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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

Date: FEB 06 2012 Office: Detroit FILE:

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:

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.

Thank you,

Michael Shumway

for Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Acting Field Office Director ("field office director"), Detroit, Michigan, 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 sustained.

The record reflects that the applicant is a native and citizen of India who was ordered removed on November 20, 2006, and departed while the order was pending. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act or INA), 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 enter the United States as a nonimmigrant worker in H-1B status.

The field office director denied the application, determining that the applicant did not warrant a favorable exercise of discretion, and that the approval of the application would serve no purpose due to the applicant's inadmissibility on other grounds. *Decision of the Acting Field Office Director*, dated May 5, 2011.

On appeal, counsel for the applicant asserts that the applicant warrants a favorable exercise of discretion, as the positive factors in this case outweigh the negative factors. *Brief from Counsel*, dated June 30, 2011.

The record contains, but is not limited to: a brief from counsel; statements from the applicant, his family members, and others in support of his presence in the United States; documentation in connection with the applicant's removal proceedings; and documentation in connection with the applicant's prior marriage and conditional permanent residence. The entire record was reviewed and considered in rendering this decision.

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 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.

The record reflects that the applicant married a U.S. citizen (his ex-wife) on or about August 11, 2001, and he obtained conditional permanent residence based on that relationship and an approved Form I-130, Petition for Alien Relative. The applicant relocated to the United States on December 7, 2001 and began residing with his ex-wife and her family. On or about January 25, 2002, the applicant left the family home and relocated to his brother's residence in North Carolina. The applicant and his former wife were divorced on June 12, 2002. On January 29, 2003, the legacy Immigration and Naturalization Service terminated the applicant's conditional permanent residence and placed him into removal proceedings. On November 20, 2006, an Immigration Judge ordered the applicant removed, in part based on a finding that the applicant failed to show that he entered into his marriage in good faith.

The applicant filed an appeal with the Board of Immigration Appeals (BIA) on December 11, 2006. The BIA upheld the findings of the Immigration Judge, noting that the Immigration Judge's decision was reviewed only "to determine whether her factual findings were clearly erroneous", and adding that "where there are two permissible views of the evidence, the Immigration Judge's choice between them cannot be deemed clearly erroneous." *Decision of the Board of Immigration Appeals*, dated November 5, 2008. The BIA withdrew the removal order and granted the applicant's request for voluntary departure. The applicant was unable to meet the terms of the BIA's voluntary departure order, as he had already departed the United States in or about September 2008, at which time the Immigration Judge's removal order was pending. Thus, the BIA's voluntary departure order became a removal order.

The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii)(II) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

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 Seventh 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.

The applicant has presented numerous favorable factors to support that his Form I-212 application should be approved. The applicant has significant family ties to the United States, including his U.S. citizen parents, brother, and sister-in-law. The record does not show that the applicant has engaged in criminal activity at any time. The applicant has completed significant academic study to become a pharmacist and engaged in the profession in the United States. The applicant owns a pharmacy in Michigan, where he helps the economy by employing U.S. workers, and he assists individuals who rely on him for their pharmaceutical needs. The applicant is the beneficiary of an approved Form I-129, H-1B nonimmigrant visa petition, which supports that he will contribute to the United States economy. The applicant's alleged fraudulent marriage occurred over 10 years ago. The applicant has been a person of good moral character for the past 10 years, as supported by numerous reference letters and the BIA's finding that he was eligible for a grant of voluntary departure.

The record contains unfavorable factors that weigh against approval of the application. The applicant was found to have entered into a marriage for the purpose of obtaining immigration benefits. The applicant accrued unlawful presence from the date that his conditional permanent residence was terminated on January 29, 2003 until he departed the United States in approximately September 2008. This period totals over five years and renders him inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of his last departure.

As the applicant is applying for nonimmigrant visa, the record presents no statutorily disqualifying factors that mandate dismissal of the appeal; thus, the entire record must be assessed in aggregate to determine whether the positive factors outweigh the negative factors. The AAO has carefully examined the entire record relating to the applicant's prior marriage and the associated removal proceedings. The Immigration Judge determined that he failed to meet his burden to rebut a presumption that he entered into his marriage for the purpose of an immigration benefit. The BIA did not find that the Immigration Judge committed clear error, but vacated the removal order and granted the applicant's request for voluntary departure. The findings of the Immigration Judge and BIA are not under review in the present proceeding, and we lack jurisdiction or authority to review decisions of the Executive Office for Immigration Review (EOIR), which operates under the authority of the Attorney General. *See* INA § 103(a)(1). However, the AAO must determine the proper negative weight to give the applicant's conduct that led to his removal. The AAO agrees with counsel that the BIA's decision to vacate the removal order and instead grant voluntary departure tempers the negative weight accorded to the Immigration Judge's finding of marriage fraud.

The applicant has provided statements from his mother, father, brother, and others that support his account of the factors that led to the dissolution of his first marriage. The AAO recognizes that the applicant lacks evidence that is commonly deemed to show a commitment to a marriage, such as documentation of comingled funds, yet it is understood that such evidence would be limited or nonexistent in a relationship of approximately five months. The record supports that the applicant's family members were involved in arranging his marriage and they committed time and funds to the process, while there is no indication that they were engaging in an effort to circumvent the laws of the United States. It is further noted that there is no affirmative evidence beyond the applicant's ex-

wife's testimony that contradicts his claimed intentions in entering into the marriage. The AAO is not inclined to rely on the applicant's wife's testimony, particularly when it is contradicted by statements from numerous other individuals with knowledge of the events described. The applicant's failure to rebut the presumption of marriage fraud is viewed as a negative factor, yet the weight accorded is reduced due to the substantial countervailing evidence.

It is noted that the field office director committed the majority of his analysis to the applicant's actions in relation to his prior marriage. The field office director relied substantially on a U.S. Department of Homeland Security (DHS) Motion for Summary Affirmance, submitted to the BIA on or about September 13, 2007 in response to the applicant's appeal of his removal order. However, this document was an adversarial filing in the context of removal proceedings, and constitutes assertions that were yet to be litigated or proven. In fact, the BIA did not grant DHS's motion for summary affirmance, and instead issued a decision discussing the merits of the applicant's case. *See* 8 C.F.R. § 3.1(a)(7). Thus, we will not rely on this document in the present matter.

The applicant's unlawful presence constitutes a negative factor. His violation of U.S. immigration law cannot be condoned. The AAO accords negative weight to the finding that the applicant entered into a marriage for the purpose of gaining an immigration benefit. However, the numerous positive factors, considered in aggregate, outweigh the negative factors. Accordingly, the applicant warrants a favorable exercise of discretion and his Form I-212 application may be approved.

As noted by the field office director, the applicant must overcome all grounds for which he is inadmissible in order to be admitted to the United States. He must obtain a waiver of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act for his prior unlawful presence. The field office director stated that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission or benefits under the Act by fraud or willful misrepresentation.[1] As the applicant is applying for temporary admission in nonimmigrant status, he may obtain a waiver by filing Form I-192.

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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

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[1] The field office director did not cite the relevant law or engage in discussion of the facts in light of the legal standard of section 212(a)(6)(C)(i) of the Act. Accordingly, the AAO does not find the field office director's conclusion to be a proper determination of inadmissibility, and we cannot conclude that such a charge is sustained based on our analysis of the evidence related to the applicant's prior marriage.