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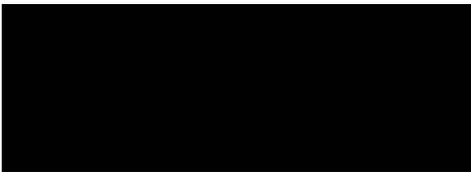
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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090
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U.S. Citizenship
and Immigration
Services

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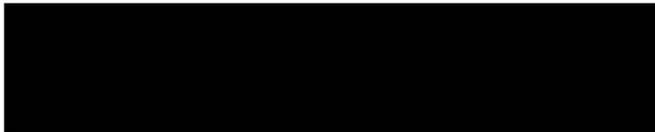
FILE: [REDACTED] Office: SAN FRANCISCO, CA

Date: DEC 02 2008

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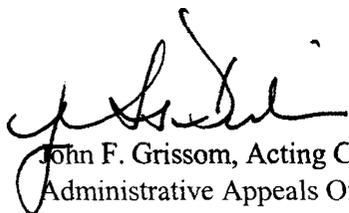
APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Field Office Director, San Francisco, California 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 March 31, 1997, filed an Application for Asylum and Withholding of Deportation (Form I-589). On July 31, 1997, the applicant testified that he had entered the United States without inspection on March 1, 1996. On August 13, 1997, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On January 25, 1999, the immigration judge denied the applicant's applications for asylum and withholding of removal and ordered the applicant removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on March 12, 2002. On December 4, 2002, a warrant for the applicant's removal was issued. On May 30, 2004, the applicant filed the Form I-212. On June 22, 2006, the applicant's spouse, [REDACTED] became a lawful permanent resident. On April 24, 2007, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. The applicant is inadmissible under 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 reside in the United States with his lawful permanent resident spouse and children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion. *See Field Office Director's Decision* dated March 24, 2008.

On appeal, counsel contends that the applicant should be granted permission to reapply for admission. *See Counsel's Brief*, dated April 22, 2008. In support of his contentions, counsel submits the referenced brief, copies of the applicant's family members' lawful permanent resident cards, copies of documents related to the applicant's relative petition, and copies of documentation previously provided. 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 the applicant is married to [REDACTED] who is a native and citizen of India, who became a lawful permanent resident in 2006. The applicant and [REDACTED] have a 23-year old daughter and a 19-year old son who are natives and citizens of India who became lawful permanent residents in 2006. The applicant and [REDACTED] are in their 40's.

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

On appeal, counsel asserts that the applicant has a spouse and two children who are lawful permanent residents. He asserts that [REDACTED] and the children have resided in the United States since June 22, 2006. He asserts that the applicant's family needs him to preserve unification of the family.

Counsel asserts that the applicant is eligible for an immigrant visa as the beneficiary of a Petition for Alien Relative (Form I-130) filed on behalf of the applicant by [REDACTED] brother. However, the record does not contain evidence of the petition filed on behalf of [REDACTED] or that the applicant was listed as a derivative beneficiary on the petition. The record contains a notice from the immigrant visa section of the U.S. Embassy in New Delhi, India, indicating that the applicant was required to file a Form I-212; however, the notice does not establish that the applicant is otherwise entitled to an immigrant visa. However, the record establishes that [REDACTED] filed a separated Form I-130 on behalf of the applicant with the Texas Service Center on April 24, 2007.

Finally, counsel asserts that the applicant departed the United States on January 8, 2003, and returned to India where he has since resided. Counsel submits a copy of the applicant's current passport, issued on September 19, 2005, in Jalandhar, India, a copy of a page of that passport indicating that the applicant's previous passport was issued in San Francisco, California, on July 1, 2003, and a copy of an itinerary for a plane ticket from San Francisco, California, to Delhi, India, for January 8, 2003. The AAO finds that the applicant has failed to establish the date on which he departed the United States, as the travel itinerary cannot verify departure without copies of travel stamps, independent confirmation by the U.S. Embassy, or other documentation establishing the applicant's physical presence in India since that date. However, the AAO does find that the applicant has departed the United States and is physically present in India, as established by the issuance of his current passport and his physical presence at the U.S. Embassy in 2006. While counsel asserts that the applicant has not evaded the laws of the United States and has always maintained a lawful status, the AAO finds that the applicant entered the United States without inspection and accrued unlawful presence in the United States. The applicant was physically present in the United States without authorization until he began to accrue unlawful presence in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted, until July 31, 1997, the date on which he filed the Form I-589. The

applicant began to accrue unlawful presence again from March 12, 2002, the date on which the BIA dismissed his appeal, until the date on which he departed the United States¹.

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

¹ The AAO notes that the applicant may be inadmissible pursuant to sections 212(a)(9)(B)(i)(I) or (II) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(i)(I) or (II), for either, accruing more than 180 days, but less than one year of unlawful presence and seeking admission within three years of his departure, or, accruing more than one year of unlawful presence and seeking admission within ten years of his departure. If the applicant accrued more than 180 days, but less than one year of unlawful presence prior to his departure he is no longer inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act. However, if the applicant accrued more than one year of unlawful presence prior to his departure he would need to apply for a waiver under section 212(a)(9)(B)(v) of the Act, by filing an Application for Waiver of Grounds of Inadmissibility (Form I-601). Since the applicant has not clearly established his date of departure, the AAO will not consider this ground of inadmissibility a negative factor to be considered in exercising discretion.

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 lawful permanent resident spouse, his two lawful permanent resident children, the general hardship to his family if he were denied admission to the United States and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's spouse's and children's adjustments of status to that of lawful permanent residents and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. These factors are "after-acquired equities," which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States; his failure to comply with an order of removal until at least January 8, 2003; and his unauthorized and unlawful presence in the United States.

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.

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.