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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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FILE:

Office: LOS ANGELES, CA

Date SEP 21 2010

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)

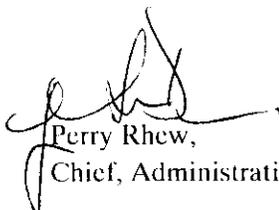
ON BEHALF OF APPLICANT:

INSTRUCTIONS:

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 Field Office Director, Los Angeles, 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 October 10, 2002, appeared at the San Diego, California port of entry. The applicant presented a DSP-150 border crossing card bearing the name [REDACTED]. The applicant was placed into secondary inspection. The applicant admitted that she was not the true owner of the document and that she did not have valid documentation to enter the United States. The applicant admitted that she knew it was illegal to attempt to enter the United States with the document. The applicant failed to provide her true identity to immigration officers. The applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud. On October 10, 2002, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1) under the name "[REDACTED]."

On October 13, 2002, the applicant appeared at the Calexico, California port of entry. The applicant presented a DSP-150 border crossing card bearing the name [REDACTED]. The applicant was placed into secondary inspection. The applicant admitted that she was not the true owner of the document and that she did not have valid documentation to enter the United States. The applicant admitted that she knew it was illegal to attempt to enter the United States with the document. The applicant admitted that she had been previously removed. The applicant failed to provide her true identity to immigration officers. The applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud. On October 13, 2002, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1) under the name "[REDACTED]."

On October 14, 2008, the applicant filed an Application to Register Permanent Residence of Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed on her behalf by her then lawful permanent resident father. The Form I-485 indicates that the applicant entered the United States without inspection in October 2002. On the same day, the applicant filed a Form I-212, indicating that she resided in the United States. On May 7, 2009, the Form I-485 was denied. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i) for a period of twenty years. She 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 her now naturalized U.S. citizen father, lawful permanent resident mother and four U.S. citizen children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated May 7, 2009.

On appeal, counsel contends that it would be impermissibly retroactive to apply *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007) to the applicant's case when she relied upon *Perez-*

Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004).¹ Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Statement*, dated June 29, 2009. In support of his contentions, counsel submits the referenced statement, affidavits from the applicant and her father, medical documentation, identity documentation for the applicant's family members, financial records, educational documentation and letters of recommendation. 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 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.

....

¹ The AAO finds counsel's contentions on appeal to be unpersuasive. In 2007, the Ninth Circuit Court of Appeals (Ninth Circuit) found that *Perez-Gonzalez* should be overturned and that the Ninth Circuit should defer to the Board of Immigration Appeals' (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). *See Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007). Furthermore, retroactivity arguments before the Ninth Circuit in regard to *Gonzales II* mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, [REDACTED] (9th Cir. 2010).

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

Counsel contends that the applicant was removed from the United States for attempting to enter the United States without inspection. The AAO notes that the record reflects that the applicant was removed from the United States for attempting to enter the United States by fraud on two occasions. Counsel contends that the applicant was unaware that she had been removed from the United States since she was never given notice of the decision. As discussed above, the applicant admitted that she had been previously removed and she was also provided evidence that she was being removed from the United States and warnings in regard to her reentry on October 10, 2002 and October 13, 2002.² Counsel contends that the applicant has continuously showed good moral character. Counsel contends that the recency of the applicant's removal should not be a factor. Counsel contends that the applicant's unlawful presence in the United States should not be a negative factor.

² If the applicant has lost this documentation she may request a copy of it by filing a Freedom of Information Act Request (FOIA).

Counsel states that the applicant had no other alternative than to illegally enter the United States due to a family emergency. Counsel states that the applicant was returning to the United States from caring for her family member. Counsel states that the applicant has never been arrested, charged with or convicted of a crime. Counsel states that the applicant is a good daughter, wife, mother and member of the community. Counsel states that the applicant is raising her four children to be outstanding citizens and teaching them good morals. Counsel states that the applicant strives to be a good example to her children and spends her time at home with the family. Counsel states that that applicant has family ties to the United States: a naturalized U.S. citizen father, a lawful permanent resident mother, four U.S. citizen children, and U.S. citizen and lawful permanent resident siblings, nieces and nephews. Counsel states that the applicant's father relies on her solely for assistance and shelter. Counsel states that the applicant's father will suffer if the applicant is forced to leave the United States. Counsel states that the applicant's mother also lives with the applicant and relies on her for support. Counsel states that the applicant's mother will suffer if the applicant is forced to leave the United States. Counsel states that the applicant's children will suffer if the applicant is forced to leave the United States. Counsel states that the applicant's children are doing exceptionally well in school.

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 naturalized U.S. citizen father, lawful permanent resident mother, four U.S. citizen children, the general hardship to the applicant and her family if she were denied admission to the United States, the absence of a criminal record and the approved immigrant visa petition filed on her behalf. The AAO notes that the birth of the applicant's children and the applicant's mother's adjustment of status to that of a lawful permanent resident 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 first attempt to enter the United States by fraud; her inadmissibility under section 212(a)(6)(C)(i)(I) of the Act; her second attempt to enter the United States by fraud; her unlawful reentry into the United States after having been removed; her inadmissibility under section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i); and her unlawful presence in the United States.

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates that the favorable factors in the present matter are outweighed by the unfavorable factors.

Beyond the decision of the field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(9)(C)(i)(II) of the Act and does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) of the Act. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.³

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

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *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); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).