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U.S. Citizenship  
and Immigration  
Services

H4

[REDACTED]

FILE:

[REDACTED]

Office: DALLAS, TX

Date: JAN 30 2009

IN RE:

[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)

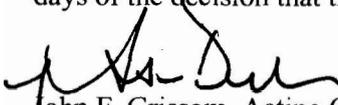
ON BEHALF OF APPLICANT:

[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.

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 Field Office Director, Dallas, 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 December 1, 1990, was admitted to the United States as a lawful permanent resident. On June 24, 2003, the applicant pled guilty to and was convicted of knowingly and recklessly transporting an alien within the United States for financial gain in violation of section 8 U.S.C. § 1324(a)(1)(B)(i). The applicant was sentenced to 346 days in jail and 3 years of probation. On April 22, 2003, the applicant married his U.S. citizen spouse, [REDACTED]. On June 3, 2005, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On November 4, 2005, the applicant was placed into immigration proceedings. On January 3, 2006, the immigration proceeding charges against the applicant were amended. On March 10, 2006, the Form I-130 was approved. On June 30, 2006, the immigration judge denied the applicant's application for adjustment of status and ordered him 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. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On October 18, 2006, the BIA dismissed the applicant's appeal. On October 28, 2006, the applicant was removed from the United States and returned to Mexico. On August 14, 2007, 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 adjust his status to that of lawful permanent resident and reside in the United States with his family.

The field office 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 field office director denied the Form I-212 accordingly. *See Field Office Director's Decision* dated March 31, 2008.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(6)(E) of the Act. She also contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, received June 5, 2008. In support of her contentions, counsel submits the referenced brief and copies of documentation already in the record.

On December 23, 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 the applicant's inadmissibility pursuant to section 212(a)(6)(E) of the Act. 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 the applicant's conviction most closely adheres to a violation of 8 U.S.C. § 1224(a)(1)(A)(ii), the record reflects that the applicant was convicted of a violation of 8 U.S.C. § 1324(a)(1)(B)(i). The record also reflects that the nature of the applicant's crime was knowingly and recklessly transporting an unlawful alien within the United States for private

financial gain by means of a motor vehicle. Counsel contends that, moreover, there has never been a finding by a criminal court or immigration judge that the applicant was involved in smuggling an illegal alien, as is required by section 212(a)(6)(E) of the Act. Counsel's contention is unpersuasive, since a finding of inadmissibility under section 212(a)(6)(E) of the Act does not require a conviction and the transcript of the hearing before the immigration judge reflects that the immigration judge made no specific finding in regard to inadmissibility under section 212(a)(6)(E) of the Act. Furthermore, the AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services (USCIS) on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

Counsel also contends that, since the applicant only transported illegal aliens within the United States, he did not assist, encourage, induce or abet an illegal alien in entering the United States, as is required by section 212(a)(6)(E) of the Act. Counsel contends that, as dictated by *Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 509 (5<sup>th</sup> Circuit, 1995), the applicant's transportation of aliens within the United States is separate and distinct from aiding and abetting the entry of an illegal alien. Counsel's contention is unpersuasive. *Rodriguez-Gutierrez* does not speak as to whether such a conviction constitutes inadmissibility under section 212(a)(6)(E). The Fifth Circuit Court of Appeals (Fifth Circuit) merely makes a statement of fact in regard to the immigration judge, stating that the immigration judge found the appellant's continuous physical presence to be unbroken because his departure 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 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. Furthermore, the applicant's case is distinguishable from *Rodriguez-Gutierrez* because there is evidence that the applicant knowingly participated in a prearranged plan to transport undocumented aliens away from the border after their unlawful entry, which constitutes clear and convincing evidence that he knowingly encouraged, aided and abetted such unlawful entry within the meaning of section 212(a)(6)(E) of the Act. See *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9<sup>th</sup> Circuit, 2005) and *Soriano v. Gonzales*, 484 F.3d 318 (5<sup>th</sup> 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).

A Record of Sworn Statement in Affidavit Form (Form I-215W), dated March 22, 2003, reflects that the applicant gave sworn testimony that he had met a man named [REDACTED] a few weeks prior, who had asked the applicant if he would be interested in transporting illegal aliens, who had been smuggled into the United States; [REDACTED] offered to pay the applicant \$300 per person transported from Laredo, Texas, to Dallas, Texas, the next time the applicant was in Laredo to pick-up his normal load as a trucker; on March 20, 2003, the applicant contacted [REDACTED] to inform him that he would be in Laredo; the applicant kept in touch with [REDACTED] throughout the day and followed [REDACTED] directions as to where to pick up the illegal aliens; the applicant loaded 16 illegal aliens into the back of his tractor-trailer and then attempted to transport the aliens to Dallas, Texas. The record reflects that the applicant was apprehended with 16 illegal aliens in the back of his tractor-

trailer at a checkpoint on Interstate 35. The statement given by the applicant establishes that the applicant knowingly transported aliens after their illegal entry based on a prearranged plan with [REDACTED]. Furthermore, the immigration judge found that, despite the applicant's claim that he was forced to transport the illegal aliens, the applicant was a knowledgeable and willing participant in a prearranged plan.

The AAO therefore finds that the applicant is inadmissible pursuant to section 212(a)(6)(E) of the Act. Aliens who, at any time, knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law are inadmissible. See section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E). An exception to the section 212(a)(6)(E) ground of inadmissibility is available to an eligible immigrant who only aided his spouse, parent, son, or daughter to enter the United States in violation of law, prior to May 5, 1988. See section 212(a)(6)(E)(ii).

A waiver of inadmissibility is dependent upon a showing that the alien (1) only aided 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; and (2) the alien either, had been admitted to the United States as a lawful permanent resident alien and did not depart the United States under an order of removal, or, is seeking admission as an eligible immigrant.

The aliens smuggled by the applicant were not relatives of the applicant. The AAO, therefore, finds that the applicant is statutorily ineligible for the exception set forth in section 212(a)(6)(E)(ii) of the Act or the section 212(d) waiver of inadmissibility for alien smuggling.

*Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(6)(E) of the Act, which are very specific and applicable. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed as a matter of discretion.

**ORDER:** The appeal is dismissed.