



U.S. Citizenship
and Immigration
Services

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FILE:



Office: HARLINGEN, TEXAS

Date: DEC 19 2006

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, Chief
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, Harlingen, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who entered the United States without a lawful admission or parole on or about August 15, 1995. On November 10, 1995, Border Patrol Agents apprehended the applicant transporting fourteen undocumented Mexican nationals. On November 11, 1995, an Order to Show Cause (OSC), for a hearing before an immigration judge was served on him and the applicant was released on a \$5,000 bond. On March 19, 1996, in the United States District Court, Southern District of Texas, the applicant was convicted of the offense of transporting an undocumented alien within the United States by means of a motor vehicle, in violation of title 8 U.S.C. § 1324(a)(1)(A)(ii). On April 5, 1996, an immigration judge ordered the applicant deported pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. Consequently, on the same date, the applicant was deported from the United States. The record reflects that the applicant reentered the United States on an unknown date, but prior to March 25, 1997, the date he married a U.S. citizen, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is inadmissible under 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 remain in the United States and reside with his U.S. citizen spouse.

The District Director determined that the applicant has no extenuating circumstances that merit the granting of the Form I-212 and denied it accordingly. *See District Director's Decision* dated May 20, 2004.

On appeal, counsel submits a brief in which she states that the decision was mistakenly based on section 212(a)(6)(E) of the Act, which relates to alien smuggling. Counsel states that in *Rodriguez-Gutierrez v. INS*, 59 F.3d 504 (5th Cir. 1995), the Fifth Circuit Court of Appeals held that an applicant convicted of transporting aliens is not excludable under section 212(a)(6)(E) of the Act. In addition, counsel states that the Board of Immigration Appeals (BIA) has held that alien smuggling has always applied only to aliens bringing in or aiding and abetting or encouraging any alien to entry or try to entry the United States and not transportation of an alien. Additionally, counsel refers to the case law in *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) and *Matter of Carbajal*, 17 I&N Dec. 272 (BIA 1978) and states that there are two principal discretionary factors for consideration in a Form I-212 when the only adverse factor of record is violation of immigration laws. Counsel further states that if the Form I-212 cures a deportation order based only on a record of immigration violations, and the record contains no other evidence of misconduct or bad moral character, discretion should be favorably exercised in spite of any perceived recency of deportation. Additionally, counsel states that the recency of the deportation is not an important factor for consideration in the exercise of discretion unless there is other evidence of record calling the moral character of the applicant into question. Counsel further states that if a deportation order is based only on a record of previous immigration violations the applicant should not be presumed to be a person of bad moral character. Finally, counsel states that the only negative factor in the applicant's case is the nine-year-old conviction for violation of title 8 U.S.C. § 1324, and requests that the Form I-212 be granted or, in the alternative, remanded to the District Director.

The AAO agrees with counsel regarding the applicant's inadmissibility pursuant to section 212(a)(6)(E) of the Act. As noted above, the applicant was convicted of the offense of transporting an undocumented alien within the United States by means of a motor vehicle in violation of title 8 U.S.C. § 1324(a)(1)(A)(ii). 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.

The AAO notes that the applicant's conviction is an aggravated felony conviction for immigration purposes, as defined in section 101(a)(43)(N) of the Act. See *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA1999).

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, or

(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 aliens 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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

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 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 court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. 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. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter married his U.S. citizen spouse on March 25, 1997, approximately one and one half years after he was placed in deportation proceedings and approximately one year after he was deported. The applicant's spouse should reasonably have been aware, at the time of their marriage, of the applicant's immigration violations and the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factor in this case is the applicant's family ties in the United States, his U.S. citizen spouse.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry, his conviction of an aggravated felony, his illegal reentry subsequent to his deportation, his periods of unauthorized employment and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee*, *supra*, that residence in the United States could be considered a positive factor only 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, marriage to a U.S. citizen, gained after his deportation from the United States and his subsequent illegal reentry, can be given only minimal weight. 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 eligibility 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.

The AAO notes that the applicant has a Service file under number [REDACTED] that should be consolidated with Service file [REDACTED]

ORDER: The appeal is dismissed.