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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: HOUSTON, TX Date: MAR 01 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Houston, Texas, 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 December 20, 1992, was placed into immigration proceedings for having entered the United States without inspection on the same day. On February 16, 1993, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States.

On March 24, 1997, the applicant married his naturalized U.S. citizen spouse, [redacted] On April 8, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by Ms. [redacted] The Form I-485 indicated that the applicant last entered the United States without inspection in December 1992. On May 1, 2003, the Form I-130 was approved. On June 13, 2003, the Form I-485 was denied. On July 14, 2008, the Form I-130 was terminated.

On May 6, 2009, the applicant filed a second Form I-485 based on the Form I-130. The Form I-485 indicates that the applicant last entered the United States utilizing an advance parole on July 21, 1999.[1] On May 6, 2009, the applicant filed a Form I-212 indicating that he resided in the United States. On January 27, 2010, the Form I-485 and Form I-212 were denied. On March 12, 2010, the applicant filed a third Form I-485 based on a second Form I-130 filed on his behalf by [redacted]. On March 12, 2010, the applicant filed the Form I-212 indicating that he continued to reside in the United States. On August 11, 2010, the Form I-485 was denied. On August 14, 2010, the Form I-130 was approved. 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). 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 naturalized U.S. citizen spouse and three U.S. citizen stepchildren.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated August 11, 2010.

On appeal, counsel contends that the field office director misapplied the standard required for approval of the Form I-212. Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief,* undated. In support of his contentions, counsel submits only the referenced brief. 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

[1] The applicant's passport indicates that he last departed the United States on June 24, 1999.

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 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 Secretary has consented to the alien's reapplying for admission.

Counsel contends that the field office director incorrectly applied the standard required for approval of an Application for Waiver of Grounds of Inadmissibility (Form I-601), "extreme hardship," in denying the applicant's Form I-212. The AAO finds that the field office director did not apply the "extreme hardship" standard, but did consider the type of hardships that would be suffered by the applicant and his spouse, concluding that such hardships were not beyond those normally expected with departure. The hardships suffered by the applicant and his spouse are appropriate factors to be considered in determining whether a favorable exercise of discretion is warranted.

Counsel contends that the applicant's only inadmissibility ground is his removal order from 1993; his medical is properly executed; he has never been convicted of a crime; he has never misrepresented himself; and he never triggered the unlawful presence provisions. The AAO finds that the applicant did trigger unlawful presence provisions and was inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for accruing more than one year of unlawful presence from April 1, 1997, the date on which unlawful presence provisions were enacted, until June 24, 1999, the date on which he departed the United States, because the applicant's Form I-485 was not filed affirmatively and did not serve to toll the accrual of unlawful presence; however, it has been more than ten years since his last departure so he is no longer seeking admission within ten years of his last departure and is no longer required to file a Form I-601.

Counsel contends that: the field office director failed to take into consideration the applicant's good moral character and recency of removal holdings as discussed in *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978); the field office director misapplied the standard of proof ; the applicant warrants a

favorable exercise of discretion; the applicant's case stands in stark contrast to *Matter of Tin,* 14 I&N Dec. 371 (Reg. Comm. 1973), since the applicant has much stronger ties to the United States; the applicant's entrepreneurship should weigh his favor; and the applicant has been waiting patiently to adjust his status in the United States.

The record reflects that Ms. [redacted] is a native of Cuba who became a lawful permanent resident in 1971 and a naturalized U.S. citizen in 1990. The applicant and [redacted] do not have any children together. Ms. [redacted] has a 26-year-old daughter, a 22-year-old son and an 18-year-old son who are all U.S. citizens by birth.[2] The applicant is in his 40's and [redacted] is in her 50's.

Counsel states that the applicant has been married to his spouse since 1997 and their marriage continues to grow stronger each passing day. Counsel states that the applicant has been a devoted stepfather and he has helped to raise the children as if they were his own. Counsel states that, even though the applicant's stepchildren are all now adults, the applicant has played a major role in their lives. Counsel states that the applicant has only ever been married to Ms. [redacted] and he has no other children. Counsel states that the applicant is a person of good moral character who has never committed a crime or had any kind of problem with drugs, alcohol, gambling, vice, etc. Counsel states that the applicant owned a pizza shop and currently owns a food store. Counsel states that these undertakings have generated jobs and contributed to the local economy.

The applicant, in an affidavit accompanying the Form I-212, states that, if he is not permitted to remain in the United States his spouse will experience hardship. He states that he has been married to his spouse for almost 13 years and they love each other very much. He states that the United States has been his wife's home since she was 6 years old. He states that his stepchildren were all born and grew up in the United States. He states that his spouse has one grandchild who was born in the United States. He states that his spouse will have the impossible choice of joining him in India, a country with which she is unfamiliar and in which she will experience a different culture, language, customs and have to leave behind her children and grandchild, as well as the last resting place of her parents; or his spouse will have to be separated from him after 13 years of marriage and without any additional means of financial or emotional support.

The record reflects that the applicant filed joint taxes from 1998 through 2003 and from 2008 through 2009. The record reflects that the applicant has been employed in the United States since at least March 1998. The record reflects that the applicant has been issued employment authorization from July 25, 1997 through July 24, 1999 and from July 22, 2009 through June 13, 2011.

The record reflects that Ms. Bansal is currently employed as an assistant with an annual income of $34,645.

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:

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[2] The AAO notes that the record does not contain birth records for these children; however, for the purposes of this decision the AAO will consider the applicant's stepchildren to be favorable factors.

> 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 a discretionary determination. 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 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.

As established by the record, the favorable factors in this matter are the applicant's naturalized U.S. citizen spouse, his three U.S. citizen stepchildren, the general hardship to the applicant and his family if he were denied admission to the United States, the absence of a criminal record, the filing of federal taxes and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, establishment of the stepchild/parent relationships and filing of the immigrant visa petition benefiting him occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The unfavorable factors in this case include the applicant's original unlawful entry into the United States; his failure to comply with an order of removal; his reentry into the United States after having departed the United States under an order of removal, even though that entry was otherwise lawful; his unlawful presence in the United States; and his unauthorized employment in the United States except for periods of work authorization.

The applicant in the instant case has multiple immigration violations. As such, 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.