

H4

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date:

AUG 24 2004

IN RE:

Applicant:

[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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Mexico who entered the United States without a lawful admission or parole on or about December 6, 1976. The applicant was placed in removal proceedings and on October 27, 1977, she was granted voluntary departure until January 14, 1978, in lieu of deportation but failed to depart voluntarily. On May 3, 1978, a Notice to Report for Deportation was issued and mailed to the applicant informing her to report for deportation on May 25, 1978. The applicant filed an appeal with the Board of Immigration Appeals (BIA) on May 23, 1978. On March 3, 1982, the BIA dismissed the appeal. The applicant was removed to Mexico on March 24, 1982. She reentered the United States approximately one week after her removal without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen son. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). 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 remain in the United States and reside with her spouse and children.

The director determined that the unfavorable factors outweigh the favorable ones and that section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) applies in this matter and denied the application accordingly. *See Director's Decision* dated November 14, 2003.

Section 241(a) detention, release, and removal of aliens ordered removed.-

(5) reinstatement of removal orders against aliens illegally reentering.- if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The applicant reentered the United States prior to the April 1, 1997, enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("IIRIRA"), Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009. The Ninth Circuit Court of Appeals held in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001) that section 241(a)(5) of the Act was not retroactive and did not apply to illegal reentries that occurred prior to its April 1, 1997, enactment. Since this case arises in the Ninth Circuit, *Castro-Cortez* is controlling and section 241(a)(5) of the Act is not applicable in this case. For this reason, the AAO finds that the Director erred in his decision finding that section 241(a)(5) of the Act is applicable in this case.

However, the applicant is clearly inadmissible under section 212(a)(9) of the Act.

Section 212(a)(9). Aliens previously removed.-

(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 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

On appeal, counsel submits a brief, letters of recommendation from friends and family regarding the applicant's character and copies of the applicant's children's birth certificates. In his brief counsel states that the applicant is the beneficiary of a Petition for Alien Relative filed by her U.S. citizen child and that she is the mother of three U.S. citizen and two Lawful Permanent Resident (LPR) children who would suffer extreme hardship if the waiver application were denied. In addition counsel states that the applicant has been residing in the United States for approximately twenty-eight years. Furthermore counsel states that the applicant has raised and educated five children, she is a person of good moral character and that her actions were actions of a desperate mother wanting to improve the lives of her children.

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 of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

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.*

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 be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The favorable factors in this case include the applicant's family ties, her three U.S. citizen and two LPR children, an approved I-130 relative petition, the absence of any criminal record since entering the United States, the fact that she has filed tax returns, as required by law, the potential of general hardship to her family, her service to the community and the numerous favorable recommendations from relatives and friends attesting to her good moral character.

The unfavorable factors in this matter include the applicant's illegal entry into the United States in December 1976, her failure to depart the United States after she was granted voluntarily departure, her failure to appear after receipt of a notice of removal, her reentry subsequent to her removal in 1982, and her presence in the United States without a lawful admission or parole.

While the applicant's failure to depart the United States after being granted voluntary departure and her illegal stay in the United States are serious matters that cannot be condoned, the AAO finds that given all of the circumstances in the present case and the time that has elapsed since her immigration violations, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.