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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H4

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: DEC 17 2007

IN RE:

LAKHWINDER SINGH

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 September 20, 1985, was placed into proceedings after he entered the United States without inspection. On March 18, 1986, the applicant filed Request for Asylum in the United States (Form I-589) before the immigration court. On August 27, 1986, an immigration judge denied the applicant's application for asylum and withholding of removal and denied the applicant's application for voluntary departure. The applicant appealed to the Board of Immigration Appeals (BIA). On March 16, 1988, the applicant filed an Application for Temporary Resident Status as a Special Agricultural Worker (SAW) (Form I-700). On April 23, 1990, the Form I-700 was denied. The applicant filed an appeal with the Legalization Appeals Unit (LAU). On June 25, 1991, the BIA dismissed the applicant's appeal of the denial of his asylum and withholding of removal applications but granted the applicant voluntary departure for a period of 30 days. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On August 7, 1992, the LAU dismissed the applicant's appeal of the denial of the Form I-700. On December 7, 1993, this office rejected the applicant's motion to reopen the denial of the Form I-700. On October 16, 1996, a warrant for the applicant's removal was issued. On April 30, 2001, the applicant's employer filed an Application for Alien Employment Certification (Form ETA-750) with the Department of Labor (DOL). On November 18, 2003, the DOL certified the Form ETA-750. On April 19, 2004, the applicant's employer filed an Immigrant Petition for Alien Worker (Form I-140) on the applicant's behalf, based on the approved ETA-750, which was approved on September 9, 2004. On October 24, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-140. On May 25, 2006, 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 children.

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 August 18, 2006.

On appeal, counsel contends that the director's decision is erroneous and that the applicant has numerous favorable factors which were ignored by the director. Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated September 18, 2006. In support of his contentions, counsel submits the referenced brief, social security and tax documentation. 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 of proceedings indicates that the applicant entered the United States without inspection and, when granted voluntary departure on appeal, failed to voluntarily depart the United States. The voluntary departure became a final order of removal with which the applicant failed to comply. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

As a SAW applicant the applicant was entitled to depart and reenter the United States utilizing his EAD while the appeal of the Form I-700 was pending. The applicant departed the United States between November and December of 1988, January and May of 1991, and September and December of 1991, by utilizing the Employment Authorization Document (EAD) issued to him as part of his SAW application. The AAO notes that the director incorrectly stated that the applicant had illegally entered the United States following these departures.

The AAO notes that the director stated that the applicant's spouse was a favorable factor because she is a U.S. citizen. However, the record reflects that the applicant's spouse, [REDACTED] is a native and citizen of India who is a dependent on the applicant's Form I-140. The applicant and Ms. [REDACTED] have a 10-year old son and a 9-year old son, both of whom are U.S. citizens by birth. The applicant and Ms. [REDACTED] are in their 40's.

On appeal, counsel contends that the director erred in finding that the applicant breached his bond. The record reflects that the applicant failed to surrender for removal and that, on June 2, 2001, the applicant's bond was cancelled. However, whether the applicant's bond was returned to him or was breached is not a factor in exercising discretion. The applicant's failure to comply with voluntary departure and removal orders, however, are factors to be considered in exercising discretion. On appeal, counsel contends that the applicant has filed numerous non-frivolous immigration applications demonstrating his attitude of sustained and continuous respect for the United States' immigration laws. The record reflects that the applicant was entitled to and took advantage of the opportunity to file appeals of the denial of his applications before the immigration court and the Form I-700. However, the record reflects that the applicant was not entitled to remain in the United States after his appeal of the denial of the Form I-700 was dismissed on August 7, 1992.

The record reflects that the applicant failed to comply with an order of removal and was unlawfully present and employed in the United States for an extended period of time.

On appeal, counsel contends that the director erred in finding that the applicant had only filed federal income taxes for some of the years he was employed in the United States. Counsel submits a social security statement and tax returns reflecting that, since 1987, the applicant has paid federal income taxes. Counsel asserts that the applicant has paid 19 years of taxes to the federal government and has been fully employed since 1987. Counsel asserts that the applicant is in a stable and happy marriage and resides with his two U.S. citizen children. Counsel asserts that it would be a great hardship to the applicant's two U.S. citizen children to be forced to live in India. Counsel asserts that the applicant's eldest son requires both special medical attention and special learning care and would be deprived of the medical and educational support structures that he requires. Counsel asserts that the applicant owns property in the United States. Counsel asserts that the applicant and his family are active members of a religious congregation.

The applicant, in his statement, indicates that he is a person of good moral character who has never been arrested for or committed any crimes. He states that his services with his employer are in high demand as evidenced by the approval of his Form I-140. He states that his family would have difficulty adjusting to life in India, especially his two U.S. citizen sons. He states that, from 1997 to 2000, his wife and son were ill and required extensive medical care, hospitalizations and surgeries. Medical documentation indicates that Ms. [REDACTED] underwent surgery to remove her gallbladder in 1997 as a result of gallstones. The medical documentation does not indicate that Ms. [REDACTED] has received any further treatment for a condition relating to the gallstones since 2000. The medical documentation indicates that Ms. [REDACTED] suffered a miscarriage in 1997. The medical documentation indicates that the birth of Ms. [REDACTED] youngest son went smoothly. While counsel asserts that the applicant's eldest son currently requires medical treatment and special learning assistance, the medical documentation in the record indicates that, in 1998 to 1999, Ms. [REDACTED] eldest son was seen in the emergency room for treatment of illnesses such as cold, cough, fever and ear ache (otitis media). There is no evidence in the record to establish that the applicant's wife or eldest son have received any treatment since 2000 or that either suffers from an ongoing physical or mental condition.

A letter from the President of the [REDACTED] Center indicates that the applicant and his family have been members of the congregation and regularly participated in religious and ceremonial activities since October 2000.

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 in the United States unlawfully. *Supra*.

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 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 two U.S. citizen children, payment of federal taxes and an approved immigrant petition for alien worker.

The AAO finds that the unfavorable factors in this case include the applicant's failure to comply with an order of voluntary departure; 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 birth of the applicant's U.S. citizen children also occurred after he was placed into proceedings. The AAO finds these factors to be "after-acquired equities" and therefore accords them diminished weight. 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.