U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: SAN ANTONIO, TEXAS Date: APR 10 2006

IN RE: Applicant: [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:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, San Antonio, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Mexico who was admitted to the United States as a Lawful Permanent Resident (LPR) on December 5, 1989. On June 3, 1998, in the United States District Court, Western District of Texas, Del Rio Division, the applicant was convicted of the offense of illegal transportation of aliens in violation of Title 8 U.S.C. § 1324 (a)(1)(A)(ii) and (B)(i). On March 12, 1999, the applicant was served with a Notice to Appear (NTA) for a removal hearing before an immigration judge. On April 5, 1999, an immigration judge found the applicant removable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony at any time after admission. Consequently, the applicant was removed from the United States. The applicant is **inadmissible pursuant to section 212(a)(9)(A)(ii) of 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 travel to the United States and reside with his U.S. citizen spouse and children.

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), for knowingly encouraging, assisting, abetting, aiding any other alien to enter or to try to enter the United States in violation of law and, therefore, not eligible for any exemption or waiver under the Act. The District Director then denied the Form I-212 accordingly. *See District Director's Decision* dated May 14, 2004.

On appeal, counsel submits a brief in which she states that the applicant was convicted of transporting persons already in the United States and, therefore, not inadmissible under section 212(a)(6)(E)(i) of the Act. In addition, counsel states that the Director erred in his decision stating that the applicant was indicted on four counts of illegal transportation of aliens and pled guilty on two of those counts. Counsel states that the applicant was indicted on two counts and pled guilty on one. Counsel does not dispute the fact that the applicant's conviction of transporting illegal aliens rendered him removable as an aggravated felon. Counsel further states that the Fifth Circuit Court of Appeals has held that an applicant convicted of "transporting illegal aliens" is not excludable under section 212(a)(6)(E) of the Act, because that provision relates to alien smuggling. *Rodriguez-Gutierrez v. INS,* 59 F.3d 504 (5th Cir. 1995). Furthermore, counsel states that the Board of Immigration Appeals (BIA) in an unpublished decision dated April 18, 2005, held that a person convicted under U.S.C. § 1324 (a)(1)(A)(ii) and § 1324 (a)(1)(B)(i) is not inadmissible under section 212(a)(6)(E)(i) of the Act.

The AAO agrees with counsel. The record of proceedings indicates that the applicant was indicted on two counts of Title 8 U.S.C. § 1324 (a)(1)(A)(ii) and (B)(i) and convicted on one count. In addition, since this case arises in the Fifth Circuit, *Rodriguez-Gutierrez,* is controlling and the applicant is not inadmissible pursuant to section 212(a)(6)(E)(i) of the Act. Although the applicant is not subject to section 212(a)(6)(E)(i) of the Act, he is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

> (ii) Other aliens.- Any alien not described in clause (i) who-
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> > (I) has been ordered removed under section 240 or any other provision of law, or
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> > (II) departed the United States while an order of removal was outstanding, and 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

On appeal, counsel states that the District Director did not review the documentation previously submitted with the Form I-212. In addition, counsel states that the applicant's family has suffered tremendously. They have lost their home and car because the applicant's spouse could not meet the payment by herself, and his children's grades at school have dropped. Furthermore, counsel states that the applicant has respected the immigration judge's order by remaining in Mexico since the date of his removal. He is employed, has been rehabilitated and has established his eligibility for a waiver.

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.

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 AAO finds that the favorable factors in this case include the fact that the applicant had been residing legally in the United States for over nine years prior to the order of removal, his 19-year marriage to a U.S. citizen, the fact that he is the father of four U.S. citizen children, the prospect of general hardship to his family and the numerous favorable recommendations from relatives, friends and employers attesting to his good moral character. Finally, there is nothing in the record of proceeding to indicate that the applicant has not been rehabilitated.

The AAO finds that the unfavorable factor in this case is the applicant's conviction for transporting illegal aliens, which although cannot be condoned, does not render the applicant inadmissible under section 212(a)(6)(E) of the Act.

The AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.