

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



H4

FILE:

Office: SAN ANTONIO, TX

Date:

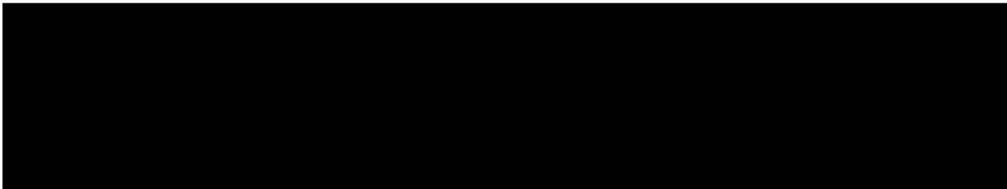
FEB 02 2009

IN RE:



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)

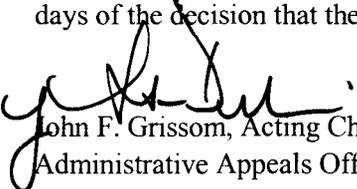
ON BEHALF OF APPLICANT:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, San Antonio, Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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, on April 15, 1971, was admitted to the United States as a lawful permanent resident. On September 24, 1987, the applicant was granted deferred adjudication for a period of one year in reference to driving under the influence and resisting arrest charges. On November 14, 1997, the applicant pled guilty to and was convicted of knowingly and in reckless disregard of the fact that the aliens had come to, entered or remained in the United States in violation of law, unlawfully and willfully harboring four named aliens and attempting to harbor these aliens at the applicant's place of business in violation of section 8 U.S.C. § 1324(a)(1)(A)(iii). The applicant was sentenced to 18 months in jail and three years of probation. On July 13, 1999, the applicant was placed into immigration proceedings. On August 17, 1999, the immigration proceeding charges against the applicant were amended. On August 23, 1999, the immigration judge ordered the applicant 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 being convicted of an aggravated felony, specifically section 101(a)(43)(N) of the Act related to alien smuggling, *in absentia*. On August 25, 1999, the applicant was removed from the United States and returned to Mexico. On October 17, 2005, the applicant filed the Form I-212. 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) for seeking admission as an aggravated felon after being ordered removed. The applicant 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 U.S. citizen spouse and children.

The district director determined that the applicant is inadmissible pursuant to section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E) and that no waiver or exception is available to him under sections 212(a)(6)(E)(ii) and (iii) of the Act, 8 U.S.C. §§ 1182(a)(6)(E)(ii) and (iii). The district director also found that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated April 6, 2007.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(6)(E) of the Act. He also contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, received June 4, 2007. In support of his contentions, counsel submits only the referenced brief.

On December 22, 2008, the AAO issued a notice to the applicant and counsel informing the parties that it was this office's intent to dismiss the applicant's appeal based upon evidence establishing further unfavorable factors in the applicant's case, such as two employer sanctions final orders for hiring illegal aliens; and conduct reflecting consistent involvement with hiring and harboring illegal aliens in the United States. The applicant and counsel were granted fifteen days to provide evidence to overcome, fully and persuasively, these findings. Counsel and the applicant failed to respond to the notice of intent to dismiss. The entire record was reviewed in rendering a decision in this case.

Section 212(a) of the Act, 8 U.S.C. § 1182(a), provides, in pertinent part:

(a) Classes of Aliens Ineligible for Visas or Admission

....

(6) Illegal Entrants and Immigration Violators

(E) Smugglers.-

- (i) In general.-Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.
- (ii) Special rule in the case of family reunification.-Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.
- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (d)(11).

Section 212(d) of the Act, 8 U.S.C. § 1182(d), provides in pertinent part:

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested.

While counsel contends that *Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 509 (5th Circuit, 1995) held that transportation of aliens within the United States is separate and distinct from aiding and abetting

the entry of an illegal alien, the AAO finds that the case does not make this specific holding. The AAO notes that the BIA has on a number of occasions, pointed to this case as holding that the transportation of aliens within the United States is separate and distinct from aiding and abetting the entry of an illegal alien. However, in parsing *Rodriguez-Gutierrez v. INS*, the court does not speak as to whether such a conviction constitutes inadmissibility under section 212(a)(6)(E). It merely makes a statement of fact in regard to the immigration judge, stating the immigration judge found that the appellant's continuous physical presence was not broken because it did not involve criminal intent. The immigration judge found that, even though the appellant had been found deportable for having entered the United States without inspection and for transporting aliens, he had not been convicted of aiding and abetting entry and therefore lacked the necessary criminal intent to constitute a meaningful interruptive entry. The Fifth Circuit Court of Appeals (Fifth Circuit) did not affirm the immigration judge's finding in regard to the appellant's conviction for transporting aliens and it did not discuss the reasoning behind such a finding by the immigration judge. There is no case law that directly speaks to whether harboring aliens within the United States constitutes smuggling as dictated by the requirements of section 212(a)(6)(E) of the Act. However, the Fifth and Ninth Circuit Courts of Appeals have held that evidence of an alien's knowing participation in a prearranged plan to transport undocumented aliens away from the border after their unlawful entry, constitutes clear and convincing evidence that he knowingly encouraged, aided and abetted such unlawful entry, and that such conduct constitutes inadmissibility under section 212(a)(6)(E) of the Act, even if the alien was convicted of only transporting the aliens within the United States. *See Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Circuit, 2005) (an individual may knowingly encourage, induce, assist, abet, or aid with illegal entry, even if he did not personally hire the smuggler and even if he is not present at the point of illegal entry) and *Soriano v. Gonzales*, 484 F.3d 318 (5th Circuit, 2007) (knowingly transporting illegal aliens after entry based on prearranged plan constitutes knowing encouragement and assistance of alien's unlawful entry under section 212(a)(6)(E) of the Act). Accordingly, if an alien harbored aliens within the United States as part of a prearranged plan to harbor illegal aliens after their unlawful entry, the alien is inadmissible under section 212(a)(6)(E) of the Act. However, if there is no evidence to establish that an alien convicted of harboring illegal aliens within the United States has engaged in such a prearranged plan, the alien's conviction for harboring illegal aliens in the United States would not result in inadmissibility under section 212(a)(6)(E) of the Act.

In reviewing the applicant's record, there is no evidence to establish that the applicant had harbored illegal aliens in the United States as part of a prearranged plan made prior to the aliens' entry into the United States. The AAO therefore finds that the applicant is not inadmissible pursuant to section 212(a)(6)(E) of the Act. However, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

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 on a 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. [emphasis added]

The applicant claims that he is married to [REDACTED], a native of Mexico, who became a lawful permanent resident in 1988 and a naturalized U.S. citizen in 2003. The AAO notes that the record does not contain a marriage certificate, however, this office will accept that the applicant is married to [REDACTED] for purposes of adjudicating the Form I-212. The record reflects that the applicant and [REDACTED] have a 30-year old daughter, a 25-year old daughter and a 20-year old son who are all U.S. citizens by birth. [REDACTED] and the applicant have a 27-year old daughter who is a native of Mexico who became a lawful permanent resident in 1988 and a naturalized U.S. citizen in 2003. The applicant and [REDACTED] are in their 50's.

On appeal, counsel contends that the field office director erred in citing to and comparing the applicant's case to a case involving different factors than those presented in the applicant's case, a case in which the waiver was granted, and a case, which only peripherally discussed the exercise of discretion. However, while the cases cited by the field office director may differ from the applicant's own case, the field office director correctly cites these precedents because they set forth factors and findings in regard to the exercise of discretion. These precedents offer incite into what type or combination of factors would and would not warrant a favorable exercise of discretion.

On appeal, counsel asserts that the applicant is the beneficiary of an approved immigrant visa petition filed on his behalf by [REDACTED]. However, U.S. Citizenship and Immigration Services' (USCIS) records do not reflect, and the record does not contain evidence to establish, that [REDACTED] has filed a Petition for Alien Relative (Form I-130) on behalf of the applicant.

On appeal, counsel contends that the district director's finding that there is no proof of the applicant's daughters' health problems is in error because the applicant provided proof in the form of a doctor's appointment card and prescriptions with medication instruction sheets. Counsel asserts

that the prescriptions are issued by physicians, who are licensed to treat medical issues. Counsel contends that, though the evidence does not take the form preferred by the district director, it is still clear and convincing evidence from qualified providers of the health issues affecting the applicant's daughters. However, the AAO finds that the prescriptions and their instruction sheets can only be regarded as evidence that the applicant's daughters take such medications and not that the applicant's daughters suffer from the claimed health problems. The district director and this office are not licensed physicians and cannot make a determination as to why such prescriptions have been issued to the applicant's daughters. Additionally, the district director and this office cannot make a determination as to the extent that the claimed health problems affect the applicant's daughters, whether the applicant's absence is detrimental to such health problems, or the prognosis for the applicant's daughters.

The AAO finds that the district director's comments in regard to the applicant's ability to help with his son's behavioral problems in light of his own criminal mistakes are not factors to be considered in determining whether a favorable exercise of discretion is warranted. However, the applicant's criminal conduct is a factor to be weighed in the exercise of discretion.

The AAO now turns to a consideration of positive and adverse factors in the present case.

Counsel asserts that the applicant has been in the United States for many years pursuant to lawful permanent resident status and has remained outside the United States since 1999. He asserts that the applicant also has compelling family hardships and responsibilities that require his presence and parental attention, including the health problems of his two U.S. citizen daughters and the behavioral problems of his son.

in her statement accompanying the Form I-212, states that she married the applicant on September 24, 1977, in Chicago, Illinois. She states that they have four U.S. citizen children and that she has had to care for those children and all the household matters by herself since the applicant's removal in 1999. She states that it has been a very difficult time since she had always relied on the applicant for financial and moral support. She states that she has had to care for herself and the family's small business called [REDACTED]. She states that this has caused her mental anguish and financial difficulty because she has had to take her children, who have become very depressed, to a doctor who informed her that the children were depressed because of their separation from their father. She states that her eldest daughter has a heart condition. She states that her middle daughter suffers from manic-depression. She states that her youngest daughter has bipolar disorder. She states that she is also having a lot of problems with her son, who has been truant from school on many occasions. She states that she has been to court for her son's truancies. She states that she is unable to control and manage her son since he has become rebellious and does not listen to her. She states that she loves her husband very much. She states that she can only afford to visit her husband in Mexico during school vacation because she has to care for the business and keep her children in school. She states that the applicant is a wonderful father and they have many plans together for the future.

An appointment card for the applicant's oldest daughter is dated August 2 with the Children's Regional Heart Network in San Antonio, Texas. Prescription and medication information sheets

indicate that the applicant's oldest daughter was prescribed fosinopril in 2002, and digoxin, amiodarone, fosinopril, furosemide, spironolactone and levothyroxine on July 12, 2005.

Prescription and medication information sheets indicate that the applicant's middle daughter was prescribed lithium in 2005 and carbamazepine, benztropine, lithium carbonate, ziprasidone and oxcarbazepine on various dates in 2003.

Prescription and medication information sheets indicate that the applicant's youngest daughter was prescribed oxcarbazepine in 2002. A Homebound Referral Medical Examination Report, dated March 23, 2002, indicates that the applicant's youngest daughter was referred for homebound services for a diagnosis of bipolar disorder-mixed in November 2001.

Court documents reflect that the applicant's son and [REDACTED] were charged and convicted of failure to attend school and parent contributing to nonattendance, respectively, on August 16, 2005.

The record reflects that, on April 3, 1980, immigration officers apprehended the applicant. At the time of his apprehension, the applicant was in possession of 218 blank social security cards, 53 blank alien registration receipt cards, \$12,364 in cash, cashiers checks and money orders, and 3 handguns. On April 4, 1980, prosecution of the applicant's case was denied. On April 29, 1991, the applicant was issued an employer sanctions final order in the amount of \$500 for violating section 274A of the Act. The settlement agreement reflects that the applicant admitted to knowingly hiring an illegal alien. On May 21, 1996, a worksite enforcement operation conducted at the applicant's place of business revealed that eight illegal aliens were present at the place of business. The operation revealed that the applicant hired these aliens with the full knowledge that they were in the United States illegally. The applicant also permitted some of these aliens to reside at his place of business. On November 12, 1996, the applicant was issued an employer sanctions final order in the amount of \$14,156 for violating section 274A of the Act. The record reflects that the applicant engaged in conduct reflecting that he knowingly hired and harbored illegal aliens at his place of business since prior to 1991 and up until he was convicted of harboring illegal aliens in 1997. This conduct reflects that, despite receiving employer sanctions and being fully aware of the illegal nature of his activities, the applicant continued to engage in the hiring and harboring of illegal aliens in violation of U.S. immigration laws.

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 in the United States unlawfully. *Supra*.

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 7th Circuit Court of Appeals 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 *Carnalia-Munoz 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 AAO finds these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, three U.S. citizen children and the general hardship to the applicant and his family if he were denied admission to the United States.

The AAO finds that the unfavorable factors in this case include the applicant's failure to appear at an immigration hearing; the applicant's removal order from the United States as a lawful permanent resident who has been convicted of an aggravated felony relating to smuggling; his two employer sanctions final orders for hiring illegal aliens; his conviction for harboring illegal aliens; and his conduct reflecting extended involvement with hiring and harboring illegal aliens in the United States.

The applicant in the instant case has multiple immigration violations and a criminal conviction. Moreover, the record fails to establish that he is the beneficiary of any immigrant or nonimmigrant visa petition that would offer him a means of acquiring lawful residence in the United States. The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he 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.