



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

H4

[REDACTED]

FILE:

[REDACTED]

Office: FRESNO, CA

Date:

OCT 20 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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Fresno, California, 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 August 1, 1991, was placed into immigration proceedings for having entered the United States without inspection in July 1989 and having been convicted of sale of marijuana. On August 6, 1991, the immigration judge ordered the applicant removed from the United States. On the same day, a warrant for the applicant's removal was issued. On August 7, 1991, 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 October 23, 1991, the date on which he pled guilty to discharging a firearm with gross negligence. The applicant was sentenced to two years in jail. On October 12, 1997, the applicant married [REDACTED] a U.S. citizen, in Las Vegas, Nevada. On February 14, 1998, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Residence or Adjust the Status (Form I-485). On July 12, 2001, the Form I-130 was approved. On August 31, 2001, the Form I-485 was denied. On January 3, 2003, the Superior Court of the County of Los Angeles granted the applicant's writ of *coram nobis* in regard to his conviction for sale of marijuana. On June 6, 2005, the applicant filed a second Form I-485 based on the approved Form I-130. On the same day, the applicant filed a Form I-212, indicating that he continued to reside in the United States. On May 12, 2006, the Form I-485 and Form I-212 were denied. On December 11, 2006, the applicant filed a third Form I-485 based on the approved Form I-130. On the same day, the applicant filed a second Form I-212. During an interview in regard to the Form I-485 the applicant testified that he last reentered the United States without inspection in January 1997. On June 18, 2009, the Form I-485 was denied. 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). 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 U.S. citizen spouse and U.S. citizen children.

The field office 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 field office 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 field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated June 18, 2009.

On appeal, counsel contends that it would be fundamentally unfair to apply *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007) when the applicant, in filing the Form I-212, relied upon the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Counsel contends that *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) did not hold that the applicant must be currently abroad at the time he or she applies for permission to reapply for admission. Counsel contends that it has been more than ten years since the applicant's last departure from the United States and that the applicant is eligible for permission to reapply for admission. *See Counsel's Brief*, dated August 13, 2009. 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)(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 the applicant contends that he was not deported, but rather voluntarily returned to Mexico, the record in this matter establishes that the applicant was removed from the United States on August 7, 1991, and he has testified that he returned to the United States immediately thereafter and then again in January 1997, without inspection. 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.¹ The AAO, therefore, finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because his unlawful reentry into the United States occurred prior to April 1, 1997. However, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant and [REDACTED] have a seven-year-old son and a two-year-old daughter who are both U.S. citizens by birth. The applicant

¹ The AAO notes that a number of Circuit courts have found that an illegal reentry prior to the date of enactment may render an alien inadmissible pursuant to section 245(a)(5) of the Act in certain circumstances; however, the applicant does not reside in a circuit which has reached this issue.

has a fourteen-year-old daughter and an eleven-year-old son from a prior relationship who are U.S. citizens by birth. The applicant and [REDACTED] are in their 30s.

[REDACTED] in a declaration accompanying the Form I-212, states that she resides with the applicant and their children. She states that, even though they were not married until October 1997, they have known each other since October 1993. She states that they were separated only when he went to reside with his mother and his family in Texas, where he began working at a restaurant in 1993. She states that the applicant went to Texas to get away from the bad influences in Los Angeles. She states that the applicant rebuilt his life, that he got a good job, a skill and a future. She states that as soon as they got married the applicant moved back to Fresno, California and was able to get a good job right away. She states that the applicant has been a wonderful provider ever since. She states that their life together is very stable and healthy and completely oriented toward family. She states that they have bought their own home and have a small savings account. She states that she recently gave birth to their second child who was in the neonatal intensive care unit. She states that they are very fortunate to have excellent medical insurance through the applicant's employment. She states that the applicant was very determined to learn from the mistakes he made in his youth. She states that she is proud of him for making the changes and very proud that he is her husband. She states that in 2001 the applicant went to Texas to ensure that he had a good relationship with his children from his prior relationship. She states that she works seasonally and makes approximately \$14,000 a year with the IRS. She states that her employment allows her to stay home most of the time so that she can give care and attention to her children. She states that she will need to be at home all the time to attend to her second child especially if she ends up with long-term complications from being born prematurely. She states that she does not know how she would make ends meet if the applicant was not here to earn a living in support of the family. She states that besides the financial distress of the applicant's absence, emotionally she and her children would be lost. She states that the applicant and his son have a very strong and close relationship. She states that she is crazy about her husband and that their family counts on the applicant for everything. She states that she is afraid that the family would end up in bankruptcy court or worse if the applicant was not in the United States because they would be unable to meet their monthly obligations. She states that she is afraid she would have to move in with her parents and make money to pay for babysitting.

Medical documentation in the record reflects that the applicant's spouse could return to employment eight weeks past her delivery date. The documents reflect that the applicant's daughter was admitted to Children's Hospital Central California on April 26, 2007 and was released on May 21, 2007 with all issues resolved.

The AAO notes that there is no evidence in the record to establish that the applicant's spouse or children have a medical condition for which they would be unable to receive appropriate care or medication in the absence of the applicant or appropriate care or medication in Mexico. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record reflects that the applicant filed joint taxes from 2001 through 2002 and in 2005. The record reflects that the applicant has been employed in the United States since at least 1993. The record reflects that the applicant was issued employment authorization for February 24, 1998 to February 23, 1999; February 24, 2001 to February 23, 2002; August 2, 2005 to August 1, 2006; July 17, 2007 to July 16, 2008; and August 27, 2008 to August 26, 2009.

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. *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 *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 a discretionary determination. 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 legal decisions 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, his four U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, his filing of joint taxes, the absence of a criminal background since 1991 and the approved immigrant visa petition filed on his behalf. The AAO notes that the applicant's marriage, the births of his children and the filing of the immigrant visa petition 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 original illegal entry into the United States; his illegal reentry into the United States after having been removed; his conviction for discharging a firearm with gross negligence; his second illegal reentry into the United States after having been removed; his unauthorized employment in the United States except for periods of authorized employment; and his unlawful presence 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.