his failure to comply with the voluntary departure should be excused because he was undergoing hemodialysis three times per week to sustain his life and eventually received a kidney transplant in India in December 2001. Medical documentation indicates that, in June 2000, the applicant was admitted to a San Francisco hospital and found to have renal failure, for which the applicant received hemodialysis. The record reflects that, while the Notification of Departure-Bond Case (Form I-392) executed by the U.S. Embassy in India indicates that the Ninth Circuit Court of Appeals extended the applicant's voluntary departure until August 14, 2000, the last time that the applicant's voluntary departure was extended was by the BIA on August 31, 1998, for a period of thirty days. There is no evidence in the record that the applicant experienced any problems until June 2000 or that he would have been unable to receive sufficient treatment upon his return to India. While the AAO notes that June 27, 2000, letter from the applicant's doctor at San Francisco General Hospital, which states that renal transplantation would not be an option were he to return to India, the record indicates that the applicant had a successful kidney transplant approximately one year after he returned home.

Counsel asserts that the applicant's spouse is now a U.S. citizen and that she is experiencing serious difficulties caring for herself and the applicant's children without the applicant. Counsel asserts that [REDACTED] is receiving treatment for diabetes, depression and sleep deprivation and that her two children are mid-evaluation for kidney disease. Counsel contends that, while [REDACTED] provides [REDACTED] with housing and food, she has two children that suffer from congenital muscular dystrophy. Counsel asserts that, while the applicant's kidney transplant was successful, he still has kidney disease and would receive better care in the United States. Apart from counsel's and [REDACTED] assertions, there is no evidence in the record that establishes that [REDACTED] as financially dependent upon [REDACTED]. The record also reflects that the applicant's parents reside in the United States and may be able to assist her in the absence of the applicant. Medical documentation reflects that [REDACTED] has diabetes, depression and sleep deprivation and that it is the

opinion of her doctor that “a big part of her medical problems comes from [REDACTED] being apart from her husband.” [REDACTED] doctor does not, however, indicate the severity of her health concerns, her prognosis or that she is unable to benefit from appropriate treatment in the absence of the applicant. He also fails to indicate the medical problems he finds to result from [REDACTED]’s separation from her husband. Medical documentation indicates that the applicant is having graft kidney dysfunction which requires further management. While the medical documentation states the applicant would receive better care in the United States, the record does not demonstrate that he would have been unable to receive sufficient treatment in India. Although [REDACTED] at the Bay Area Pediatric Medical Group, Inc. states in a June 29, 2005, letter that the applicant’s children are being evaluated for kidney disease, he does not indicate they have been found to suffer from kidney disease. The AAO notes that [REDACTED] in this same letter, offers his opinion that the applicant is now in good health and can again become a productive member of society.

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 in the United States 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 7th Circuit Court of Appeals 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-Munoz 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 AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's U.S. citizen spouse, two U.S. citizen children, a U.S. citizen sister, lawful permanent resident parents, the absence of any criminal record since entering the United States, and an approved immigrant petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States, failure to depart the United States under an order of voluntary departure and non-compliance with an order of removal.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage, birth of his children, his parents adjustment of status to that of lawful permanent residents and approval of his immigrant petition occurred after the applicant was placed into proceedings. The AAO finds these factors to be "after-acquired equities" and that any favorable weight derived from the applicant's marriage, birth of his children, his parents' adjustment of status to that of lawful permanent residents or his approved immigrant visa petition must be accorded diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by 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 that he 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.