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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 17 2007

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:

[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 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 May 5, 1997, filed an Application for Asylum or Withholding of Deportation (Form I-589) after he entered the United States without inspection. On June 19, 1997, the applicant's Form I-589 was referred to the immigration judge and the applicant was placed into proceedings. On April 10, 1998, the immigration judge ordered the applicant removed *in absentia*. On April 15, 1998, a warrant for the applicant's removal was issued. On January 4, 2002, the applicant married his spouse, [redacted] On May 20, 2003, Ms. [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on September 20, 2006. On June 20, 2005, the applicant filed the Form I-212. 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 remain in the United States and reside with his U.S. citizen spouse and daughters.

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 June 5, 2006.

On appeal, counsel contends that the director ignored the applicant's substantial equities. *See Counsel's Brief*, dated October 18, 2006. In support of his contentions, counsel submits the referenced brief and a copy of the applicant's Form I-130 approval notice. 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 Ms [redacted] is a U.S. citizen by birth. The applicant and Ms. [redacted] have a five-year old daughter and a one-year old daughter who are both U.S. citizens by birth. The applicant is in his 30's and Ms. [redacted] is in her 20's.

On appeal, counsel asserts that irrelevant negative factors were added to the applicant's immigration violations. Counsel is correct in stating that the applicant's removal order should not be a negative factor to be considered in a discretionary decision. However, counsel's assertion that the applicant's extended unlawful presence and employment in the United States should not be considered negative factors, because they are part and parcel of an application for permission to reapply for admission, is unpersuasive. The Form I-212 is an application to waive the bar imposed against an alien for having been removed or ordered removed from the United States. An applicant's failure to appear at an immigration hearing, failure to comply with a removal order and extended unlawful presence and employment in the United States as a result of failure to comply with a removal order are separate issues and are appropriately considered in a discretionary analysis. An applicant who complies with an order of removal and thereafter applies for permission to reapply for admission from abroad would not necessarily have such negative factors.

On appeal, counsel asserts that equities such as the applicant's U.S. citizen daughter's health were entirely ignored by the director. However, the record does not contain evidence that establishes the applicant's eldest daughter has health problems. A Supplemental Security Income (SSI) notice, dated November 28, 2004, indicates that the applicant's eldest daughter is receiving SSI. Unfortunately, the record does not contain a statement or finding from the Social Security Administration (SSA) indicating why the applicant's eldest daughter is entitled to receive SSI. Speech and Language therapy documentation indicate that the applicant's older daughter attended preschool language therapy sessions in 2005 and 2006. However, these documents indicate only that her language objectives have been addressed. They fail to indicate the speech problems of the applicant's daughter or that she requires further therapy. An affidavit from Ms. [redacted] father, dated May 10, 2003, notes that his granddaughter was born prematurely and requires care. Again the record fails to indicate the nature or extent of the health problems that resulted from the premature birth or the type of care required.

Ms. [redacted] in her affidavit dated June 13, 2005, states that she and the applicant are extraordinarily close and have a beautiful daughter. She states that the applicant is the anchor of her family and she would face hardship if the applicant were to leave the United States. She states that she would have to raise her daughter by herself, which would be impossible for her because her daughter is still young and requires constant attention. She states that if she and her daughter went to India with the applicant they would face hardship and she does not want to raise her child in a country where the schools and medical care are not equivalent to that found in the United States. She states that she does not know the language or political system in India, that it would be very difficult to find a job and that she would find India nearly unlivable.

Counsel asserts that the director incorrectly cited *Matter of Lee,* 17 I&N Dec. 275 (Comm. 1978), in regard to what can be considered as a negative factor. Counsel contends that the language concerning negative factors in *Matter of Lee* is *dictum* because the application was granted. Counsel's assertions are unpersuasive. Additionally, the director did not cite to *Matter of Lee* alone. The director cited to *Matter of Lee* along with *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973) and *Matter of H-R-,* 5 I&N Dec. 769 (Comm. 1954),

cases which, as discussed below, expand upon what can and cannot be considered as favorable and negative factors in a discretionary decision.

In *Matter of Tin, Supra.*, 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, Supra., 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. *Supra.*

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.

The favorable factors in this matter are the applicant's U.S. citizen spouse, two U.S. citizen daughters and an approved immigrant visa petition.

The AAO finds that the unfavorable factors in this case include the applicant's failure to attend an immigration hearing; his failure to comply with an order of removal; and his extended unlawful presence and employment in the United States.

The applicant in the instant case has multiple immigration violations. The AAO finds that the immigrant visa petition benefiting him was filed and approved after the applicant was placed into proceedings. The applicant's marriage and the birth of the applicant's U.S. citizen children also occurred after he was placed into proceedings. As these factors are "after-acquired equities," the AAO will accord them diminished weight in this proceeding. 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 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.