



U.S. Citizenship  
and Immigration  
Services

HT4

FILE:

[REDACTED]

Office: HOUSTON, TX

Date: DEC 04 2009

RELATES)

IN RE:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, Houston, Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion to reconsider is dismissed. The order dismissing the appeal will be affirmed.

The record reflects that the applicant is a native and citizen of Pakistan who, on December 5, 1995, filed an Application for Asylum and for Withholding of Deportation (Form I-589). The applicant indicated that he had entered the United States without inspection on September 8, 1995. On January 11, 1996, the Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On April 15, 1996, the immigration judge ordered the applicant removed *in absentia*. On July 31, 1996, a warrant for the applicant's removal was issued. The applicant failed to depart the United States.

In April 1999, the applicant departed the United States and returned to Pakistan in order to seek consular processing of a Diversity Visa application. On April 19, 1999, the applicant was admitted to the United States as a lawful permanent resident under the diversity visa program. On October 1, 2003, the applicant was encountered by deportation and removal officers. Deportation and removal officers determined that the applicant had failed to inform the U.S. Consulate of his prior removal at the time he sought his immigrant visa. On October 1, 2003, the applicant was placed into immigration proceedings under section 237(a)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1226(a)(1). On November 12, 2003, the applicant's then lawful permanent resident spouse filed a Petition for Alien Relative (Form I-130). On November 12, 2003, the applicant filed the Form I-212, along with an Application for Waiver of Grounds of Inadmissibility (Form I-601). On April 15, 1996, the immigration judge granted U.S. Immigration and Customs Enforcement's (USICE) motion to terminate proceedings. USICE indicated that the applicant's immigrant visa had been cancelled and that USICE intended to reinstate the applicant's prior removal order. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On November 29, 2005, the BIA dismissed the applicant's appeal. The applicant seeks a waiver under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with his now naturalized U.S. citizen spouse and five U.S. citizen children.

The district director determined that the applicant was subject to reinstatement provisions under the Act and was ineligible to apply for any relief. The district director denied the Form I-212 accordingly. *See District Director's Decision*, dated March 22, 2006.

On January 7, 2009, the AAO dismissed the applicant's appeal because the applicant did not warrant a favorable exercise of discretion. *Decision of AAO*, dated January 7, 2009.

In his motion to reopen or reconsider, counsel contends that the AAO exceeded the scope of its appellate authority in ruling on the merits of the Form I-212.<sup>1</sup> Counsel contends that the AAO failed to

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<sup>1</sup> The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. *See Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*.

give “diminished weight” to both the negative, as well as positive factors in the applicant’s case. *See Counsel’s Motion to Reconsider.*

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.

....

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.-Any alien who-
  - (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
  - (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) *Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In support of his motion to reconsider, counsel contends that the AAO should reconsider the applicant's factors by applying the "diminished weight" doctrine to both his positive and negative factors. The AAO finds that precedent legal decisions establish the general principle that diminished weight is given to "after-acquired *equities*" for purposes of assessing favorable equities in the exercise of discretion. There is no case law that reflects that the principle applies to negative factors in an applicant's case.

Counsel contends that the AAO failed to consider the need for the applicant's expertise in software engineering in the United States or the length of time that he resided in the United States prior to self-deporting. The AAO finds that the record does not establish that the applicant has expertise in software engineering which is required in the United States or that his expertise is above and beyond or more extraordinary than the expertise found in other candidates. The AAO finds that the time the applicant spent in the United States prior to self-deporting was in unlawful status and while under an order of deportation, rendering the time spent in the United States a negative factor, which was considered in the AAO's prior decision.

Counsel contends that the AAO failed to consider the recency of the applicant's violations in rendering its decision. Counsel contends that the applicant's entry without inspection, failure to appear, period of unauthorized stay and period of unauthorized employment are all actions that took place in 1995 and 1996. Counsel contends that the most recent unfavorable factors occurred in 1998 when the applicant applied for lawful permanent resident status. The AAO notes that the length of time since occurrence of the applicant's various negative factors were considered in rendering a decision. The AAO also notes that the applicant's most recent violations did not occur in 1998 as they are ongoing. Even though the applicant's initial fraud leading to the issuance of an immigrant visa occurred in 1998, the applicant continued to perpetrate that fraud in 1999 at the time he applied for his immigrant visa abroad and then again at the time he sought admission as a lawful permanent resident at the port of entry. Furthermore, since an alien who acquired permanent resident status through fraud or misrepresentation has never been "lawfully admitted for permanent residence" and has not made a lawful entry, the applicant's presence and employment in the United States since 1999 is unlawful, unauthorized and ongoing. *See Matter of T*\_, 6 I&N Dec. 136 (BIA, A.G. 1954); *Matter of Wong*, 14 I&N Dec. 12 (BIA 1972); *Monet v. INS*, 791 F.2d 752 (9<sup>th</sup> Cir. 1986); *Matter of Longstaff*, 716 F.2d 1439 (5<sup>th</sup> Cir. 1983); *Biggs v. INS*, 55 F.3d 1398 (9<sup>th</sup> Cir. 1995); *In re Koloamatangi*, 23 I&N Dec. 548 (BIA 2003). As reflected by the AAO's finding that the applicant's negative factors included unlawful presence and unauthorized employment in the United States, the AAO considered the applicant's ongoing unlawful presence and unauthorized employment in the United States in its prior decision.

As such, counsel did not state any incorrect applications of law or policy and did provide any pertinent precedent decisions to establish an incorrect application of law or policy by the AAO. The AAO, therefore, finds that counsel has not met the requirements for a motion to reconsider.

After a careful review of the record, it is concluded that the applicant has failed to establish that the contentions submitted in the motion to reconsider meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider is dismissed and the order dismissing the appeal is affirmed.

**ORDER:** The motion to reconsider is dismissed. The order dismissing the appeal will be affirmed.