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U.S. Citizenship
and Immigration
Services

H4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 30 2006

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)(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.

Ellen C. Johnson

Robert P. Wiemann, Director
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 citizen of Pakistan who, on June 2, 1990, was admitted into the United States as a student. The applicant failed to maintain his nonimmigrant status and on March 18, 1993, he applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On November 2, 1995, the applicant was interviewed for asylum status. His application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an immigration judge was issued on November 16, 1995. On May 15, 1996, an immigration judge found the applicant deportable and granted him voluntary departure in lieu of deportation until November 15, 1996. On November 15, 1996, the District Director extended the applicant's voluntary departure to January 15, 1997. In December of 1996, the applicant filed a motion to reopen his deportation proceedings, which was denied on January 13, 1997. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on October 16, 1997. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on February 18, 1998. A new motion to reopen his deportation proceedings was denied by an immigration judge on January 9, 2001. Based on the Form I-205 the applicant was apprehended on February 25, 2002. An application for stay of deportation was denied by the BIA on March 22, 2002. Consequently, on November 20, 2002, the applicant was removed from the United States. 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 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 travel to the United States and reside with his U.S. citizen spouse and children.

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 November 2, 2004.

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 . . . [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 of an 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 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 reducing and/or stopping 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, a copy of the applicant's marriage certificate, copies of United States passports belonging to his spouse and children, copies of medical reports, a copy of a police certificate regarding the applicant's lack of criminal record and copies of various collection notices and overdue bills. The medical evaluations submitted regarding the applicant's spouse state that she has been diagnosed with major depression and generalized anxiety disorder, has been prescribed anxiety medication, suffers from pre-cervical cancer and in general is in poor health. In addition, counsel states that as a result of the applicant's removal from the United States, his spouse suffered financial hardship, filed for bankruptcy, sold the family's house and furniture, and now resides with her parents. Furthermore, counsel states that the applicant's children are experiencing depression and anxiety. They suffer from nightmares, and they have been "clingy and withdrawn" since their father's removal. Additionally, counsel states that the applicant's children suffered from serious health problems when they traveled to Pakistan. Both children were prescribed antibiotics, one for asthma attacks, and one for "secretory otitis media." Counsel further states that the water at the applicant's residence in Pakistan in not potable, his spouse had been hospitalized upon visiting him there and the family cannot relocate to Pakistan because of intolerable country conditions which affect their health. No supporting documentation was submitted with the filing of the Form I-212 because counsel stated that it is established practice by CIS to request evidence after filing. Counsel assertion is not persuasive because the instructions state that when filing the Form I-212, supporting documentation should be submitted with the application.

CIS is not required to issue a request for evidence or a notice of intent to deny a Form I-212. The medical records regarding the applicant's spouse and children's medical conditions in Pakistan are dated prior to the filing of the Form I-212 and should have been submitted with the application. However, the documentation submitted by counsel with the appeal is being taken into consideration by the AAO in the adjudication of the appeal.

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. In addition, there are no laws that require the applicant's spouse and children 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." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. *See Shooshtary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

On appeal, counsel states that the Director improperly denied the Form I-212 by stating that the applicant is inadmissible under section 212(a)(9) of the Act. Counsel refers to the Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004).

In *Perez-Gonzalez,* the court found that the Service denied the Form I-212 erroneously on the ground that permission to reapply is only available to aliens who are outside the United States, applying at a port of entry, or paroled into the United States. The court ruled that the alien, who returned to the United States following a deportation and had his deportation order reinstated, could still adjust status if his Form I-212 were granted. The applicant in the present case is out of the country and was allowed to file a Form I-212. The Director adjudicated the application pursuant to section 212(a)(9)(A)(iii) of the Act. The AAO notes that *Perez-Gonzalez* states that ". . . if permission to reapply is granted the approval of Form I-212 is retroactive . . . and therefore, the alien is no longer subject to the grounds of inadmissibility under section 212(a)(9)." The operative word is "if". In the present case, the application was denied because the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. Permission to reapply was not granted, therefore, the applicant remains inadmissible.

Counsel further asserts that the applicant is not subject to the ten-year bar, as the Director suggests in his decision, but rather to a five-year bar. Counsel claims that since the applicant was issued an OSC on November 16, 1995, he was in deportation proceedings and not removal proceedings, and as a result is not subject to IIRIRA amendments made effective on April 1, 1997.

Counsel's assertion is not persuasive. Several sections of the Act were added and amended by IIRIRA. According to the reasoning in *Matter of Soriano,* Interim Decision 3289 (BIA, A.G. 1996) the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of the legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. *See Bradley v. Richmond School Board,* 416 U.S. 969, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Mater of George*, 11 I&N Dec. 419 (BIA 1965). *Mater of Leveque*, 12 I&N Dec. 633 (BIA 1968). The AAO finds that the applicant was removed after the effective date of IIRIRA and his removal order clearly states that he is subject to the ten year bar.

Counsel states that the director went beyond the scope of the Form I-212 by considering the applicant's future eligibility for admission. Counsel states that if a consular officer finds the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act, the applicant must be given the opportunity to submit an Application for Waiver of Grounds of Inadmissibility (Form I-601). Finally, counsel states that the applicant has not shown a continued disregard for the laws of this country or that he failed to demonstrate reformation or rehabilitation as stated in the Director's decision. Counsel states that the applicant has only violated one section of the Act. He has not entered or attempted to enter the country after his deportation and is following the appropriate legal channels for gaining lawful entry in the United States.

The AAO agrees with counsel in part. The proceedings in the present case are for permission to reapply for admission into the United States after deportation or removal, and therefore, the AAO will not discuss the applicant's potential grounds of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. However, if the applicant is found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, he is eligible to file a Form I-601 under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) based on his marriage to a U.S. citizen. This ground of inadmissibility in and of itself does not preclude the applicant from applying for permission to reapply for admission. These proceedings are limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived.

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 November 12, 1996, after he was placed in deportation proceedings. The applicant's spouse should reasonably have been aware of the applicant's immigration violations and the possibility of his being removed from the United States at the time of their marriage. He now seeks relief based on that after-acquired family tie.

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 and children, an approved Form I-130, the prospect of general hardship to his family, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's overstay after his initial lawful admission, his failure to depart the United States after he was granted voluntary departure and after his voluntary departure order became a final order of deportation, his periods of unauthorized employment and his lengthy 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 he was placed in deportation proceedings and after his voluntary departure order had expired, 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 that the applicant 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.