

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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]

Date: FEB 27 2012 Office: SAN FRANCISCO, CA [REDACTED]

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.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Francisco, California, 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 21, 2002, the Board of Immigration Appeals (BIA) affirmed this decision on April 13, 2004, the Ninth Circuit Court of Appeals denied his petition for review on January 4, 2008 and the applicant was removed on July 8, 2008. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I). 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 U.S. citizen spouse, child and stepchild.

The field office director determined that the applicant's negative factors outweigh his positive factors and denied the Form I-212 accordingly. *Field Office Director's Decision*, dated August 13, 2010.

On appeal, counsel asserts that the applicant only has positive factors and his Form I-212 should be granted. *Brief in Support of Appeal*, dated September 7, 2010.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, a psychological evaluation of the applicant's spouse and a default notice. The entire record was reviewed and considered in rendering a decision on the appeal.

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 entered the United States on November 5, 1996. The record is not clear as to the manner of his entry, although it was not legal. The applicant filed asylum applications on May 23, 1997 and April 7, 1999. The applicant was referred to an immigration judge and was ordered removed on November 21, 2002, the BIA affirmed this decision on April 13, 2004, the Ninth Circuit Court of Appeals denied his petition for review on January 4, 2008 and the applicant was removed from the United States on July 8, 2008. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

The field office director's decision mentions that the applicant was found by the immigration judge to have filed a frivolous application. In the November 21, 2002 decision, the immigration judge stated, "Whether the respondent was provided with the appropriate advisals by the Immigration Service, the Court has no way of knowing, and so there is no way for this Court to determine whether it would be appropriate to deny this respondent any relief under these Immigration laws for the rest of his life." The January 4, 2008 decision of the Ninth Circuit Court of Appeals states that the asylum application was denied by the immigration judge due to his testimony not being credible. There is no mention of the application being frivolous. A thorough review of the record does not establish that the applicant filed a frivolous application.

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 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's favorable factors include his U.S. citizen spouse, child and stepchild; his lack of a criminal record; an approved Form I-130, Petition for Alien Relative; and filing of tax returns. The record includes significant evidence of emotional hardship to the applicant's spouse, including a psychological evaluation diagnosing her with Major Depressive Disorder and which details numerous symptoms that she is experiencing. The record also includes a property loan default notice reflecting that the applicant's spouse is undergoing significant financial hardship. The AAO notes that after-acquired are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The applicant's unfavorable factors include his illegal entry, his unauthorized stay in the United States, recency of his removal and the negative credibility finding in his asylum application.

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.