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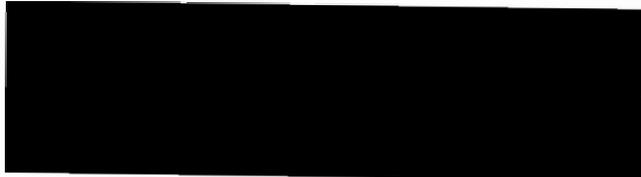
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **AUG 25 2008**

IN RE:

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, Vermont 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, on August 10, 1997, was admitted to the United States as a P-3 alien artist or entertainer with authorization to stay until August 24, 1997. The applicant remained in the United States past his authorized stay. On December 4, 1997, the applicant filed an Application for Asylum and Withholding of Deportation (Form I-589). On September 11, 1998, the applicant's Form I-589 was referred to an immigration judge and he was placed into immigration proceedings. On July 19, 1999, the immigration judge denied the applicant's application for asylum, withholding of removal and convention against torture and granted him voluntary departure until September 17, 1999. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On September 7, 2001, the applicant married his then lawful permanent resident spouse, [REDACTED]. On September 17, 2001, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On November 25, 2002, the BIA dismissed the applicant's appeal and granted him voluntary departure for a period of 30 days from the date of the decision. The applicant failed to surrender for removal or depart from the United States, thereby changing the grant of voluntary departure to a final order of removal. The applicant filed an appeal with the Ninth Circuit Court of Appeals (Ninth Circuit). On June 23, 2004, the Ninth Circuit denied the applicant's appeal. The applicant filed a motion for stay of removal with the Ninth circuit and the government filed a motion of non-opposition. On September 2, 2004, a warrant for the applicant's removal was issued. On October 6, 2004, the Form I-130 was approved. On May 26, 2005, [REDACTED] became a naturalized U.S. citizen. On January 4, 2006, the applicant filed the Form I-212. On May 16, 2007, the applicant was removed from the United States and returned to India, where he has since resided. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 return to the United States and reside with his U.S. citizen spouse and two U.S. citizen children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated February 28, 2007.

On appeal, counsel contends that the director's denial is flawed and has both legal and factual mischaracterizations and findings that establish an abuse of discretion. *See Counsel's Brief*, dated April 11, 2007. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) 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.

- (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 on a 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 Secretary has consented to the alien's reapplying for admission.

The record reflects that [REDACTED] is a native of India who became a lawful permanent resident in 1999 and a naturalized U.S. citizen in 2005. The applicant and [REDACTED] have six-year old twins who are both U.S. citizens by birth. The applicant is in his 30's and [REDACTED] is in her 20's.

The AAO finds that the director, in his decision, incorrectly stated that the applicant had entered into his marriage to [REDACTED] after his voluntary departure had expired.¹ However, the record reflects that the applicant married [REDACTED] after he had been placed into immigration proceedings and the applicant's marriage to [REDACTED] is an "after-acquired" equity as discussed below. Counsel contends that the director erred in giving diminished weight to the applicant's marriage. Counsel states that, although a marriage entered into while in removal proceedings may be suspect, the Act recognizes that such a marriage can, nevertheless, be bonafide. As discussed below, the principle of "after-acquired" equities does not negatively reflect on whether a marriage is bonafide.

On appeal, counsel asserts that the director's evaluation of the applicant's equities was dismissive and did not reflect an individual evaluation of the family's problems.

The AAO now turns to a consideration of positive and adverse factors in the present case.

On appeal, counsel asserts that the director erroneously considered the denial of the applicant's asylum claim as a negative factor. He asserts that an applicant's asylum application is confidential and the denial cannot be used against an applicant pursuant to 8 C.F.R. § 208.6. He asserts that the application may only be examined for the purposes of adjudicating the application, defense of a legal action of which the application is a part or a United States government investigation concerning a criminal or civil matter. He asserts that adjudication of the applicant's Form I-212 does not fall into any of these listed exceptions and the director is barred from reviewing the applicant's asylum proceedings in adjudicating the Form I-212. The AAO notes, however, that 8 C.F.R. § 208.6 protects the disclosure of information to third parties. As an official of USCIS the director is not a third party and is authorized to review and use information contained in asylum applications as needed.

¹ The BIA granted the applicant 30 days of voluntary departure which was stayed by the filing of the applicant's motion for stay of removal and the government's non-opposition to the motion before the Ninth Circuit. *See Desta v. Ashcroft*, 365 F. 3d 741 (9th Cir. 2004).

He is, however, bound by the regulations found at 8 C.F.R. § 208.6 and is restricted in releasing that information to third parties. By noting in his decision a finding by an immigration judge he did not reveal to a third party anything regarding an asylum application. The AAO therefore finds that the director did not go counter to the regulations in his decision.

Counsel asserts that the director failed to consider the hardship to the applicant's U.S. citizen children and his wife should he be denied permission to reapply for admission.

██████████, in her letter, states that she enjoys living her life together with her husband. She states that her twin daughters were born prematurely and she and the applicant cared for them themselves. She states that she did not send them to a babysitter. She states that she and the applicant were so happy that they were parents. She states that when she found out about the applicant's removal order she was in shock and it was like her life was over. She states that she was in a depression. She states that she cannot live without her husband. She states that he is the household and the guardian of the children. She states that she has a job, but that her income is low. She states that she cannot afford everything by herself. She states that she cannot afford to send her children to a babysitter. She states that that she will be unable to pay her bills and meet her children's needs. She states that after her delivery she had medical problems and she needs the applicant to care for her as well as the children. She states that she needs the applicant's help, support and guidance for her children and a better future.

A letter from ██████████, dated January 24, 2005, states that the applicant and ██████████ have been patients of his for two years and are parents of twins. It states that it is medically necessary for the applicant to remain with his family because ██████████ suffers from migraines and panic/anxiety attacks and is in need of help with the children. It states that she would be unable to handle the activities of daily living without the applicant's help and it would be a definite hardship for the family. It states that the applicant should remain with ██████████ until such time as he is able to comfortably leave his wife and children alone.

A letter from ██████████, pediatrician, dated January 25, 2005, states that she has been caring for the twins since their birth. It states that they were born 32 weeks premature and had an eventful perinatal period with multiple complications. It states that they were delivered by c-section and were in intensive care for four weeks. It states that ██████████ needed a lot of assistance in caring for the twins at home upon their discharge and the applicant was a great help. It states that ██████████ specifically advised them to avoid day care facilities due to a high incidence of respiratory infections and complications and that the applicant's presence in the home in helping care for the twins was absolutely essential. It states that there were several visits to the office for the first two years for immunizations and administration of synagis to avoid infection. It states that one of the twins sustained an elbow fracture and was in a cast for 6 weeks. It states that the twin is under the care of orthopedist and attends physical therapy. It states that ██████████ is the main provider for the family and it is imperative that the applicant be in the United States to care for the growing toddlers and their needs. It states that it is very stressful for ██████████ to work as well as care for the toddlers without the applicant.

Letters of support from friends and family state that the applicant and ██████████ are very loving, God-fearing and law-abiding people who have two twin daughters. They state that the applicant's and ██████████'s family is close knit and loving. They state that the applicant is a very loving and caring father. A letter of support from the applicant and ██████████'s priest indicates that they have worshipped at Gurdwara Khalsa Darbar regularly since September 2001. He states that they come with their twin daughters and that he knows them

personally. He states that they love their daughters very much and are very loving and caring parents. He states that they are a happily married, humane, law abiding and God-fearing family of the congregation.

A letter from _____ employer, dated March 11, 2005, indicates that she has been employed since 2001 with an annual salary of \$21,000. A letter from the applicant's employer, dated March 22, 2005, indicates that the applicant has been employed since 2003 and earns \$575 per week. The applicant's Biographical Information sheet (Form G-325) indicates that he was steadily employed in the United States from February 2000, until September 14, 2001, the date on which the form was signed.

Tax records reflect that the applicant has paid federal taxes from 2000 through 2004. The applicant was issued employment authorization from December 13, 1999, until December 12, 2000.

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. *Supra*.

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 these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, his two U.S. citizen daughters, the general hardship to his family, his payment of federal taxes and the approved immigrant visa petition for alien relative. The AAO notes that the applicant's marriage, the birth of his daughters and the filing of the immigrant visa petition benefiting him occurred after the applicant was placed into immigration proceedings, and are, therefore, "after-acquired equities," which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant remaining in the United States past his authorized stay; the immigration judge's credibility finding; the applicant's failure to comply with an order of voluntary departure; his failure to comply with an order of removal; his extended unlawful presence and employment in the United States; and his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure.²

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors.

The AAO notes that the record indicates that the applicant is inadmissible to the United States under section 212(a)(9)(B)(I)(II) of the Act, based on his unlawful presence in the United States. To seek a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601) at the time he applies for an immigrant visa.

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

ORDER: The appeal is dismissed.

² The AAO notes that normally unlawful presence will not accrue while judicial review of an asylum application is pending, or in the applicant's case until voluntary departure expired after the Ninth Circuit denied his appeal. However, the applicant engaged in unauthorized employment and tolling of unlawful presence for good cause due to the judicial review of the applicant's asylum application is not applicable. See section 212(a)(9)(B)(iii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii)(II). The applicant, therefore, accrued unlawful presence from August 24, 1997, the date on which his authorized stay expired, until July 19, 1999, the date on which the immigration judge granted the applicant voluntary departure. The applicant also accrued more than one year of unlawful presence prior to his departure from the United States after his voluntary departure expired.