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U.S. Citizenship
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FILE:

Office: VERMONT SERVICE CENTER

Date:

IN RE:

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 Acting 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, in October 1992, entered the United States without inspection. Immigration officers apprehended the applicant. On December 2, 1992, the applicant was placed into proceedings. The applicant filed an Application for Asylum or Withholding of Removal (Form I-589) before the immigration judge under the name [REDACTED] and with a fraudulent date of birth. On October 7, 1993, the immigration judge ordered the applicant removed from the United States *in absentia*. On November 4, 1996, the applicant filed a second Form I-589 under the name [REDACTED]. On December 26, 1996, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into proceedings. On January 16, 1997, the immigration judge ordered the applicant removed *in absentia*. On September 3, 1998, the applicant married his wife, [REDACTED] (Ms. [REDACTED]). On September 16, 1998, Ms. [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on June 24, 1999. On May 5, 2003, the applicant filed the Form I-212. An affidavit executed by the applicant accompanying the Form I-212 indicated that the applicant left the United States in June 1993 while removal proceedings were pending, returning and entering the United States in August 1996 without inspection prior to filing his second Form I-589. The affidavit indicates that the applicant again left the United States in January 1997 while removal proceedings were pending against him and returned entering the United States without inspection on September 14, 1997. 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) and 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 children.

The acting director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. *See Acting Director's Decision* dated January 24, 2006.

On appeal, counsel contends that the acting director erroneously concluded that the applicant's noncompliance with immigration laws outweighed the favorable factors in his case. Counsel contends the acting director failed to consider many favorable factors in the applicant's case and that some unfavorable factors cited by the acting director are not accurate. *See Counsel's Brief*, dated February 9, 2006. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

The AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

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 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.

The record of proceedings indicates that the applicant entered the United States without inspection on three occasions and was ordered removed on two occasions. 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.

The record reflects that Ms. [REDACTED] is a native of India who became a lawful permanent resident in 1998 and a naturalized U.S. citizen in 2004. The applicant and Ms. [REDACTED] have an eight-year old son, a six-year old daughter and a four-year old son who are U.S. citizens by birth. The applicant and Ms. [REDACTED] are in their 30's.

On appeal, counsel asserts that the acting director did not consider the hardship the applicant, the applicant's spouse and the applicant's children would suffer if the applicant is denied permission to reapply for admission. He asserts that the applicant's children would suffer emotionally due to separation from a father who works very hard for his children in the workplace and at home. Counsel asserts that Ms. [REDACTED] is already very anxious just thinking about the applicant's potential departure from the United States. Counsel asserts that the applicant works long hours to support his family and feels emotionally drained from worrying about his family's safety due to the uncertainty of his immigration status. Counsel asserts that the applicant worries how he would provide for his family in India. Counsel asserts that the applicant has suicidal thoughts and a licensed clinical social worker has found the applicant to have acute major depressive disorder and psychological issues regarding his immigration case and children's health and safety. Counsel asserts that the applicant's family would sustain economic hardship because the applicant is the main provider in the family and Ms. [REDACTED] earns a fraction of the household income. Counsel asserts Ms. [REDACTED] would be unable to obtain a high-paying job due to her lack of education. Counsel asserts the applicant may not be able to support himself in India or send funds back to the United States. Counsel asserts the applicant and Ms. [REDACTED] are concerned about their ability to support themselves in India and the cost of flying back and forth is cost prohibitive.

Ms. [REDACTED] in her affidavits, asserts that denial of the applicant's application will cause great hardship to her and the applicant's children. She states that they are fully dependent upon the applicant for emotional and financial support. She states that she would have to raise their children alone and fears that without the applicant's financial contributions she would be forced into poverty. She states that she and the children do not want to go to India because her entire family is in the United States and it is the only home that the

children have known. She states that she wishes her children to have a good education, which is not available in India.

A psychological report based on a single interview of the applicant, the applicant's spouse, and the applicant's children by a licensed clinical social worker concludes that the applicant provides essential and irreplaceable physical, emotional, financial, and instrumental care and love for his wife and children. The psychological report states that the applicant's loss would be devastating to the family and alternatively that the applicant and Ms. [REDACTED] fear the loss of the children's healthcare, education, family and other social service needs and community contacts if the family joins the applicant in India. Based on what the applicant reported to him, the licensed clinical social worker diagnoses the applicant with an acute major depressive disorder due to his concerns about his immigration status and his children's health and safety. Based on what the applicant's spouse reported to him, the licensed clinical social worker indicates the need to rule out a major depressive disorder and adjustment disorder with mixed anxiety and depressed mood for the applicant's spouse. The psychological report concludes that the cumulative effects of the denial of the applicant's application would amount to extreme hardship for the children and the family as a whole. The AAO notes, however, that the psychological report is based on a single interview with the applicant and his family and does not reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional, thereby rendering the licensed clinical social worker's findings speculative and diminishing the evaluation's value to a determination of extreme hardship. Moreover, the record does not contain evidence that the applicant, his spouse or children have received psychological treatment or evaluation other than during the appointment on which the submitted psychological report is based. Neither does the social worker recommend that the family seek additional treatment to deal with the emotional trauma he identifies.

Counsel asserts that the acting director failed to consider the applicant's extended legal residence in the United States as a positive factor. Counsel asserts that, although the applicant entered the United States illegally he has resided in the United States legally ever since Ms. [REDACTED] filed the Form I-130. The AAO notes that counsel asserts that the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130, however, there is no evidence in the record to establish that the applicant has filed a Form I-485. The proper filing of an *affirmative* application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay during which an applicant may lawfully reside in the United States. The filing of a Form I-130, however, confers no similar benefit. Accordingly, the applicant is illegally in the United States and has been residing and working in the United States without authorization.

Counsel asserts that the acting director failed to note the applicant's reformation and rehabilitation since his illegal entry into the United States as evidenced by the applicant's attempts to comply with immigration laws since his marriage to Ms. [REDACTED]. Counsel asserts that the applicant has a good job and his family belongs to a temple in the United States.

Counsel asserts that the acting director failed to note the applicant's good moral character as a favorable factor. However, the record does not support counsel's claims. Instead, it reflects that the applicant attempted to obtain immigration benefits during immigration proceedings in 1992 by filing a Form I-589 under a fraudulent name and date of birth. While the applicant lacks a criminal record in the United States, he has provided false information in order to obtain immigration benefits, which renders the applicant a person that does not possess good moral character. *See* Section 101(f)(6) of the Act; *Kungys v. U.S.*, 465 U.S. 759, 780 (1988); *Opere v. USINS*, 267 F.3d 10, 14 (1st Cir. 2001); *Matter of Haniatakis*, 376 F.2d 728 (3rd Cir. 1967).

Moreover, these actions render the applicant inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), as an alien who attempted to obtain immigration benefits by fraud. The AAO notes that, while counsel states that the acting director found the applicant to be a person of bad moral character by referring to him as a person who has shown a “callous attitude” to the immigration laws of the United States, the acting director did not utilize such language in her decision.

Counsel asserts that the acting director’s statement that the applicant’s marriage was entered into after he was placed into proceedings is a negative factor is erroneous because an applicant’s marriage can only be found to be a negative factor if his marriage is found to be fraudulent and not entered into in “good faith.” Counsel’s assertion in the matter is correct. The AAO finds that there is no evidence in the record to establish that the applicant’s marriage was entered into in bad faith, but notes that the director listed the applicant’s marriage as a negative factor only because it is subject to the “after-acquired equities” principle, discussed below.

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. *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 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 that the above-cited precedent legal decisions 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, three U.S. citizen children, the absence of any criminal record, the general hardship to the family members, an approved immigrant petition for alien relative and the numerous letters of support from family and friends.

The AAO finds that the unfavorable factors in this case include the applicant's multiple illegal entries into the United States, two removal orders and illegal reentries after having been removed from the United States and his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act.

The applicant in the instant case has multiple immigration violations. The AAO finds that the applicant's marriage, birth of his children, and approval of his immigrant petition occurred after the applicant was placed into proceedings. The AAO finds these factors to be "after-acquired equities" and that any favorable weight derived from the applicant's marriage, birth of his children, or his approved immigrant visa petition must be accorded 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.

The AAO notes that the applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for entering the United States illegally after having been ordered removed.

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.