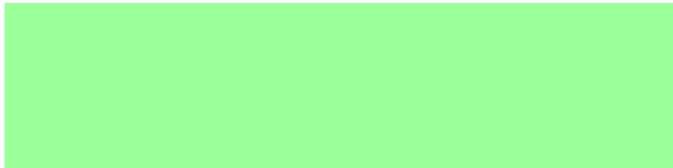


(b)(6)

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

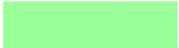


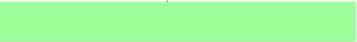
U.S. Citizenship
and Immigration
Services



Date: NOV 25 2013

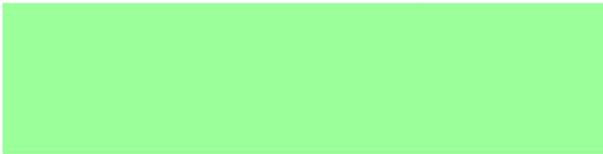
Office: PHOENIX

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Phoenix, Arizona, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision will be affirmed. The underlying waiver application remains denied.

The record reflects that the applicant is a native and citizen of India who entered the United States on September 18, 1994 with a valid nonimmigrant F-1 student visa. On August 3, 2004, the applicant was removed from the United States. 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 lawful permanent resident spouse.

The Field Office Director determined that the applicant had no favorable equities, and therefore the favorable factors could not outweigh the unfavorable factors. He denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated December 10, 2012.

The AAO, reviewing the applicant's Form I-212 on appeal, concurred with the Field Office Director that the favorable factors could not outweigh the unfavorable factors and dismissed the appeal. *Decision of the AAO*, dated May 24, 2013.

On motion, counsel contends that the AAO made mistakes of law and fact in dismissing the appeal. Counsel submits additional documentation related to the applicant's date of birth and the hardships the applicant's spouse would experience if his application is not approved.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), 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 that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). As counsel has submitted new documentary evidence to support the applicant's claim and has stated reasons for reconsideration supported by precedent decisions, the motion to reopen and reconsider will be granted.

The record includes, but is not limited to: briefs in support of the appeal and the motion; statements from the applicant and the applicant's spouse; medical documentation for the applicant and the applicant's spouse; employment documentation for the applicant and the applicant's spouse; financial documentation; copies of telephone records; a statement from the applicant's prospective employer; transcripts of immigration-court hearings; letters of reference; country-conditions information about India; documentation regarding the applicant's apprehensions in Las Vegas; and documentation related to a workplace incident in Las Vegas. The entire record was reviewed and considered in rendering the 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 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 applicant first entered the United States on September 18, 1994, with a valid nonimmigrant F-1 student visa to study at [REDACTED] Utah. The applicant withdrew from [REDACTED] on April 14, 1995, and transferred to the [REDACTED] Florida. The applicant departed the United States on November 25, 1995, for a temporary visit to the United Kingdom and re-entered the United States at [REDACTED] on December 5, 1995. The applicant again was admitted as a non-immigrant based on his F-1 student visa. The applicant's Form I-94, Arrival/Departure Record indicates that the applicant was admitted for the duration of his status as a student.

Information from the International Student Services Department at the [REDACTED] indicates that the applicant withdrew from classes in fall 1995 and has not registered at the university since. The record indicates that the applicant obtained a tuition deferment for the spring 1996 semester; however, the record does not show that the applicant attended classes during that semester.

In the fall of 1996, the applicant obtained employment with [REDACTED] as a computer technician. At that time he had no legal immigration status or authorization to work. In a statement dated April 10, 2010, the applicant asserted that [REDACTED] told him that they would "take care of" his employment authorization document. The applicant also asserted that after he submitted the documentation the company requested, including copies of his passport and Social Security card, [REDACTED] informed him that he did not need work authorization and that they would apply for a work permit when needed.

Through [REDACTED] the applicant was contracted to work for the [REDACTED] in Las Vegas. The [REDACTED] terminated the applicant's employment on April 22, 1997, following an incident involving the unauthorized use of the company's fax machine and a company stamp. The record includes a letter dated April 10, 1997, addressed to [REDACTED] who resides in Australia, offering him a job interview for the position of "Manufacturing System's Engineer" [sic] at the [REDACTED]. Counsel asserts that there is no company stamp on the letter; however, the copy of the letter includes a faint stamp that reads, "[REDACTED]" with an illegible post-office box number, and the city, state, and zip code of the company's address. The record also includes a copy of an invoice dated March 26, 1997, from [REDACTED] of Las Vegas, for an airline ticket for [REDACTED] to travel to the United States from Australia in April 1997. The invoice was issued to the applicant and includes an address in Las Vegas.

After the [REDACTED] terminated the applicant's employment, they reported the incident to the Immigration and Naturalization Service (INS) office in Las Vegas. Based on the information provided by the [REDACTED] INS Las Vegas launched an investigation, contacting the U.S. Consulate in Sydney, Australia. During testimony before an immigration judge in 1998, the applicant claimed that the fax was just a joke he was trying to play on a friend, and counsel correctly states that the investigation failed to produce sufficient evidence to charge the applicant with aiding and abetting alien smuggling under section 212(a)(6)(E) of the Act. However, the actions taken by the applicant reflect a lack of respect for workplace rules and protocol, which resulted in his employment being terminated.

The record indicates that between July 25, 1997 and March 24, 1998, the applicant was apprehended three times by the university police of the [REDACTED]. On motion, counsel contends that the AAO incorrectly stated that the applicant was arrested three times for trespassing, that the sole arrest for trespassing ended in the applicant being transferred into immigration custody, and the applicant's FBI record reflects only one arrest.

The record includes copies of three crime reports prepared by the university police of [REDACTED]. The first report, dated July 25, 1997, indicates that the applicant was cited for the crime of trespassing after being found sleeping in the library at 1:23 am. The report notes that the applicant was verbally warned previously for sleeping on the balcony on July 24, 1997. The applicant was told not to return. The second report, dated August 2, 1997, indicates that applicant was encountered again on university property while walking by the library and university police issued him a citation for trespassing. The third report indicates that the applicant was apprehended on March 24, 1998, for

the offenses of lodging without the consent of owner, trespassing, possession of stolen property, and false information to a police officer

Counsel correctly asserts that though the applicant received three citations from the [REDACTED] police, he was only arrested once, following the third apprehension, and he was subsequently placed into immigration proceedings. The record indicates that the applicant admitted that he was arrested once. *See Transcript of Hearing, Matter of [the Applicant], Removal Proceedings before the Immigration Judge, August 11, 1998, p. 88.*

The third crime report indicates that the applicant was again found sleeping in the library near closing time; that he provided false information that he was a registered student at [REDACTED] and that he was in possession of a false photo identification card (ID) with the applicant's photo under the name of [REDACTED] a bank ATM card in the name of [REDACTED] and 18 slot-club cards issued by various casinos in Las Vegas.

Concerning the applicant's false ID and slot-club cards, on motion counsel contends that these were not useful or stolen. Counsel, however, does not address the ATM card in the name of [REDACTED] [REDACTED] also found to be in the applicant's possession. Counsel states that the applicant found the casino cards on the ground, to redeem them a person has to appear with a photo ID, and the casino cards have no monetary value. Counsel further states that the applicant "also had a 5 dollar vanity ID which is sold legally in Las Vegas, the ID clearly says it's not a legal ID." The record does not include copies of these cards; therefore it is unclear from the record whether the "5 dollar vanity ID" that counsel refers to is the ID under the name [REDACTED] found in the applicant's possession. However, the record indicates that the ID included a Social Security number that is not the applicant's Social Security number.

With respect to the applicant being found in possession of an ATM card in the name of another person and the casino cards, the immigration judge referred to the applicant's accounts as "unconvincing" and "lies" before finding the applicant not credible. *See Transcript of Oral Decision of the Immigration Judge, Matter of [the Applicant], In Removal Proceedings, August 11, 1998, p. 7.*

After the applicant's application for asylum and withholding of removal were denied in August 1998, he appealed the decision, and the Board of Immigration Appeals (BIA) remanded the case to the immigration judge for consideration of the applicant's claim under the Convention Against Torture. On August 2, 2000, the immigration judge denied the applicant political asylum, withholding of removal, and torture-convention relief and ordered the applicant removed from the United States. The applicant appealed to the BIA, and on March 25, 2002, the BIA dismissed the appeal. The applicant filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit that was dismissed on March 9, 2004. The applicant was removed from the United States on August 3, 2004.

[REDACTED] South Carolina, filed a Form I-140, Immigrant Petition for Alien Worker (Form I-140), on the applicant's behalf, which was approved on November 13, 2002. A related Form I-485, Application to Register Permanent Residence or Adjust

Status (Form I-485), was found to be abandoned based on the applicant's departure from the United States and consequently denied in July 2010.

The record reflects that the applicant resided in Canada from October 2005 to March 2008. On March 6, 2007, the applicant married an Indian national in Canada. The applicant's spouse became a lawful permanent resident of the United States on March 30, 2010.

Counsel contends that the applicant's spouse is suffering mental and emotional hardships due to her separation from the applicant. The applicant's spouse, in a letter dated January 24, 2012, stated that she is experiencing extreme stress due to her concerns for the applicant, who suffers from depression and obsessive-compulsive personality disorder (OCPD). The applicant's spouse states that the applicant is clinically depressed.

The record indicates that after the applicant was detained on immigration charges in 1998, he was placed in a psychiatric care unit until 2000. A medical report from India dated December 14, 2004 states that the applicant had severe depression that was intensified by his OCPD. During the processing of the applicant's immigrant-visa application at the U.S. Consulate in Mumbai, India, in April 2012, the consulate asked him to undergo a second medical evaluation to determine whether he was inadmissible under section 212(a)(1)(A) of the Act for having a mental disorder. The consultant psychiatrist determined that the applicant had a "class B other" condition, specifically a past history of depression. The psychiatrist concluded that the applicant's mental-status examination was normal, that the applicant's mood was euthymic, and that there was no evidence of any significant psychopathology. The psychiatrist's report further stated that there was no evidence of psychosis or major depression.

On motion, counsel contends that the applicant's spouse is suffering mental hardship due to the support the applicant requires on account of his mental condition. Counsel submits copies of telephone records showing extensive contact between the applicant and his spouse from December 13, 2011 to January 12, 2012. However, the most recent psychiatric evidence in the record indicates that although the applicant started taking an anti-depressant in January 2012, he stopped and claimed he was benefiting from counseling instead. The psychiatrist concluded that the applicant is not suffering from major depression or any significant psychopathology.

The record includes a medical report about the applicant's spouse dated January 21, 2013, which states, under a subsection titled "Psychiatric," that she "denies depression, nervousness, mood swings or sleep disturbances." There is no other documentation related to applicant's spouse's mental health in the record. Counsel states that the applicant is unable to provide a mental-health evaluation for his spouse, as the applicant's spouse "has been unable to afford the time to see someone." While it is not uncommon to experience a certain amount of distress upon separation, the record does not contain sufficient information to establish the level of mental or emotional hardship that the applicant's spouse may be experiencing.

Counsel further contends that the applicant's spouse will suffer financial hardship if the applicant's request for permission to reapply for admission is not approved, because she is forced to care for two households. The applicant's spouse states in a letter dated January 24, 2012, that she is the only

source of income for the applicant and herself and that the applicant was bedridden because of his anxiety and depression, which make him unable to function. The record also includes a statement dated January 22, 2012, from the applicant's caretaker and driver, who states that the applicant spends most of the time in bed.

However, the applicant's employment status is not clear. The record includes a letter from [REDACTED] dated April 19, 2010, which states that the applicant is employed as a consulting manager earning a monthly salary of 100,000 rupees (approximately \$19,381 annually, under the current exchange rate). Moreover, according to the psychiatric report dated April 5, 2012, the applicant is working as a partner in an information-technology firm in [REDACTED] and "is working well and managing his partnership well." The same psychiatrist, in his letter dated April 13, 2012, states that the applicant has no depression and is psychiatrically fit to travel and work independently. These documents are dated three months after the applicant's spouse's letter claiming that she is the only source of income for the applicant and herself and the statement by the caretaker stating that the applicant spends most of the time in bed. The evidence in the record indicates that the applicant was employed in April 2012, and no evidence corroborates claims that the applicant was ever unemployed while residing in India or that he is currently unemployed.

Counsel submits evidence that the applicant's spouse was approved for leave under the Family and Medical Leave Act (FMLA) from February 18, 2013 to April 15, 2013. The FMLA application submitted by the applicant's spouse indicates that she requested leave to assist the applicant. The record contains no evidence to establish that the applicant's spouse traveled to India to do so.

Counsel contends that the applicant's spouse is unable to return to India, as India is not safe for women generally, and that her Christian beliefs would make her a target of violence, even from her own family. Counsel submits country-conditions information to support this contention. The record does not indicate that the applicant, who also is a Christian, has experienced difficulties in India related to his religious beliefs or practices. Additionally, the applicant's spouse asserts that she has "traveled extensively to Canada and India to meet [the applicant]" whenever she has had the chance.

Counsel further contends that the applicant's spouse is suffering medical hardship. A medical report in the record indicates that the applicant's spouse was diagnosed with left carpal tunnel syndrome. Regarding the functional capacity of the applicant's spouse, the report states she "is performing usual and customary duties without difficulty" and that a job "change or job modification is not necessary." The report notes that the applicant's spouse could develop full bone carpal tunnel syndrome and then would need surgery.

The AAO, in its decision of May 24, 2013, stated that less weight is given to equities acquired after a deportation order has been entered, citing *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991). The Seventh Circuit held that "the BIA may give less weight to equities acquired after an order of deportation has been issued than to those acquired before the alien was found deportable." *Garcia-Lopez v. INS* at p. 74. 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.

The AAO also cited *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), a case involving a discretionary decision by the BIA to dismiss an appeal from a decision by an immigration judge denying suspension of deportation for two petitioners. The Ninth Circuit, finding no abuse of discretion in the denials, noted that although one of the children gained resident status during the petitioners' hearings, and that consideration of hardship to the child would now be appropriate, the child's new status "is a post-deportation equity [and] entitled to less weight than it would otherwise demand." *Carnalla-Munoz v. INS*, at p. 1006, footnote 3.

On motion, counsel asserts that the AAO incorrectly cited *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), stating that the BIA in *Tijam* did weigh after-acquired equities. However, the case was in fact remanded by the BIA to further look at the equities and properly balance whether a waiver should be granted. A close look at the AAO's decision reflects that *Tijam, supra*, was cited merely to point out the synonymy between the phrase "after-acquired equity" and "after-acquired family ties" as used in *Tijam*.

The AAO finds the cited legal decisions support the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion. Counsel has not provided legal authority to support a position that after-acquired equities are accorded the same weight as other favorable factors. Accordingly, the AAO finds the factors related to the applicant's marriage should be accorded diminished weight.

In its previous decision the AAO noted that the applicant has used three different dates of birth and provided no explanation for submitting documentation reflecting these different dates of birth to travel to the United States and apply for U.S. immigration benefits. On motion, counsel explains that the applicant's uncle applied for his first passport when the applicant was 15 years old, that the birthdate on the passport was incorrect, and that his uncle told him it was "too much hassle" to change it. Counsel also asserts that the INS misspelled the applicant's name and that to correct his name the applicant sent the INS another birth certificate, knowing that it had an incorrect birthdate with his correct name. The applicant claims that when submitting his Forms I-140 and I-485, the church helped him to obtain a certificate from "Teen Action" that finally had his correct date of birth, and that upon his return to India, the applicant was able to obtain correct documents. Counsel also points out that records in India are constantly incorrect and that this is an endemic issue in India.

The applicant entered the United States using a passport issued on April 25, 1991, with his date of birth as October 5, 1971. The applicant's Form I-20 and F-1 visa also list the applicant's date of birth as October 5, 1971. On February 5, 1995, when the applicant returned to the United States from a visit to the United Kingdom, the applicant entered his date of birth on his Form I-94 as October 5, 1971.

On June 2, 1998, the applicant requested asylum by filing an Application for Asylum and Withholding of Removal (Form I-589), on which he claimed his date of birth is May 15, 1973. In sworn testimony before an immigration judge on August 11, 1998, the applicant stated that his date of birth was May 15, 1973. The record includes a copy of a birth certificate issued by the India, dated October 8, 1999, indicating that the birth certificate was registered on September 17, 1999, and the applicant's date of birth is May 15, 1973. The record

includes an undated letter from the applicant to an immigration judge, in which he states that his age is "24 (original), 26 (as per records)," and that his date of birth is "5/15/73 (original), 10/5/71 (as per records)." The record also includes a letter the applicant sent to the District Director, INS Atlanta, in October 1999, enclosing a copy of his birth certificate with the date of birth May 15, 1973. The letter states, "I am enclosing a copy of my birth certificate which I would like to be added to my records and adjusted accordingly." The record also includes a similar letter sent to an INS trial attorney on October 19, 1999, with a copy of the birth certificate. There is no indication in these letters that the applicant's name was misspelled or that the applicant submitted three letters with copies of his birth certificate to U.S. government officials to correct the spelling of his name.

The record also includes a Nebraska identification card, issued on August 8, 2002, listing the applicant's date of birth as May 15, 1973, and the applicant's address in Omaha, Nebraska.

On the Form I-140 that the [REDACTED] filed on behalf of the applicant, the applicant's date of birth is May 15, 1977. The record includes a certificate of birth, issued by Teen Action International on April 4, 2002, that was submitted with the Form I-140 and shows the applicant's date of birth as May 15, 1977. On motion, counsel states that the church helped the applicant obtain this certificate of birth based on hospital records. On November 22, 2002, the applicant filed a Form I-485 application for permanent-resident status, listing his date of birth as May 15, 1977. On motion, counsel submits a copy of the applicant's passport, issued by the Government of India on September 27, 2004, a copy of the applicant's driver's license, issued on February 17, 2005 for [REDACTED] India, and a copy of an identification card from the Income Tax Department of the Government of India. Each of these documents lists the applicant's date of birth as May 15, 1977. The record further includes a Certificate of Date of Birth issued on July 12, 2006 by the Consulate General of India in Toronto, Canada, certifying that the applicant's date of birth is May 15, 1977, "on the basis of entries" in the applicant's passport. Other documents from Canada listing the applicant's date of birth as May 15, 1977 include his marriage license and his application for an H-4 non-immigrant visa from the U.S. Consulate in Toronto.

Counsel and the applicant assert that the applicant's true date of birth is May 15, 1977. The explanation for the incorrect date of birth October 5, 1971 is that it was an error made by the applicant's uncle in applying for the applicant's passport. The explanation for the incorrect date of birth May 15, 1973, is that the applicant used a birth certificate with this incorrect date of birth to correct the spelling of his name. The applicant does not describe why he had this particular birth certificate with his correct name but incorrect date of birth or how he obtained it. As noted above, no evidence in the record shows that the applicant used the birth certificate for that purpose, nor is there any evidence that the applicant's name was misspelled during his immigration proceedings.

Evidence in the record appears to contradict the assertion that the applicant was born on May 15, 1977. The record includes a copy of a certificate from the Board of Intermediate Education of [REDACTED] India, dated April 4, 2001, indicating that the applicant passed the examination in March 1988. According to certification filed by the International Bible Academy dated May 15, 2002, the Intermediate Degree obtained by the applicant in 1988 is equivalent to a U.S. high-school degree. Moreover, the certification of the [REDACTED] states that the Intermediate Degree obtained by the applicant follows a two-year pre-university study program

obtained after 10 years of schooling. If the applicant was born in 1977, the certification of the [REDACTED] indicates that he achieved this degree at age 11 and would have begun his education 10 years earlier.

The record also includes a copy of the applicant's diploma from [REDACTED], dated March 1, 1994, indicating that the applicant achieved a Bachelor of Engineering degree, based on an examination in April 1993. Various websites state that a Bachelor of Engineering or BE is a four-year undergraduate program offered by engineering colleges and technical institutes or universities in India. See HigherEducationIndia <http://www.highereducationinindia.com/courses/be.php>. If the applicant was born in 1977, he received his bachelor's degree at age 17, took his examination at age 16, and began his studies for a bachelor's degree in engineering at age 12.

The school documents in the record indicate that there is an age discrepancy between the applicant's claimed date of birth and the dates the applicant achieved his degrees. The AAO finds that the date of birth the applicant now asserts is correct, May 15, 1977, is not plausible, and the explanations the applicant offers for using the three different dates of birth call into question his true identity.

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 favorable factors in this case are as follows:

- The applicant's lawful permanent resident wife lives in the United States.
- The applicant is the beneficiary of an approved Form I-140.
- The applicant's relatives and friends have submitted several letters of reference describing his own hardship and need for emotional support.

The unfavorable factors in this case are as follows:

- The applicant has not explained his use of three different dates of birth; and the date of birth that the applicant is currently using, including the date of birth on his passport, is not plausible given other documentation in the record, calling his identity into question.
- The applicant remained in the United States without lawful immigration status after his withdrawal from the University of Central Florida after the spring semester of 1996.
- The applicant was involved in an incident during his employment with the [REDACTED] involving the unauthorized use of a fax machine and company stamp, which he attributes to a joke. This incident shows a lack of respect for workplace rules and protocol.
- The applicant was found to be in possession of an ATM card and other documents that did not belong to him during his last apprehension by university police in Las Vegas.

The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen is granted and the prior AAO decision is affirmed. The underlying waiver application remains denied.