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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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H4

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER
(RELATES)

Date:

JUN 04 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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center 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 February 12, 1984, appeared at the San Diego, California port of entry. The applicant made a false claim to U.S. citizenship. Prosecution against the applicant was declined and he was returned to Mexico. On June 20, 1986, the applicant was placed into immigration proceedings after entering the United States without inspection. Immigration officers apprehended the applicant while he was transporting two of his sisters, from Calexico, California to Oxnard, California. On June 26, 1986, the immigration judge ordered the applicant removed. On June 26, 1986, the applicant was removed from the United States and returned to Mexico. The applicant reentered the United States without inspection on an unknown date but prior to June 30, 1986, the date on which he married his spouse, [REDACTED] in Oxnard, California. On December 1, 1990, [REDACTED] became a lawful permanent resident. On August 3, 1993, the applicant was convicted of driving with a suspended license. The applicant was sentenced to 5 days in jail and 36 months of probation.

On April 25, 2001, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 9, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a second Form I-130 filed on his behalf by his adult U.S. citizen daughter. On June 14, 2004, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Los Angeles District Office. The applicant testified that he last entered the United States on June 27, 1986 and denied that he had ever been removed from the United States. On June 14, 2004, the second Form I-130 was approved. On March 14, 2005, the first Form I-130 was approved. On April 7, 2005, the applicant's Form I-485 was denied. On March 27, 2006, the applicant filed the Form I-212, indicating that he continued to reside in the United States. In a statement in response to a request for evidence, the applicant stated that he last left the United States in December 1993 and returned without inspection in April 1994. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside in the United States with his lawful permanent resident spouse and four U.S. citizen children.

The director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The 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), for smuggling aliens, 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 director denied the Form I-212 accordingly. *See Director's Decision*, dated December 26, 2006.

On appeal, counsel contends that the director erred in denying the applicant's Form I-212 in light of the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated February 15, 2007. In support of his contentions, counsel submits only the referenced brief. 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(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.

While counsel fails to contend the director's finding of inadmissibility under section 212(a)(9)(C) of the Act, the AAO finds that the director erred in finding the applicant inadmissible under this section of the Act. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have unlawfully reentered the United States or attempted unlawful reentry after April 1, 1997, the effective date of the provision. The AAO finds that there is no evidence in the record to establish that the applicant has illegally reentered the United States after April 1, 1997. The applicant, however, is still inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act because he failed to remain outside the United states for a period of ten years, and is required to apply for permission to reapply for admission.

While counsel merely contends that the applicant is unaware of the alien smuggling charge and he has no proof that it occurred, the AAO finds that, on appeal, the applicant has been given an opportunity to provide evidence to rebut the allegation. Moreover, counsel may obtain a copy of documentation in the record relating to the applicant's smuggling of two illegal aliens by filing a Freedom of Information Request (Form G-639).

The AAO finds that, while the record contains evidence that the applicant transported illegal aliens in the United States and was aware that they had recently entered the United States illegally, there is no evidence to establish that the applicant knowingly participated in a prearranged plan to transport undocumented aliens away from the border after their unlawful entry. In order to be found inadmissible pursuant to section 212(a)(6)(E) of the Act for the transportation of illegal aliens within the United States, evidence must establish that the applicant knowingly participated in a prearranged plan to transport undocumented aliens away from the border after their unlawful entry which then constitutes clear and convincing evidence that he or she 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 (9th Circuit, 2005) 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). The record in the applicant's case, establishes that the applicant's sisters contacted the applicant after they had entered the United States and does not establish that there was any prearrangement between the siblings in regard to the applicant's transportation of the two sisters away from the border after their illegal entry. The AAO, therefore finds that the applicant is not inadmissible under section 212(a)(6)(E) of the Act; however, the applicant's role in the transportation of illegal aliens is a factor to be considered in rendering this decision.

The record reflects that [REDACTED] is a native and citizen of Mexico who became a lawful permanent resident in 1990. The applicant and [REDACTED] have a 27-year-old daughter, a 21-year-old son, a 19-year-old daughter and a 17-year-old son who are all U.S. citizens by birth. The applicant is in his 50's and [REDACTED] is in her 40's.

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

On appeal, counsel states that the applicant has resided in the United States for almost 35 years. He states that the applicant speaks English. He states that all the applicant's family members reside in the United States and he works to support his family. Counsel states that the applicant has never worked in Mexico and does not have a place to stay. He states that the applicant has no employment in Mexico.

The record reflects that the applicant has been employed in the United States since at least 1996. The applicant has been issued employment authorization from November 17, 2003 until November 16, 2004. The record reflects that the applicant filed taxes in 1987.

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to obtain immigration benefits in the United States by willful misrepresentation of a material fact in 2004 when he concealed his prior removal in seeking adjustment of status.

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. *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.
Supra.

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 *Carnalla-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 lawful permanent resident spouse, the applicant's four U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, his otherwise clear background since 1993, and the approved immigrant visa petitions filed on his behalf. The AAO notes that the applicant's marriage, the birth of his three youngest children and the filing of the immigrant visa petitions occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to enter the United States by making a false claim to U.S. citizenship; his original illegal entry into the United States; his transportation of illegal aliens within the United States; his illegal reentry after having been removed from the United States; his conviction for driving with a suspended license; his second illegal reentry into the United States after having been removed; his concealment of his prior removal in an attempt to obtain adjustment of status; his inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; his extended unlawful presence in the United States; and his unauthorized employment in the United States.

The applicant in the instant case has multiple immigration violations and a criminal conviction. 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.