



**U.S. Citizenship
and Immigration
Services**

(b)(6)

Date: SEP 26 2014

Office: COLUMBUS, OH

FILE: [REDACTED]

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Columbus, Ohio, 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 sustained.

The applicant is a native and citizen of Mexico who first entered the United States without inspection in 1984. On June 2, 1997, the applicant was ordered removed from the United States by an immigration judge in San Diego, California. On July 8, 1997, he attempted to reenter without inspection and on December 8, 1997, his removal order was reinstated. On August 25, 2000, he attempted to enter the United States without inspection for a third time and his removal order was again reinstated. He was removed from the United States on August 30, 2000. The applicant has remained outside the United States since his removal in 2000. 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) and section 212(a)(9)(C)(i)(II), 8 U.S.C § 1182(a)(9)(C)(i)(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 five U.S. citizen children.

In a decision, dated March 14, 2014, the field office director found that the record failed to establish that the applicant's spouse or children would suffer any extreme or unusual hardship if the applicant's Form I-212 were denied. The field office director found that the applicant failed to show that the positive factors in his case outweighed the negative and denied the Form I-212 accordingly.

On appeal, counsel states that the field office denial of the applicant's Form I-212 is unfounded and constitutes an abuse of discretion. Counsel states further that the field office did not consider all the relevant facts in the applicant's record and created its own legal standard by indicating that the applicant failed to show extreme and unusual hardship to his spouse and/or children. Counsel submits new evidence on appeal.

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.

....

(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 has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

- (A) removal;
- (B) departure from the United States;
- (C) reentry or reentries into the United States; or
- (D) attempted reentry into the United States.

As stated above, the applicant was removed from the United States on June 2, 1997, subsequently attempted to reenter the United States without inspection on two occasions and, as a result, was removed from the United States two times. His last removal occurred on August 25, 2000. The applicant is, therefore, inadmissible pursuant to sections 212(a)(9)(A)(ii) and (9)(C)(i)(II) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States *and* USCIS has consented to the applicant's reapplying for admission.

In the present matter, the applicant's last departure from the United States occurred on August 25, 2000. He, therefore, has remained outside the United States for more than 10 years and is eligible to apply for permission to reapply for admission.

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. 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.

In support of this application counsel submits: a statement from the applicant, a statement from the applicant's wife, statements from the applicant's children, criminal record information, rehabilitation documentation, a psychological evaluation, letters of reference for the applicant, documentation regarding the applicant's children's academic achievements, and financial documentation.

The unfavorable factors in the applicant's case are his record of immigration violations and his criminal record in the United States. The applicant has a long history of evading or attempting to evade U.S. immigration laws. After his first entry into the United States without inspection, the applicant resided unlawfully in the country for over 10 years. After being removed in 1997, he attempted to reenter the United States without inspection on two other occasions, having his prior removal order reinstated each time. The applicant also has a criminal record in the United States from 1996 for driving while under the influence of alcohol and driving without a license.

The favorable factors in the applicant's case begin with his strong family ties to the United States, including a U.S. citizen spouse and five U.S. citizen children ranging in ages from 8 years old to 25 years old. The applicant has no other criminal record aside from his driving while under the influence of alcohol and driving without a license convictions in 1996, which are not crimes involving moral

turpitude.¹ In addition, the applicant has been compliant with U.S. immigration law for the last 14 years while he resides in Mexico. The record indicates that his family has been experiencing hardship without the applicant in the United States and that visiting him in Mexico has become more difficult for them. The record indicates that the applicant's spouse and children are suffering emotionally and financially without their father in the United States. The record also indicates that the applicant has been a very supportive and loving husband and father to his wife and children throughout their long separation. The record includes numerous letters of recommendation for the applicant, describing him as a generous and hard working person. In his statement, the applicant indicates that he regrets his immigration violations and acknowledges that they were wrong. He states that he does not drink alcohol anymore and has learned valuable lessons from having to be separated from his family for so long.

The record indicates that the favorable factors in the applicant's case outweigh the unfavorable factors. We acknowledge that the applicant has a long history of immigration violations, but his last attempted illegal entry into the United States occurred in 2000, he has been compliant with immigration law for 14 years, and he has suffered severe consequences as a result of his actions in being separated from his family. The record indicates that the applicant has been fully rehabilitated. He has no other criminal record since 1996 and states that he no longer drinks alcohol. He has apologized for his prior actions and letters in the record indicate that he is a generous and hardworking person. Lastly, the applicant's family ties to the United States are a strong favorable factor in his case. As noted by counsel, there is no requirement that a specific level of hardship be established for permission to reapply for admission, however, hardship experienced by family members is given weight as a favorable factor. Thus, the record indicates that the favorable factors outweigh the unfavorable factors in the applicant's case such that a favorable exercise of discretion is warranted.

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 established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

¹ We acknowledge the documentation regarding the applicant's effort to address his alcoholism by attending Alcoholics Anonymous meetings in 1994, but these efforts are somewhat negated by his being convicted of driving while under the influence of alcohol in 1996.