

United States Court of Appeals
Fifth Circuit

FILED

February 17, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10437
Conference Calendar

ELENO MARTINEZ ALVAREZ,

Plaintiff-Appellant,

versus

CASITA MARIA, INC., A Texas Domestic Business Corporation;
MARIA BRIONES; JUSTIN LUCIO; JANE DOE; JOE GRANADOS;
CHRISTINA MARTINEZ,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:02-CV-02442

Before HIGGINBOTHAM, EMILIO M. GARZA, and PRADO, Circuit Judges.

PER CURIAM:*

Eleno Martinez Alvarez, federal inmate #25777-177, appeals the district court's dismissal of his complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Alvarez's motion for appointment of counsel is DENIED.

Alvarez reiterates his contention that the defendants' failure to file with the Immigration and Naturalization Service a

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Form I-212 on his behalf resulted in his conviction and incarceration.

A Form I-212 must be filed by a deported alien to gain permission from the Attorney General to reapply for admission to the United States. United States v. Sanchez-Milam, 305 F.3d 310, 312-13 (5th Cir. 2002), cert. denied, 537 U.S. 1139 (2003); see 8 C.F.R. 212.2. The Form I-212 must be approved prior to entry to the United States, and the submission of an I-212 does not automatically result in consent by the Attorney General. See Sanchez-Milam, 305 F.3d at 312-13.

Alvarez's appeal is without arguable merit, is frivolous, and is DISMISSED. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. The district court's dismissal of Alvarez's complaint for failure to state a claim and the dismissal of this appeal as frivolous count as "strikes" under 28 U.S.C. § 1915(g). We caution Alvarez that if he accumulates three such "strikes," he will not be able to proceed in forma pauperis in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996).

APPEAL DISMISSED AS FRIVOLOUS; SANCTION WARNING ISSUED;
MOTION DENIED.