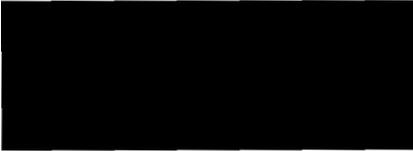




U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: DEC 19 2006

IN RE:

Applicant:



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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) 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 a citizen of India who entered the United States without a lawful admission or parole in April 1985. On October 28, 1985, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and an Order to Show Cause (OSC), for a hearing before an immigration judge was served on him. In May 1986, the applicant filed a Request for Asylum in the United States (Form I-589) with the office of the immigration judge. On June 5, 1987, the applicant failed to appear for the deportation hearing. The immigration judge denied his Form I-589 for lack of prosecution and ordered the applicant deported *in absentia* pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible pursuant to 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 remain in the United States and reside with his U.S. citizen spouse.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Director's Decision* dated December 29, 2005.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

(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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

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, counsel submits a brief in which she states that the applicant qualifies for adjustment of status under section 245(i) of the Act and, therefore, the Director incorrectly weighed as unfavorable factors his unlawful entry and his unauthorized employment. In addition, counsel states that the applicant filed a Form I-589 with the assistance of an attorney, Alan Russell, who eventually resigned from the State Bar of California and is no longer eligible to practice law. The same attorney represented the applicant during his deportation hearing and never informed the applicant of his deportation order. Counsel states that the applicant applied for temporary legalization status under the Special Agriculture Worker's program, and instructed his attorney to request a change of venue because of his relocation, to withdraw his Form I-589, and to request that his deportation proceedings be administratively closed due to the granting of temporary legalization. Counsel further states that the applicant was unaware of his deportation order because his previous attorney did not inform him of the hearing. Additionally, counsel states that the applicant has tried to comply with immigration laws and regulations. He applied for work authorizations, he owns and operates a business, and has paid taxes. Furthermore, counsel states that if the applicant were not permitted to adjust his status, his spouse would face extreme hardship. Counsel states that the applicant's spouse was granted asylum in the United States and she would not be able to visit her husband in India as she fears for her life. Counsel further states that the applicant operates their business and without him, his spouse would not be able to maintain her customary standard of living because she relies on the applicant. Finally, counsel requests that the Director's decision be reversed and the Form I-212 be approved.

The record of proceeding reflects that the applicant's Form I-589 was filed with the assistance of another attorney and not by Alan Russell, as stated by counsel. In addition, counsel states that the applicant instructed Alan Russell to request a change of venue, withdraw his Form I-589 and administratively close the proceedings due to the grant of temporary legalization. The record reflects that the applicant's deportation hearing was scheduled for June 5, 1987, and he did not file for temporary resident status until September 15, 1987. His application was approved on March 4, 1988. Therefore, counsel's statement that the applicant did not appear at his deportation hearing because he believed that his attorney would withdraw the asylum application and close the proceedings due to the grant of temporary legalization is not persuasive.

The proceeding in the present case is for a Form I-212 and, therefore, the AAO will not discuss the applicant's possible eligibility for adjustment of status under section 245(i) of the Act. However, the AAO notes that applicants for adjustment of status under section 245(i) of the Act, as with all applicants for adjustment of status, must be admissible to the United States. *Section 245(i)(2)(A) of the Act.* There are exceptions for applicants under section 245(i) of the Act, but admissibility under section 212(a)(9)(A) of the Act is not one. In order for an applicant's inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived all favorable and unfavorable factors must be weighed. While it is true the section 245(i) of the Act allows for periods of unauthorized presence and employment, counsel cited no authority that prevents the Service from using them when weighing favorable and unfavorable factors in section 212(a)(9)(A)(iii) of the Act proceedings.

The record of proceeding does not reflect that the applicant has made a good faith effort to comply with immigration laws. The applicant entered the United States without a lawful admission or parole, worked without authorization, failed to appear for deportation proceedings and failed to depart the United States after his temporary resident status was terminated.

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 spouse, but it will be just one of the determining factors.

It is noted that there are no laws that require the applicant's spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

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.*

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 court 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-Nunoz 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 applicant in the present matter married his U.S. citizen spouse on April 19, 2001, two months after the AAO dismissed his appeal regarding his temporary resident status. The applicant's spouse should reasonably have been aware, at the time of their marriage, of the applicant's immigration violations and the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse, an approved Form I-130, and the prospect of general hardship to his spouse.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his failure to appear for deportation proceedings, his periods of unauthorized employment, and periods of unauthorized presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after his temporary resident status was terminated, can be given only minimal weight. 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 eligibility 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.

The AAO notes that the applicant has a Service file under number [REDACTED] that should be consolidated with Service file [REDACTED]

ORDER: The appeal is dismissed.