

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

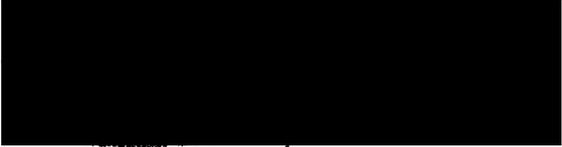
**PUBLIC COPY**

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

H4



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 06 2005

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:

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 after removal was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico who entered the United States without a lawful admission or parole on or about February 1, 1979. On May 31, 1989, the applicant was granted lawful permanent resident status. The record of proceedings reveals that the applicant was convicted four times, in the County Court at Law #2 of Bell County, Texas, of the offense of operating a motor vehicle in a public place while intoxicated. In addition on June 6, 2000, in the 27<sup>th</sup> District Court of Bell County, Texas, the applicant was convicted of driving while intoxicated III and was sentenced to five years imprisonment suspended for a period of ten years. The applicant was placed in removal proceedings and on July 31, 2000, he was removed from the United States 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. The record reflects that the applicant reentered the United States on or about September 19, 2002, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). On October 16, 2002, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act and the applicant was removed to Mexico on the same date. The applicant is therefore 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 Lawful Permanent Resident (LPR) spouse and U.S. citizen children.

The Director found the applicant inadmissible to the United States because he falls within the purview of section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B) for having been convicted of two or more offenses for which the aggregate sentences to confinement were 5 years or more. In addition the Director determined that the evidence on record fails to establish that a favorable exercise of the Attorney General's discretion is warranted and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated May 19, 2003.

On appeal, counsel states that the cited section, which is the basis for the denial, is no longer applicable law. In addition counsel states that in *Matter of Moises Chapa*, the Fifth Circuit Court decided that a conviction for driving while intoxicated is not considered an aggravated felony because it is not considered a "crime of violence" and section 237(a)(2)(A)(iii) of the Act does not apply in this matter.

This office agrees, in part, with counsel's statements. In his decision the Director did not cite section 237(a)(2)(A)(iii) of the Act, but rather found the applicant inadmissible pursuant to section 212(a)(2)(B) of the Act. Therefore counsel's statement that the cited section, on which the denial was based, is no longer applicable law is not persuasive. As noted above the applicant was sentenced to five years imprisonment for driving while intoxicated III and therefore he is inadmissible under section 212(a)(2)(B) of the Act which states:

(B) Multiple criminal convictions. -Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

In *United States v. Chapa-Garza* 243 F.3d 921 (5<sup>th</sup> Cir. 2001) the Fifth Circuit Court of Appeals ruled that a conviction for driving while intoxicated is not a “crime of violence” under 18 U.S.C. § 16 and hence is not an “aggravated felony” under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F).

Since this case arises in the Fifth Circuit, *Chapa-Garza* is controlling. The applicant is no longer inadmissible under section 237(a)(2)(A)(iii) of the Act.

The AAO notes that the applicant was deported based on the aggravated felony charge. This office does not have jurisdiction over the Immigration Judge’s ruling and cannot change the ruling, despite the Fifth Circuit Court decision. The AAO’s finding that the applicant is not inadmissible under section 237(a)(2)(A)(iii) of the Act does not change the fact that he was removed from the United States on July 31, 2000, and October 16, 2002. Therefore he is inadmissible under section 212(a)(9)(A)(ii) of the Act. The proceeding in the present case is for the application for permission to reapply for admission into the United States after deportation or removal under section 212(a)(9)(A)(iii) of the Act.

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-

(I) has been ordered removed under section 240 or any other provision of law . . . [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 Attorney General [now Secretary, Homeland Security, “Secretary”] has consented to the alien's reapplying for admission.

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 be a condonation of the alien's acts and could encourage others to enter without being admitted 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 AAO finds that the favorable factor in this case is the applicant's family ties in the United States, his LPR spouse and U.S. citizen children.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States in 1979, his criminal record, his illegal reentry after his July 31, 2000 removal, his second removal on October 16, 2002, his employment without authorization and his periods of unlawful presence in the United States.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.