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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

H4

FILE:

Office: DALLAS, TX

Date: FEB 22 2011

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:

[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 \$630. 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, 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 November 4, 1982, was apprehended while transporting five aliens away from the Eagle Pass, Texas area to the Abilene/Dallas, Texas area. The applicant failed to provide his true identity at the time of apprehension. The record reflects that the applicant agreed with a smuggler to transport the five aliens away from their point of entry at the border to the Abilene/Dallas, Texas area. The record reflects that, as part of an agreed upon arrangement, the applicant picked up the five illegal aliens immediately after they had entered the United States without inspection and transported them to a local motel. The applicant subsequently was attempting to transport the five illegal aliens to the Abilene/Dallas, Texas area the following day at the time of his apprehension. On November 5, 1982, the applicant was convicted of two counts of aiding, abetting and assisting an alien not entitled to enter into or reside in the United States, to enter into the United States from the Republic of Mexico at a place other than as designated by immigration officials in violation of section 8 U.S.C. § 1325 and section 18 U.S.C. § 2. The applicant was sentenced to two months in jail for count 1 and 179 days in jail for count 2. On November 5, 1982, the applicant was placed into immigration proceedings for having entered the United States without inspection under the name [REDACTED]. On May 6, 1983, the immigration judge ordered the applicant removed from the United States. On May 7, 1983, the applicant was removed from the United States and was returned to Mexico.

On June 8, 1987, the applicant was admitted to the United States as a conditional resident under his true identity. The record reflects that the applicant failed to reveal his use of an alias, his prior removal and his convictions for smuggling at the time of his application. On June 8, 1989, the applicant's conditional resident status was terminated. On December 5, 1994, the applicant married his then lawful permanent resident spouse. On December 5, 1995, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on February 20, 1996. On January 21, 2000, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) indicating that he had last entered the United States without inspection in 1994 and that he had never been arrested. On March 11, 2005, the Form I-485 was withdrawn. On June 30, 2008, the applicant filed the Form I-212 indicating that he continued to reside in the United States. The applicant is permanently 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 reside in the United States with his now naturalized U.S. citizen spouse and four U.S. citizen children.

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 August 18, 2010.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(6)(E) of the Act. Counsel contends that the applicant was only convicted of unlawful transportation of

illegal aliens within the United States. *See Form I-290B and Counsel's Brief*, dated September 13, 2010. In support of his contentions, counsel submits the referenced Form I-290B, brief and copies of case law.

Section 101(a)(43) of the Act provides, in pertinent part:

The term "aggravated felony" means

....

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act

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.

While counsel contends that the applicant was only convicted of unlawful transportation of illegal aliens within the United States, the record reflects that the applicant was convicted of two counts of "aiding, abetting and assisting an alien not entitled to enter into or reside in the United States, to enter into the United States from the Republic of Mexico at a place other than as designated by immigration officials." As such, the applicant's convictions clearly reflect that the applicant knowingly encouraged, induced, assisted, abetted, or aided an alien to enter or to try to enter the United States, and he is, therefore, inadmissible under section 212(a)(6)(E) of the Act. While counsel contends that the charges against the applicant differ from the charges listed in an FBI report, and that the charges are not signed by the U.S. Magistrate and cannot be regarded as conclusive with respect to the ultimate disposition of the matter, the burden is upon the applicant to establish his eligibility for the benefit he is seeking. Here, the applicant fails to provide evidence that these were not the charges filed against him. Furthermore, a finding of inadmissibility under section 212(a)(6)(E) of the Act does not require a conviction and, as discussed below, the record reflects that the applicant's actions render him inadmissible under section 212(a)(6)(E) of the Act.

Counsel contends that the underlying facts in the applicant's conviction demonstrate that the applicant only knowingly transported undocumented aliens within the United States, but did not aid or assist them in their actual entry 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 (5th 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 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 in this matter knowingly participated in a prearranged plan to transport undocumented aliens away from the border after their unlawful entry. The applicant, therefore, 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).

Affidavits executed by the applicant and two of the aliens transported by the applicant reflect that the applicant agreed with a smuggler to transport aliens away from their point of entry at the border. The affidavits reflect that, as part of an agreed upon arrangement, the applicant picked up five aliens immediately after they had entered the United States without inspection and transported them to a local motel. The applicant was subsequently arrested while attempting to transport the five aliens from the motel to the Abilene/Dallas, Texas area. The affidavits establish that the applicant knowingly transported aliens after their illegal entry based on a prearranged plan with a smuggler. The record reflects that the applicant was a knowledgeable and willing participant in the prearranged plan.

The applicant is thus inadmissible pursuant to section 212(a)(6)(E) of the Act. An alien 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 the law is 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 alien who only aided his or her spouse, parent, son, or daughter to enter the United States in violation of the law, prior to May 5, 1988. Section 212(a)(6)(E)(ii). The aliens smuggled by the applicant were not relatives of the applicant. Therefore, 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.