

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**

H4

[Redacted]

FILE: [Redacted] Office: PHOENIX, AZ

Date: SEP 13 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,  
  
Perry Rhew  
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, Phoenix, Arizona and the Administrative Appeals Office (AAO) dismissed a subsequent appeal and a motion to reconsider. The matter is now before the AAO on a second motion to reconsider. The motion will be granted and the previous decisions denying the application will be affirmed.

As the facts and procedural history have been adequately addressed in our previous decisions, the AAO shall repeat only certain facts here. The record indicates that the AAO issued its initial dismissal of the applicant's appeal on February 21, 2008. Counsel incorrectly filed the first motion to reconsider with the AAO on February 18, 2010. The AAO returned the motion to reconsider to counsel and informed her that she had incorrectly filed it with this office.<sup>1</sup> On February 25, 2010, or 735 days after the decision was issued, U.S. Citizenship and Immigration Services (USCIS) received the motion. Accordingly, the motion was untimely filed.

In her first motion to reconsider, counsel contended that she did not file the motion within 30 days of the issuance of the decision because of "the unique procedural posture of the case." According to counsel, the Department of Homeland Security (DHS) prematurely issued an order to reinstate the applicant's prior removal, which the applicant was challenging in the U.S. Court of Appeals for the Ninth Circuit.<sup>2</sup> Counsel contended that by challenging the reinstatement of the order, it was not clear that the AAO had the authority to review the denial of the Form I-212. In the alternative, counsel contended that the AAO should *sua sponte* reconsider its previous decision. Counsel contended that the AAO erred in concluding that the applicant was convicted of a felony and that he was inadmissible for a crime involving moral turpitude. Counsel further contended that the AAO gave unwarranted weight to the applicant's conviction. *See Counsel's Motion*, dated February 17, 2010. In its May 24, 2010 decision, the AAO dismissed the applicant's motion for failure to meet applicable requirements pursuant to 8 C.F.R. § 103.5(a)(4), and found no basis upon which to *sua sponte* reconsider the matter.

In her current motion to reconsider, counsel contends that the AAO erred in failing to *sua sponte* reopen the applicant's case because of errors in its May 24, 2010 decision. According to counsel, although the AAO claims that it made no finding that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the the Immigration and Nationality Act (the Act), such claims clearly contradict the AAO's February 21, 2008 decision and demonstrate that the AAO must reweigh the equities in the applicant's case. Counsel contends that the AAO's February 21, 2008 decision explicitly states that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel also contends that the applicant's conviction is not a crime involving moral turpitude because it is a misdemeanor and an assault conviction, and that, even if the applicant's conviction involved moral turpitude, it would qualify for treatment under the petty offense exception.

The AAO finds counsel's contentions unpersuasive. While the AAO noted in its February 21, 2008 decision that the director had found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude, the AAO, in actually weighing the factors in the applicant's case, did not make a specific finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. According to the February 21, 2008 decision, the AAO noted that the

---

<sup>1</sup> A motion to reconsider is not properly filed until the field office receives it.

<sup>2</sup> *Espino v. Holder*, No. 06-74757 (9<sup>th</sup> Cir.) Currently on a petition for rehearing.

applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act only when relating the facts and procedural history of the case. The pertinent section of the AAO's decision, which discussed favorable and negative factors, did not include a finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act; the AAO made a finding of inadmissibility under section 212(a)(9)(A)(ii) of the Act. Similarly, in the section of the decision in which the AAO weighed the factors in the applicant's case, the AAO also did not find that inadmissibility under section 212(a)(2)(A)(i)(I) of the Act was a negative factor.<sup>3</sup> Instead, the AAO found the applicant's "criminal history" to be a negative factor, but at no point made a conclusion about whether the applicant had been convicted of a crime involving moral turpitude.

Counsel contends that the AAO's May 24, 2010 decision errs in concluding that the February 21, 2008 decision did not address whether the applicant's conviction was a felony or misdemeanor. Counsel contends that, because the AAO failed to correct the director's finding that the offense was a felony, the AAO clearly adopted the director's erroneous conclusions. Counsel contends that the failure to note that the offense was reduced to a misdemeanor is an implicit adoption of the director's erroneous conclusion that the conviction was a felony and, as such, the AAO's failure to identify the offense as a misdemeanor and to engage in a new balancing test in light of the less severe penalty assigned to the crime was in error.

The AAO reiterates that it found the applicant's "criminal history" to be a negative factor and did not make a conclusion about whether the applicant had been convicted of a felony or a misdemeanor. The AAO notes that it is not relevant whether the applicant's conviction was for a felony or misdemeanor. The applicant was not convicted of assault; he was convicted of "criminal damage to property." The section of law under which the applicant was convicted is not a crime involving moral turpitude because malicious intent was not required for conviction, only recklessness. As such, whether the crime was designated a felony or a misdemeanor would not affect a decision as to whether the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The AAO, therefore, need not reach whether the applicant's conviction was eligible for treatment under the petty offense exception.<sup>4</sup>

Regarding counsel's claims that the AAO erred in not correcting the director's conclusions, it must be emphasized that the AAO conducts appellate review on a *de novo* basis and is not bound by the decision of a director. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The AAO's February 21, 2008 decision did not rely on any weighing of factors by the director. The record reflects that, at the time the AAO rendered its original decision in 2008, the record did not contain evidence to establish that the applicant's conviction had been reduced to a misdemeanor conviction upon completion of probation. *See*

---

<sup>3</sup> If the AAO had agreed with the director's finding that the applicant's conviction rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, the AAO would have been required to find such an inadmissibility a negative factor in the applicant's case, as set forth in *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973).

<sup>4</sup> The AAO notes that, at the time the applicant was convicted, the difference between a felony 6 and misdemeanor 1 criminal damage conviction was the amount of the dollar damage done to the property, specifically, whether the damage caused was above or below \$100. The court documents reflect that the applicant was ordered to pay restitution to the victim in the amount of \$350.

*Petition and Order*, submitted with the first motion to reconsider. As such, the evidence to establish that the applicant was convicted of a misdemeanor was not available to the AAO on appeal.

The AAO acknowledges that it failed to point out in its May 24, 2010 decision that the evidence in the record at the time of the AAO's 2008 decision reflected that the applicant had pled guilty on the assumption that the crime would later be designated a misdemeanor offense. Nevertheless, such an omission is harmless error since the AAO did not explicitly find the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Regarding the dismissal of the motion for failing to meet applicable requirements, counsel states that, as explained in the original motion to reconsider, the premature issuance of an order of reinstatement made it unclear as to whether the AAO had jurisdiction over the appeal, that prior counsel did not file a motion to reconsider in light of the error, and that the motion to reconsider should have been accepted. According to current counsel, the applicant's prior counsel, [REDACTED] did not file the motion to reconsider because she believed there was no authority over the case because of the reinstatement. Counsel states that the applicant retained her after his petition for review was denied by the Ninth Circuit and it was at this point that she acted immediately to remedy the errors made in the AAO's 2008 decision by filing the motion to reconsider. Counsel contends that the applicant's failure to file the motion to reconsider was reasonable as he relied on [REDACTED] representations and belief that, since the reinstatement had been issued, the AAO did not have jurisdiction over the Form I-212 decision. Counsel maintains that the applicant has thus demonstrated that the delay in filing the motion to reconsider was reasonable and beyond his control.

Counsel submits a letter from [REDACTED] dated June 15, 2010, in which she states that she believed the director's decision consisted of some significant and relevant errors and she appealed to the AAO. She states that she did not file a motion to reconsider the AAO's dismissal of the appeal because the applicant had already been served with a reinstatement order that was the subject of the Ninth Circuit appeal. [REDACTED] does not state that she believed the AAO could not consider a motion to reopen or reconsider because of a jurisdictional issue.

Current counsel's claim that the applicant's failure to timely file a motion to reopen or reconsider after the AAO's February 21, 2008 was due to an ineffective assistance of prior counsel does not have merit. A motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Current counsel has not submitted any evidence that the requirements of *Lozada* have been met. As stated in our May 24, 2020 decision, the AAO does not concur that a unique procedural history existed in this matter simply because the applicant's petition for review before the Ninth Circuit Court of Appeals (Ninth Circuit) was still pending at the time the AAO made its appellate decision.

The AAO shall weigh the positive and negative factors in the applicant's case to determine whether he merits a favorable exercise of discretion. The entire record was reviewed in rendering a decision in this case.

The applicant is a native and citizen of Mexico whose naturalized U.S. citizen brother, on April 29, 1992, filed a Petition for Alien Relative (Form I-130) on his behalf. On June 30, 1992, the applicant pled guilty to and was convicted of criminal damage, a class 6 undesignated felony. The applicant was sentenced to 18 months probation and \$350 in restitution. On July 21, 1992, the Form I-130 was approved. On September 2, 1993, the applicant was placed into immigration proceedings for having entered the United States without inspection. On December 17, 1993, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States. On January 5, 1994, the applicant completed his probation and the court redesignated the applicant's conviction as criminal damage, a class 1 misdemeanor. On May 6, 1996, the applicant was removed from the United States and returned to Mexico.

On April 12, 2002, the applicant filed a motion to reopen with the immigration judge. On April 29, 2002, the immigration judge denied the motion to reopen. The applicant filed an appeal of the denial of the motion to reopen with the Board of Immigration Appeals (BIA). On July 7, 2003, the BIA dismissed the appeal.

On March 16, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On July 20, 2006, the Form I-485 was administratively closed. The Form I-485 indicates that the applicant last entered the United States without inspection in May 1996. On August 9, 2006, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On October 3, 2006, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act. The applicant was placed on an order of supervision. On the same day, the applicant filed a petition for review of the order of reinstatement and a motion for stay of removal with the Ninth Circuit. On December 13, 2007, the Ninth Circuit terminated the petition for review for lack of prosecution. On January 22, 2008, the Ninth Circuit reinstated the petition for review. On March 12, 2008, the applicant's Form I-485 was denied. On January 20, 2010, the Ninth Circuit denied the petition for review. On May 4, 2010, the Ninth Circuit granted a motion for petition for a rehearing.

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 naturalized U.S. citizen brother, his wife, and four U.S. citizen children.

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 of an 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.

The record reflects that the applicant married his current spouse, a native and citizen of Mexico, on December 23, 1995, in Santa Ana, California. The applicant and his spouse have a 12-year-old daughter, a ten-year-old daughter, a seven-year-old son and a five-year-old daughter who are all U.S. citizens by birth. The applicant's brother is a native of Mexico who became a lawful permanent resident in 1986 and a naturalized U.S. citizen in 1991. The applicant, his wife and his brother are all in their 40's.

A letter from the applicant's oldest child, submitted with the Form I-212, states that the applicant is the best dad in the whole wide world and he is a very, very hard worker. She states that the applicant works almost every day and he takes care of her, her two sisters and brother. She states that she will not know what to do if the applicant is taken from her.

A letter from [REDACTED] Investigations Division, Police Department of Lake Havasu, undated, indicates that he has known the applicant for fifteen years. He states that the applicant was employed in the kitchen of a restaurant when he met the applicant and that the applicant has been employed at a different restaurant for the past six years. He states that the applicant has proven to be a productive member of the community and he is a very hard worker who has been continuously employed. He states that the applicant has never been arrested and only has one minor traffic offense with the police department. He states that the last contact the applicant had with the department was in 2002 when he was the victim of a theft.

Recommendation letters from the applicant's business associates, friends and family, submitted with the Form I-212, state that the applicant can be depended upon for his reliable nature. They state that the applicant is motivated, dedicated, honest, thoughtful, likeable, friendly, and a hard-working

person. They state that the applicant is dedicated to doing the best he can at whatever task he sets out to accomplish. They state that the applicant pushes himself to continually improve and grow. They state that the applicant spends a lot of time with his children and that he is a great father. They state that the applicant is committed to his family and is dedicated to building a positive community. They state that the applicant is an excellent provider for his family and wife. They state that the applicant is a good friend. They state that the applicant will be a model citizen. They state that the applicant is a good listener and gives good advice.

The record reflects that the applicant has been employed in the United States since June 1990 until present. The applicant has been issued employment authorization from May 25, 2007 through May 24, 2008; July 23, 2008 through July 22, 2009; and September 17, 2009 through September 16, 2010.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 naturalized U.S. citizen brother, his four U.S. citizen children, the general hardship to the applicant and his family if he were denied admission to the United States, the absence of a criminal record since his 1992 conviction and the approved immigrant visa petition filed on his behalf. The AAO notes that the births of his U.S. citizen children 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 unlawful entry into the United States; his criminal conviction; his failure to appear at an immigration hearing; his failure to comply with a removal order; his unlawful reentry into the United States after having been removed; his unauthorized and unlawful presence in the United States; and his unauthorized employment in the United States, except for periods during which employment authorization was issued.

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 previous decisions denying the application are affirmed.

**ORDER:** The motion is granted. The previous decisions of the AAO, dated February 21, 2008 and May 24, 2010, are affirmed. The application is denied.