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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEW DELHI Date: FEB 03 2004

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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Officer in Charge, New Delhi, India. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous December 31, 2002, AAO order dismissing the appeal will be affirmed.

The applicant is a native and citizen of India who arrived in the United States on October 15, 1993, using a visa she had purchased in India. Upon arrival, the applicant applied for admission as an asylee. The applicant was advised in writing by an airport immigration officer that she was inadmissible under section 212(a)(7)(B)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(B)(i), for being an alien not in possession of a valid travel document or non-immigrant visa. The applicant was further advised in writing that her inspection into the U.S. would be deferred, and that she was scheduled for an asylum-related exclusion hearing before an immigration judge at 9:30 a.m., on January 7, 1994. *See* Form I-222, Notice to Applicant for Admission Detained/Deferred for Hearing before an Immigration Judge. The applicant did not appear at her January 7, 1994, immigration court hearing and she was ordered excluded and deported in absentia.

On November 15, 1995, an Order to Show Cause (OSC) was issued against the applicant, based on a subsequent and separate affirmative asylum application filed by the applicant. The applicant's asylum claim was found to be not credible by an immigration asylum officer, and the OSC charged the applicant with illegal entry at San Ysidro, California, the stated manner of entry, under penalty of perjury, on her asylum application. The OSC was served upon the applicant on January 11, 1996, and deportation proceedings were initiated.

The applicant married a U.S. citizen on February 13, 1997. The record indicates that, with the intent to pursue an adjustment of status application, the applicant withdrew her asylum application before the immigration court on February 27, 1997. Based on the applicant's pending adjustment of status application, the immigration judge granted the applicant voluntary departure through October 25, 1997. The voluntary departure date was subsequently extended to February 28, 1998.

The record indicates that the applicant's Form I-130, Petition for Alien Relative, was approved by the Immigration and Naturalization Service (Service, now Citizenship and Immigration Services, CIS) in October 1997. The applicant subsequently filed a motion to reopen her removal proceedings with the immigration court, based on the approved I-130 petition. The record indicates that at that time, counsel for the applicant was advised by the immigration judge that the motion to reopen would be denied absent Service concurrence. Counsel for the applicant was further advised that if the motion was denied, the applicant would be required to leave the U.S. by February 28, 1998, or be subject to an order of deportation. *See* February 20, 1998, Letter from Applicant's Attorney to Service Trial Attorney. The record indicates that the Service trial attorney replied to the motion and letter, by informing the applicant's attorney that fingerprint reports revealed a prior 1994, final order of exclusion against the applicant. *See* February 20, 1998, Letter from Service Trial Attorney. The Service trial attorney further informed the applicant's attorney that the applicant had therefore been improperly placed into new deportation proceedings, and that she was inadmissible and was required to return to India in order to obtain a waiver of her exclusion based bar to admission. Consequently, the Service trial attorney moved to terminate removal proceedings, and the immigration judge terminated the proceedings on March 2, 1998. The applicant nevertheless, did not depart the United States at that time. The evidence in the record reflects that the Service Office of Detention and Deportation issued a memorandum regarding the applicant's 1994, final order of exclusion, indicating that the applicant was under

a final order of deportation and that the applicant should be taken into custody for removal purposes. The applicant subsequently departed the United States on her own on January 26, 2000. The applicant presently 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).

The officer in charge determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the application accordingly. The AAO affirmed the decision on appeal.

8 C.F.R. § 103.5(a) states in pertinent part:

> (a) Motions to reopen or reconsider
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> . . . .
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> (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.
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> . . . .
>
> (3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.
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> (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

On motion, counsel asserts that the previous AAO decision unconstitutionally violated the equal protection clause of the U.S. Constitution and that the decision is therefore void. In support of his assertion, counsel indicates that the fact that the AAO referred to the applicant's husband as a native of India and naturalized U.S. citizen, rather than simply as a U.S. citizen, implies that the AAO views and treats native U.S. citizens more favorably than naturalized U.S. citizens. Counsel offers no other evidence or reasons for asserting that the AAO assessed the applicant's appeal in an unfair manner.

The AAO notes that it lacks jurisdiction to rule upon constitutional issues arising under the Act and the regulations. *See Matter of Church of Scientology International,* 19 I&N Dec. 593 (Comm. 1988); *see also Matter of C-,* 20 I&N Dec. 29 (BIA 1992). The AAO notes further that it finds no evidence to indicate that the AAO's reference to the applicant's husband as a native of India and naturalized U.S. citizen was improper or that it constituted an abuse of discretion.

Counsel also asserts on motion, that the approval of a Form I-601, Waiver of Inadmissibility, would be justified in the applicant's case. The AAO notes, however, that its previous decision was properly limited to an appeal pertaining to the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. Counsel's assertions regarding the applicant's eligibility for a waiver of inadmissibility will therefore not be addressed.

Counsel asserts further that the AAO finding that the applicant's actions constituted "fraud" under section 212(a)(6)(C)(i) of the Act was erroneous. The AAO finds counsel's assertion to be correct on this issue.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

In *Matter of G—G--*, 7 I&N Dec. 161 (BIA 1956), the Board of Immigration Appeals (Board), held that a finding of fraud for immigration purposes requires that the alien engaged in deceitful activity, that the alien knew the falsity of the activity, and that the alien intended to deceive a Government official and succeeded at this deception. In the present case, although the applicant admitted that she did not apply for or receive a legitimate immigrant visa to enter the United States, and that she instead purchased a visa without going through the required consulate procedures, the applicant did not, in fact, succeed at being admitted into the U.S. with the false documents. Nevertheless, the AAO finds that the applicant's actions clearly establish that she willfully sought to procure and did procure a visa in violation of section 212(a)(6)(C)(i) of the Act. The AAO therefore finds that its error was harmless in the present case and that the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act was properly analyzed as an unfavorable factor.

Counsel asserts on motion, that the December 31, 2002 AAO decision misapplied legal rulings pertaining to the treatment of "after-acquired equities". Counsel concedes that courts have held that equities acquired after a deportation order receive diminished weight in the exercise of discretion. Counsel asserts, however, that the applicant's case is factually distinguishable from the precedent legal cases cited by the AAO, and that a general rule regarding after-acquired equities should not be applied against the applicant because she has a bona fide marriage and did not exhibit a flagrant disregard for the law.

The AAO finds counsels assertions to be unpersuasive. Regardless of the facts involved in a particular case, courts have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation has been issued. *See Garcia-Lopez v. INS,* 923 F.2d 72, 74 (7th Cir. 1991) (citing *Bothyo v. Moyer,* 772 F.2d 353, 357 (7th Cir. 1985); *see also Carnalla-Munoz v. INS,* 627 F.2d 1004, 1006 (9th Cir. 1980) (citing *Wang v. INS,* 622 F.2d 1341 (9th Cir. 1980) and *Matter of Correa,* 19 I&N Dec. 130, 134 (BIA 1984)). 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 notes that in the present case, the record contains strong evidence that the applicant's husband entered into his marriage with the applicant with the knowledge that she was in removal proceedings and that she might be deported. As is noted above, the record contains a February 20, 1998, letter from the applicant's attorney to the Service trial attorney indicating that on February 27, 1997, (eleven days after the applicant's February 13, 1997, marriage to her husband) the applicant withdrew her asylum application before the immigration court on the basis that she was pursuing adjustment of status through her husband.

Counsel asserts on motion, that the AAO should not have applied amended 1996, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (IIRIRA), immigration restrictions in its use of discretion against the applicant, because her 1994, deportation order was issued

against her before the enactment of IIRIRA. Counsel additionally asserts that the AAO failed to properly analyze the favorable factors in the applicant's case and that the AAO misapplied the legal standard for exercising discretion in I-212, Application for Permission to Reapply for Admission cases.

Counsel provides no legal basis or authority to support his assertions pertaining to the discretionary interpretation of post-IIRIRA decisions. Moreover, the AAO notes that the discretionary analysis contained in the AAO's December 31, 2002 decision was based on the guidance set forth in *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973) and other pre-IIRIRA legal cases. In *Matter of Tin,* the Regional Commissioner held that:

> In determining whether the consent required by statute [for an application for permission to reapply for admission] should be granted [by the Secretary], all pertinent circumstances relating to the applicant which are set forth in the record of proceedings are considered. These include but are not limited to the basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitation, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

See Matter of Tin at 374-75. The AAO notes that the pre-IIRIRA, *Tin* decision found that an alien's unlawful presence in the United States was evidence of disrespect for the law. *See id.* at 373. Moreover, the Regional Commissioner noted in *Tin,* that the alien had gained his claimed equity while being unlawfully present in the United States. The Regional Commissioner stated that through his illegal actions, the alien had obtained an advantage over aliens who properly sought visa issuance abroad or who abided by the terms of their admission while in this country. In denying the applicant's I-212, Application for Permission to Reapply for Admission, the Regional Commissioner concluded that approval of the I-212 application would be a condonation of the alien's acts that could encourage others to enter the United States unlawfully. *Id.*

Counsel additionally reasserts the favorable and unfavorable factors of the applicant's case in his motion to reconsider. The AAO finds that its December 31, 2002, decision properly listed and balanced the positive and negative factors set forth on appeal in the applicant's case. The AAO notes that the applicant's marriage, and the birth of her son took place after a final deportation order was issued against her in 1994, and after she had been placed in removal proceedings for a second time in 1996. The AAO notes further that the evidence in the record indicates that at the time of their marriage, the applicant's husband was aware that his wife was in removal proceedings and could be deported. The record additionally indicates that the applicant's son was born after the applicant failed to depart the U.S. after her 1996 removal proceedings were terminated. These factors were properly found to be after-acquired equities, and any favorable weight derived from hardship faced by the applicant and her family was therefore properly accorded diminished weight.

The AAO notes counsel's assertion that, in addition to the favorable factors set forth on initial appeal, the applicant's husband would suffer medical and business-related financial hardship if the applicant's I-212 application were denied, and that, as an American, his life could be in danger if he moved to India. The AAO finds that the new hardship assertions are considered to be after-acquired equities in the applicant's case. Moreover, although the medical evidence in the record reflects that the applicant's husband has only one kidney, the evidence fails to establish that the applicant has required specialized medical treatment as a result of his condition or that he would be unable to obtain proper medical treatment in India if, at some point, he did require treatment for his condition. In addition, the AAO finds that the post-September 11, 2001,

country reports referred to by counsel are general in nature and do not demonstrate that the applicant's husband would face a threat to his safety if he moved to India. The AAO notes further that the business-related hardship to the applicant's husband was raised on initial appeal, and was addressed in the previous December 31, 2002, AAO decision.

Moreover, the AAO notes that its previous decision properly concluded that the applicant exhibited a clear disregard for the immigration laws of the United States by procuring a visa in violation of section 212 (a)(6)(C)(i) of the Act, failing to appear at her 1994 immigration court hearing and subsequently failing to depart the country after being ordered excluded and deported in 1994. In addition, the applicant misrepresented her manner of entry under penalty of perjury in her asylum application, and she failed to depart the United States for an additional 2 years subsequent to the termination of her 1996 initiated immigration removal proceedings.

The AAO finds that counsel failed to establish that the previous AAO decision contained an erroneous conclusion of law or statement of fact. The previous AAO decision will therefore be affirmed.

ORDER: The previous AAO decision, dated December 31, 2002, is affirmed.