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

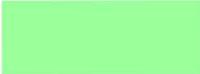


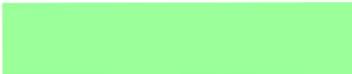
U.S. Citizenship  
and Immigration  
Services



Date: **JUN 30 2014**

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). We dismissed an appeal of the denial. We then granted a motion to reopen and reconsider and affirmed our previous decision. The matter is again before us on a motion to reconsider. The motion will be granted and the prior decision to dismiss the appeal will be affirmed.

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), as an alien who seeks admission within 10 years of the date of his removal. 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.

Reviewing the applicant's Form I-212 on appeal, we concurred with the Field Office Director that the favorable factors did not outweigh the unfavorable factors and dismissed the appeal. *Decision of the Administrative Appeals Office (AAO)*, dated May 24, 2013.

On June 24, 2013, the applicant, through counsel, filed a motion to reopen and reconsider the appeal decision, contending that we made mistakes of law and fact in dismissing the appeal, and submitted additional documentation. We granted the motion and affirmed our prior decision. *Decision of the AAO*, dated November 25, 2013.

The applicant, through counsel, now files a motion to reconsider our decision of November 25, 2013. On this second motion, counsel again contends that we made errors of law and fact in the decision to dismiss the appeal. Counsel asserts that our most recent decision constitutes an abuse of discretion, citing the Administrative Procedures Act and case law. Counsel further submits an affidavit from the applicant regarding the discrepancies in his date of birth and an article about underage children in Indian schools.

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, and it also must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). As counsel has stated reasons for reconsideration supported by precedent decisions, the motion to reconsider will be granted.

The record includes, but is not limited to: briefs in support of the appeal and motions; 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.

In our decision of November 25, 2013, we listed four unfavorable factors that we determined outweighed the applicant's favorable factors and supported our conclusion that the applicant did not warrant the Secretary's discretion in granting the Form I-212: (1) the applicant's use of three different dates of birth throughout his immigration proceedings and applications; (2) the applicant remaining in the United States without lawful immigration status; (3) the applicant's unauthorized use of a company stamp and fax machine against workplace rules and protocol to play an

immigration-related “joke”; and (4) the applicant’s possession of documentation not belonging to him.

With respect to the first factor, the applicant’s use of three different dates of birth, we found the applicant failed to satisfactorily explain why he used three different dates of birth during his immigration proceedings and that this called his identity into question. We also identified age discrepancies between the applicant’s currently claimed date of birth and the dates he achieved his academic degrees.

On current motion, counsel submits an article regarding underage children attending school in India and asserts that the article proves that “huge percentages” of such children attend school in India. The article discusses the percentages of children in India who enter primary school under the age six. Though informative, the article does not establish that the applicant himself was underage when he started attending school or that he resided in a region where this practice was common. In his affidavit submitted with the current motion, the applicant claims he entered school at the age of three, combined a few years of school into one year, completed his high school graduation at the age of 11, and earned his bachelor’s degree in engineering from 1988 to 1994. If the applicant was born in 1977, as he now claims, he began his studies for his engineering degree at age 11. However, according to Educational Consultants India Limited<sup>1</sup>, the minimum age for admission to undergraduate courses in engineering or technology generally is 17 years but may vary slightly from institution to institution. See <http://www.educationindia4u.nic.in/admissionrules.asp> (accessed April 21, 2014).

The applicant does not support his assertions concerning his early and accelerated education with corroborative evidence. Moreover, although counsel states that the applicant’s identity has never been questioned, she has not shown how the applicant’s inability to adequately explain using three different dates of birth cannot be considered a negative factor in determining whether he warrants a favorable exercise of discretion.

Counsel asserts that regulations make it clear that false or incorrect information on its own is not a negative factor but must be used in an attempt to make a material misrepresentation, and there has been no such attempt by the applicant. Counsel cites no regulation to support her assertion. Though to find an applicant inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation, an alien must have sought to procure an immigration benefit by fraud or willfully misrepresenting a material fact, the applicant has not been found inadmissible under section 212(a)(6)(C)(i) of the Act. However, the applicant’s statements regarding his three different dates of birth and his inability to provide a credible explanation about which date of birth is correct concern the applicant’s credibility.

With respect to the second unfavorable factor, that applicant remained in the United States without lawful immigration status after his status as a student ended, counsel concedes that the applicant was

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<sup>1</sup> This entity’s website indicates that it is a public-sector enterprise under the Ministry of Human Resource Development of the Government of India.

out of status but notes that he did not accrue unlawful presence. She also states that students are young and often go through life problems that cause interruptions in education. However, the applicant was not found inadmissible for his unlawful presence, and counsel's contention does not address the issue of his unlawful status after he stopped attending classes. The applicant was removed from the United States on August 3, 2004, following a failed attempt to gain asylum in the United States, because he was out of lawful immigration status.

With respect to the third unfavorable factor, the applicant's unauthorized use of a company stamp and fax that counsel and the applicant characterize as a "joke," counsel contends that the details of the fax are immaterial. The details, however, include the applicant's offer of employment to an individual in Australia and the ensuing investigation into the possibility that this was an alien-smuggling attempt. The applicant was terminated from his employment after these activities, which had prompted the office of the Immigration and Naturalization Service in Las Vegas to contact the U.S. Consulate in Sydney to look out for visa applications submitted by the recipient of the fax.

With respect to the fourth unfavorable factor, the applicant's possession of documentation not belonging to him when he was arrested in Las Vegas in March 1998, counsel asserts that the documents in the applicant's possession were trash that he picked up off the street, and all charges of stolen property were dropped. In addition to a bank card and casino cards, the documentation included a false photo identification card with the applicant's photo and a different name, which he likely did not pick up from the street. Counsel provides no authority to support her contention that, because the applicant was not prosecuted, his possessing a false identity document may not be considered a negative factor.

Counsel contends that our findings of unfavorable factors are arbitrary and capricious and constitute an abuse of discretion. To support these assertions, counsel cites *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), regarding the standard for evaluating whether an agency's action is arbitrary and capricious; *Bertrand v. Sava*, 684 F.2d 204 (2nd Cir. 1982), regarding finding an agency abuses its discretion when it exercises discretion to discriminate invidiously against a particular race or group; *Jean v. Nelson*, 472 U.S. 846 (1985), regarding an agency's deviation from its internal regulations constituting an abuse of discretion; and *Doherty v. U.S. Dep't of Justice*, 908 F.2d 1108, 1117-18 (2nd Cir. 1991), regarding an agency giving effect to considerations that Congress could not have intended to make relevant.<sup>2</sup>

The U.S. Court of Appeals for the Second Circuit stated:

An abuse of discretion may be found in those circumstances where the . . . decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner.

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<sup>2</sup> Although in her brief counsel cites this case as *Doherty v. Thornburgh*, 943 F. 2d 204, 1117-18 (2nd Cir. 1991), the reference counsel makes appears at the reporter and page cited here.

*Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2<sup>nd</sup> Cir. 2001) (reviewing decision of the Board of Immigration Appeals) (citations omitted).

The factors listed above were accompanied by a rational explanation for considering each one a negative factor. Counsel has not shown that we departed from established policies, deviated from regulations, or exercised our discretion to discriminate invidiously against the applicant. Counsel also has not shown that our decision was devoid of reasoning or that it contained only summary or conclusory statements. Therefore, counsel has not supported her assertion that we acted in an arbitrary or capricious manner or abused our discretion in identifying these factors as unfavorable in this case.

Counsel contends that the hardship to the applicant's lawful permanent resident spouse carries more weight than any factor and reasserts the specific hardships presented in the applicant's first motion. However, as explained in our previous decisions, less weight is given to equities acquired after a deportation order has been entered. Counsel presents no legal authority to establish that our giving diminished weight to the applicant's after-acquired equities related to his marriage is incorrect as a matter of law.

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. However, the applicant was removed from the United States on August 3, 2004. He will no longer be inadmissible under section 212(a)(9)(A)(ii) of the Act on August 4, 2014, as he will no longer be seeking admission within 10 years of the date his removal, and he will no longer require an approved Form I-212.

**ORDER:** The motion to reconsider is granted and the prior decision to dismiss the appeal is affirmed.