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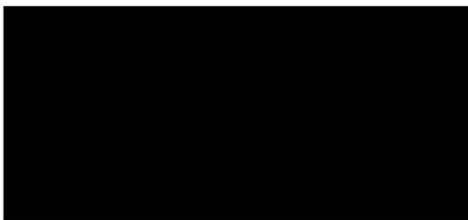
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]

Office: CALIFORNIA SERVICE CENTER Date: JUL 08 2008

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:
[REDACTED]

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 application for permission to reapply for admission after removal was denied by the Director, California 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 initially entered the United States on August 5, 1992, on a B-2 nonimmigrant visa, with authorization to remain in the United States until February 4, 1993. On November 20, 1992, the applicant filed a Request for Asylum in the United States (Form I-589). On December 14, 1995, an Order to Show Cause (OSC) was issued and the applicant's Form I-589 was referred to an immigration judge. On December 15, 1996, the applicant's wife, a lawful permanent resident of the United States at this time, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On March 19, 1997, an immigration judge granted the applicant voluntary departure, to depart the United States by January 1, 1998. On June 4, 1997, the applicant's Form I-130 was approved. On December 3, 1997, the applicant filed a motion to reopen the immigration judge's decision. On December 8, 1997, the applicant filed an Application for Stay of Deportation (Form I-246). On January 27, 1998, an immigration judge denied the applicant's motion to reopen. The applicant failed to depart the United States as ordered, and on June 1, 1999, a Warrant of Removal/Deportation (Form I-205) was issued. On July 19, 1999, the applicant's Form I-246 was denied. On January 6, 2000, the applicant filed another Form I-246, and on the same day, the applicant was removed from the United States. On August 3, 2001, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On December 29, 2005, the Director denied the applicant's Form I-212. On July 26, 2006, the applicant filed a second Form I-212. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), and section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B). He now 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 with his United States citizen wife.

The Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for his unlawful presence in the United States, and section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for being ordered removed and attempting to reenter the United States without being admitted. The Director found that the unfavorable factors in the applicant's case outweighed the favorable factors, and she denied the applicant's Form I-212 accordingly. *Director's Decision*, dated May 9, 2007.

Section 212(a)(9) of the Act states:

(A) Certain alien previously removed.-

(i) Arriving Aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 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 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

. . . .

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.- Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

The AAO finds that the Director erred in finding the applicant inadmissible under section 212(a)(9)(C) of the Act, since there is no evidence in the record that the applicant attempted to reenter the United States without being admitted, after his January 6, 2000 removal from the United States. However, the AAO does find the applicant inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for being ordered removed from the United States.

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, the applicant, through counsel, asserts that the Director “improperly [sic] considered [the applicant’s] prior arrest record in making [her] determination regarding his Form I-212...[And, the Director] did not give sufficient weight to the favorable factors in making their decision regarding [the applicant’s] Form I-212.” *Form I-290B*, filed June 7, 2007. Counsel claims that the Director “should not have given weight to the [applicant’s] criminal arrest in considering [the applicant’s] good moral character.” *Appeal Brief*, page 4, filed July 6, 2007. The AAO agrees that an arrest without a conviction should not be used as an unfavorable factor. Counsel claims that the applicant “lived in the United States for over eighteen years...[the applicant’s wife] is currently suffering severe mental anguish at the separation from her husband. He helped her recover from a miscarriage and has been a constant source of emotional support.” *Id.* The AAO notes that the majority of the time that the applicant was present in the United States was without authorization and that is an unfavorable factor. Dr. [REDACTED]

diagnosed the applicant’s wife with severe major depression and post traumatic stress disorder. *See psychological evaluation by [REDACTED] Ph.D.*, dated August 31, 2001. The AAO notes that the psychological evaluation is dated August 31, 2001, which is over six years ago, and there was no updated evaluation submitted on appeal. The applicant’s wife states that since her marriage to the applicant, “[the applicant] has been [her] confidant, best friend and lover. [They] were constantly together, [they] never spent more than a day apart from each other. These past years of separation have been arduous for [them]. [She] would suffer tremendously if [she] had to leave the United States and go to Pakistan to be with [the applicant]. [She is] very close with [her] family and cannot imagine being separated from them...[She is] also under the care of a doctor for [her] high blood pressure and thyroid problem...[She] would also suffer extreme hardship if [the applicant] is not allowed to return to the United States and [she does] not join him in Pakistan.” *Affidavit from the applicant’s wife*, dated May 25, 2006. The AAO notes that 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 for 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 wife, but it will be just one of the determining factors.

Counsel claims that the applicant "was also receiving medical care during his residence in the United States that he unable to obtain in Pakistan." *Appeal Brief, supra* at 4. The applicant's wife states that she "worr[ies] about [the applicant] constantly, because of his heart problem. In June of 1999, [the applicant] suffered a heart attack and had to undergo heart surgery...Since returning to Pakistan he has not been able to see a doctor." *Affidavit from the applicant's wife, supra*. The AAO notes that the record contains documentation establishing that the applicant and his wife suffer from various medical conditions. However, the AAO notes that there was no documentation submitted establishing that the applicant or his wife cannot receive medical care for their medical conditions in Pakistan. Counsel claims that the applicant's wife is suffering financial hardship without the applicant's financial contributions to the household. *See Appeal Brief, supra* at 5. The AAO notes that the majority of the time that the applicant was employed was without authorization and that is an unfavorable factor.

The record of proceedings reveals that on March 19, 1997, an immigration judge granted the applicant voluntary departure. The applicant failed to depart the United States as ordered, and on June 1, 1999, a Form I-205 was issued. On January 6, 2000, the applicant was removed from the United States. Based on the applicant's order of removal from the United States, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act.

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.*

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant's Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien's request for discretionary voluntary departure relief. The Seventh Circuit found that the Board's denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an OSC had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980), the Ninth Circuit Court of Appeals (Ninth Circuit) reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds). In *Wang*, the alien sought discretionary relief and a finding of extreme hardship through a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang*, that "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country."

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c) waiver of deportation discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

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 hardship to a spouse and for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's family ties to his United States citizen wife, general hardship she may experience, and the approval of a visa petition filed by the applicant's wife on his behalf. The AAO notes that the applicant's marriage to his wife occurred on August 16, 1996, which was after the applicant was placed in deportation proceedings, and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

The AAO finds that the unfavorable factors in this case include the applicant's failure to depart the United States before his authorization to remain in the United States expired, his failure to abide by an immigration judge's order, his arrest record, and periods of unauthorized presence and employment.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

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.

ORDER: The appeal is dismissed.