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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE:



Office: PHILADELPHIA, PA

Date:

**JUN 16 2009**

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.

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, Philadelphia, Pennsylvania 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 April 2, 2000, was admitted to the United States as a nonimmigrant visitor. On May 30, 2000, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On July 1, 2000, the applicant's nonimmigrant status expired. On July 26, 2000, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On March 16, 2001, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture and granted him voluntary departure until May 16, 2001. The applicant appealed to the Board of Immigration Appeals (BIA). On October 29, 2002 the BIA dismissed the applicant's appeal and granted him 30 days of voluntary departure. 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 May 21, 2003, the applicant married his U.S. citizen spouse, [REDACTED], in Souderton Pennsylvania. On July 14, 2003, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on January 31, 2005. On April 21, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On the same day, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On October 6, 2005, the applicant's Form I-485 was denied. On December 27, 2005, the applicant filed a motion to reopen with the BIA. On May 8, 2006, the BIA denied the applicant's motion to reopen. 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 reside in the United States with his U.S. citizen spouse.

The district director determined that the applicant had failed to file the correct filing fee with the Form I-212. The district director also determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated October 6, 2005.

On appeal, counsel contends that the applicant filed the correct filing fee with the Form I-212. Counsel contends that the applicant's due process rights have been violated. Counsel contends that the appeal should be granted and the matter remanded to the district director for a full and fair adjudication of the Form I-212. *See Counsel's Brief*, received October 25, 2005. In support of his contentions, counsel submits the referenced brief and copies of documentation previously provided. 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 reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] do not appear to have any children together. The applicant is in his 40's and [REDACTED] is in her 30's.

Counsel contends that the district director erred in finding that the applicant failed to file the correct filing fee with the Form I-212. The AAO finds that the record contains evidence to establish that the applicant filed the correct filing fee of \$250, despite the fact that a rejection notice was issued in regard to the Form I-212. As such, the AAO finds that the applicant's Form I-212 was correctly filed. While counsel contends that the appeal should be remanded to the district director for a full and fair adjudication, the AAO will adjudicate the Form I-212 on appeal.

Counsel contends that the district director fails to acknowledge that the applicant had filed an Application for Stay of Deportation or Removal (Form I-246). The AAO, however, finds that the district director was not required to address the applicant's Form I-246 in the decision denying the Form I-212 and Form I-485.

Counsel also asserts that the applicant's due process rights were violated. Constitutional issues are not within the appellate jurisdiction of the AAO; therefore, this assertion will not be addressed in the present decision.

Finally, counsel contends that, pursuant to 8 C.F.R. §103.3(a)(1)(i), the applicant's rights were violated when the district director failed to provide a copy of the adverse decision to the applicant

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<sup>1</sup> The AAO notes that the Form I-246 is adjudicated by Immigration and Customs Enforcement (ICE), not U.S. Citizenship and Immigration Services (USCIS).

who was in detention at the time the decision was issued. The record reflects that the district director issued a copy of the decision to the applicant at his last known address. Records reflect that the applicant's wife received this decision and, therefore, the applicant has been provided with the required copy of the decision.

The AAO now turns to a consideration of positive and adverse factors in the present case.

Counsel, in a statement attached to the Form I-212, contends that the applicant has considerable equities upon which the Form I-212 should be granted. Counsel contends that the applicant is legally employed as a manager at Wendy's restaurant. Counsel states that the applicant is a hard and reliable worker, which is reflected by his consistent record of employment. Counsel states that the applicant's income helps to support his spouse with whom he shares a small home. Counsel states that the applicant has paid federal income taxes since his entry into the United States. Counsel contends that the denial of the applicant's application would visit terrible hardship upon the applicant's spouse. Counsel states that, on February 29, 2004, [REDACTED] suffered an extreme bout of abdominal pain. Counsel states that as a result of this abdominal pain [REDACTED] underwent a surgical procedure to remove two ovarian cysts on April 15, 2004. Counsel states that [REDACTED] has a documented history of illness. Counsel states that [REDACTED] suffers from hyperthyroidism and polycystic ovarian syndrome. Counsel contends that [REDACTED] will continue to develop ovarian cysts and will likely continue to have them removed surgically. Counsel states that the applicant provides an indispensable source of support and security for [REDACTED] especially in light of her medical conditions. Counsel states that [REDACTED] would lose that support if the applicant is denied permission to reapply for admission. Counsel states that the applicant has been a law-abiding individual during his stay in the United States and that he had no contact with law enforcement or the criminal justice system. Counsel contends that the applicant's sole transgression was a failure to depart the United States as ordered by the immigration judge.

[REDACTED] in a letter dated January 12, 2004, states that she initially met the applicant through the internet in October 2002. She states that she and the applicant have resided together since January 2003. She states that she would be devastated both emotionally and financially if the applicant is removed from the United States. She states that she has a medical diagnosis of hypothyroidism and polycystic ovarian disease. She states that the applicant has supported her throughout this medical diagnosis and that she is currently on his medical insurance plan. She states that her father is a veteran of the U.S. Army and has suffered two major strokes over the last 3 years, which has left him permanently disabled. She states that she and the applicant help her father with things that he is no longer able to do. She states that it will be likely that she will have to bring her father to live with her since he is elderly and it has become increasingly difficult for her to care for him. She states that she would find it extremely difficult to care for her father without the applicant's help and that it will cause her great financial emotional and physical distress.

Copies of clinic notes from [REDACTED] dated January 10th 2000, indicate that the applicant's spouse was concerned that she was suffering from hypothyroidism and polycystic ovarian syndrome. The notes reflect that [REDACTED] was treated for mild elevation of the thyroid stimulating hormone four years prior to her current visit and for which she did not continue treatment. The notes reflect that [REDACTED] had undergone a unilateral oophorectomy at age 16. The notes reflect that [REDACTED] was complaining of weight gain, irregular menses and mild hirsutism. Subsequent tests revealed a normal level of thyroid stimulating hormone. The notes reflect that the doctor found her

thyroid status to not contribute to her symptoms and that polycystic ovarian syndrome was possible but would need to be verified through measurement of androgens and gonadotropins. The doctor indicated that he would assess fasting insulin and glucose levels to assess her insulin resistance and that birth control pills would be a reasonable intervention. A follow-up letter, dated January 25, 2000, reflects that [REDACTED]'s thyroid function was normal and resumption of thyroid medication was not necessary. It was found that [REDACTED]'s pituitary levels were also normal. The doctor concluded that [REDACTED] had slightly elevated testosterone levels and insulin levels consistent with resistance to insulin. The doctor recommended that [REDACTED] begin a trial period of birth control pills due to the mildly elevated testosterone levels which would decrease with birth control pill therapy and regulate her menses.

A medical incident/injury report dated February 29, 2004, indicates that [REDACTED] experienced a feeling that she would faint due to abdominal pain. The report indicates that no treatment was rendered and that the applicant was contacted by an employee to take [REDACTED] to the hospital. An operative report, dated April 15, 2004, indicates that [REDACTED] underwent a successful surgery to remove two cysts.

The AAO notes that, while [REDACTED] was placed on birth control pills for elevated testosterone and insulin resistance, the records do not establish that she suffers from polycystic ovarian syndrome. While medical records reflect that [REDACTED] underwent surgery to remove cysts from her ovary, there is no evidence to establish that she continues to require further surgeries. The AAO also notes that there is no evidence in the record to establish that [REDACTED] would be unable to receive appropriate care or medication in India. The AAO also notes that there is no evidence in the record to establish that [REDACTED] would be unable to receive appropriate care or medication in the absence of the applicant. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record reflects that the applicant has been employed in the United States since April 2000. The applicant has been issued employment authorization from May 20, 2002 until May 30, 2003, April 16, 2005 until April 15, 2006, September 11, 2006 until September 10, 2007, November 14, 2007 until November 13, 2008, and September 19, 2008 until September 18, 2009. The record reflects that the applicant filed joint federal taxes from 2001 through 2004. The AAO notes that the applicant has received employment authorization since 2005 based on a stay of removal issued by the Third Circuit Court of Appeals in connection with repeated habeas corpus petitions. The AAO also notes that the applicant's last habeas corpus petition was denied by the Third Circuit Court of Appeals and his stay of removal was vacated on July 25, 2008.

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 7<sup>th</sup> Circuit Court of Appeals 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-Munoz 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 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.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, the general hardship to the applicant and his spouse if he were denied admission to the United States, his otherwise clear background, his filing of federal income taxes and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original overstay of his nonimmigrant status; his failure to comply with voluntary departure; his failure to comply with a removal order; his unlawful presence in the United States; and his unauthorized employment in the United States except for periods of employment authorization.

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates 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.