



U.S. Department of Justice

Immigration and Naturalization Service

H4

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [Redacted] Office: Nebraska Service Center

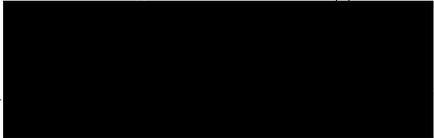
Date:

AUG 14 2000

IN RE: Applicant: [Redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:



Public Copy

Identifying data located to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is before the Associate Commissioner on a motion to reopen. The motion will be dismissed and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of India who initially was admitted to the United States as a nonimmigrant crewman on May 5, 1986 with authorization to remain until June 3, 1986. The applicant remained longer than authorized. On October 14, 1987, an immigration judge found the applicant to be deportable under former § 241(a)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1251(a)(2), for having remained longer than authorized and granted the applicant until December 14, 1987 to depart voluntarily in lieu of deportation. The applicant appealed the immigration judge's decision denying him political asylum and withholding of deportation.

During the applicant's initial stay in the United States, he became the beneficiary of an employment-based preference visa petition. The applicant subsequently withdrew his application for asylum on April 6, 1990, and according to Service records, he self-deported by leaving the United States while under an outstanding order of deportation on June 7, 1990. These actions all occurred while being assigned file number [REDACTED]

On September 14, 1990, the applicant was issued an immigrant visa at the American Embassy in New Delhi, India, he was admitted for permanent residence on September 17, 1990 and he was assigned a second Service file number [REDACTED]. The applicant returned to the United States without having obtained permission to reapply for admission in violation of § 276 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1326 (a felony). The applicant subsequently departed the United States at some unspecified date.

On February 9, 1992, he applied for admission as a returning resident alien at J.F.K. International Airport. There is no evidence in the Board's decision of October 15, 1992 that it was aware of the applicant's self-deportation in June 1990 which rendered the appeal of the immigration judge's 1987 decision moot, or the applicant's subsequent receipt of an immigrant visa, or admission as a permanent resident, or his subsequent departure from and return to the United States on February 9, 1992, claiming to be a returning resident, when the Board granted him voluntary departure until November 13, 1992 in lieu of deportation.

While remaining in the United States following his return in February 1992, the applicant has become the beneficiary of a new employment-based visa petition filed by the [REDACTED]. The applicant was ordered excluded and deported on July 28, 1994. A prior application for permission to reapply for admission was denied on May 18, 1993, and an appeal of that decision was dismissed on June 30, 1994. The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to remain with his family.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel states that the applicant's entry after deportation was pursuant to an immigrant visa despite his lack of knowledge of his non-entitlement to such visa. Counsel speculates that had the visa appointment been scheduled earlier, he would have left during his first grant of voluntary departure; had the appointment come later, he would have left during the second grant of voluntary departure. Counsel states that, since the applicant had been granted a favorable exercise of discretion by an immigration judge, he should be granted a favorable exercise of discretion by the Associate Commissioner. Counsel states that the applicant has been a law abiding citizen since his entry, he has a U.S. citizen wife and 3 U.S. citizen children and is responsible for their support. Counsel asserts that the applicant is the beneficiary of an approved immigrant visa petition indicating that his skills are in short supply and in demand. A denial would result in economic deprivation as well as moral and emotional hardship to his family.

Section 212(a)(9) of the Act, ALIENS PREVIOUSLY REMOVED, provides, in part, that:

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(ii) OTHER ALIENS.-Any alien not described in clause

(i) who-

(I) has been ordered removed under § 240 of the Act 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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of

that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Matter of Lee, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

The alien in Matter of Tin, gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following Tin, supra, an equity gained while in an unlawful status can be given only minimal weight.

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as "after-acquired family ties") in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States as a nonimmigrant crewman on May 5, 1986 with authorization to remain until June 3, 1986. He was placed in deportation proceedings on August 7, 1986. The applicant's employment experience and his family's status were gained after being placed in deportation proceedings. He now seeks relief based on his after-acquired equities.

The favorable factors in this matter are the applicant's family ties, the absence of a criminal record, the approved preference visa petition, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's initially remaining longer than authorized, his being found deportable, his failure to depart voluntarily, his felonious reentry without permission, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, supra, that he could only relate a positive factor of residence in the United States where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law, would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity (employment certification) gained while being unlawfully present in the United States and entered into while in deportation proceedings can be given only minimal weight.

On motion, counsel has not provided substantial evidence to demonstrate that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); and Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the order dismissing the appeal will be affirmed.

ORDER: The order of December 21, 1999 dismissing the appeal will be affirmed.