

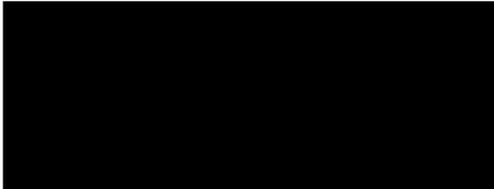
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U.S. Citizenship  
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FILE:



Office: VERMONT SERVICE CENTER

Date: JAN 31 2007

IN RE:

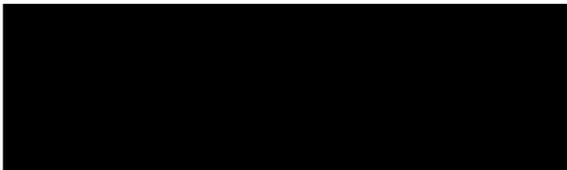
Applicant:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Afghanistan who was present in the United States without a lawful admission or parole on August 27, 2001. The applicant was a dependent on an Application for Asylum and for Withholding of Removal (Form I-589) filed by his mother on November 2, 2001, with the Immigration and Naturalization Service (now Citizenship and Immigration Services, (CIS)). On December 4, 2001, his mother's asylum application was referred to an immigration judge for a hearing and the applicant was served with a Notice to Appear (NTA) for a hearing before an immigration judge. On August 5, 2002, an immigration judge denied the applicant's mother's request for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). The immigration judge found the applicant removable pursuant to section 237(a)(1)(A) of the Immigration and Nationality Act (the Act), as an alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time, and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa or other valid entry document. The applicant's mother filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on June 23, 2004. A petition for review filed with the United States Court of Appeals for the Fourth Circuit was dismissed on March 23, 2005. On November 15, 2005, a Warrant of Deportation (Form I-205) was issued. Consequently, on November 28, 2005, 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 under 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 travel to the United States and reside with his U.S. citizen spouse and child.

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 July 28, 2006.

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 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 for others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (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/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief in which he states that the Director failed to weigh all factors presented and failed to render a reasoned decision that reflects consideration of the cumulative effect of all emotional and economic hardship factors presented, as required by case law. Counsel states that the applicant was a minor when he entered the United States under the direction of his mother, and after his mother's asylum application was finally denied, he departed the United States at his own expense, showing respect for the immigration laws of the United States. Counsel states that the applicant was a derivative on his mother's asylum application and, therefore, the denial of his mother's asylum application, application for withholding of removal, and protection under the CAT should not be considered an unfavorable factor against the applicant. In addition, counsel states that the applicant never worked without employment authorization, as mentioned in the Director's decision. Counsel notes that the applicant's mother and spouse supported the applicant. Furthermore, counsel states that the decision gave insufficient weight to the applicant's favorable factors. Counsel states that having a U.S. citizen family is one of the most important positive discretionary factors. Counsel also states that the applicant did not gain his equity while in unlawful presence because at the time of his marriage his mother's asylum application was still awaiting a final decision. Finally, counsel states that the decision did not give proper weight to the extreme hardship the applicant's family would suffer if he were not permitted to reenter the United States and requests that the application be granted in the exercise of discretion.

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 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 7, 2004, approximately two and one half years after he was placed in removal proceedings. 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 be given appropriate weight.

The AAO finds that the applicant's mother's application for asylum and subsequent denial of her asylum application are not unfavorable factors. The applicant's mother had the right to file an asylum application, and although it was subsequently denied, she was entitled to exhaust all means available to her by law in an effort to legalize her and the applicant's status in the United States. The applicant's mother's appeal and petition for review conferred on the applicant a status that allowed him to remain in the United States while they were pending.

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 child, an approved Form I-130, the absence of a criminal record and the potential for hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry and his failure to depart the United States immediately after the Fourth Circuit Court of Appeals denied his mother's petition for review. The AAO notes that the applicant was under the age of 18 when he entered the United States and, therefore, cannot be held accountable for his illegal entry.

While the applicant's actions cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

**ORDER:** The appeal is sustained and the application approved.