U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: DENVER, COLORADO Date: AUG 2 4 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

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DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the Interim District Director, Denver Colorado, 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 a citizen of Mexico who was present in the United States without a lawful admission or parole on June 15, 1976. The applicant was place in removal proceedings and was granted voluntary departure until February 28, 1982, in lieu of deportation but failed to depart voluntarily. The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation was issued on January 14, 1983. The applicant's failure to depart on or prior to February 28, 1982, changed the voluntary departure order to an order of deportation. The record further reflects that in November 1989 the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). She now 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 section 241(a)(5) of the Act, 8 U.S.C. § 1231(a) (5) applies in this matter and the applicant is not eligible for any relief. The Interim District Director then denied the application accordingly. *See Interim District Director's Decision* dated April 3, 2003. A motion to reopen the Application for Permission to Reapply for Admission was filed with the district office and was dismissed by the Interim District Director on September 17, 2003, because counsel did not present any new information to warrant a reversal of the original decision.

On appeal, counsel states the Interim District Director failed to address the issue of the motion to reopen the case. Counsel asserts that there is no evidence of enforced or self-deportation in 1982 and therefore the deportation order should not have been reinstated under section 241(a) of the Act.

The record of proceedings clearly reflects that a Warrant of Deportation was issued on January 14, 1983, after the applicant failed to depart the United States. In addition on July 1, 2003, the applicant admitted to a District Adjudications Officer that she reentered the United States in November 1989. The applicant failed to provide any documentary evidence that she departed the United States on or prior to February 28, 1982, and therefore she is inadmissible under section 212(a)(9) of the Act.

The applicant's illegal reentry into the United States occurred 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. Before the AAO can adjudicate the appeal it must first be determined if section 241(a)(5) of the Act is retroactive and applies to illegal reentries that occurred prior to its April 1, 1997, enactment date.

Section 241(a) states in pertinent part:

> (5) Reinstatement of removal orders against aliens illegally reentering. - If the Attorney General [Secretary] 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 Ninth Circuit 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. The AAO notes that the Sixth Circuit has reached a similar conclusion. *Bejjani v. INS,* 271 F.3d 670 (6th Cir. 2001). The Eighth Circuit, by contrast, has held that the reinstatement aspect of section 241(a)(5) applies to aliens who made illegal reentries before April 1, 1997, but that the part of section 241(a)(5) that precludes an alien who is subject to reinstatement from seeking relief from removal applies only to aliens who make illegal reentries on or after that date. *Alvarez-Portillo v. Ashcroft,* 280 F.3d 858 (8th Cir. 2002).

None of these three cases binds the AAO in this case since the applicant in the present case resides within the jurisdiction of the Tenth Circuit Court of Appeals. *See* 28 U.S.C. § 41. The Tenth Circuit, where the applicant resides, has not ruled on the issue of section 241(a)(5)'s retroactivity. The applicant will therefore be bound by the AAO's determination regarding whether section 241(a)(5) of the Act applies retroactively to the applicant. The AAO will not follow *Castro-Cortez*, *Bejjani*, or *Alvarez-Portillo* outside of the Ninth, Sixth and Eighth Circuits, respectively.

In cases outside of these Circuits, the AAO will follow the judgment of the Fifth Circuit in *Ojeda-Terrazas v. Ashcroft,* 290 F.3d 292 (5th Cir. 2002). In that case, the Fifth Circuit held that section 241(a)(5) of the Act applies to illegal reentries made before April 1, 1997. Against the argument that an alien may have reentered illegally in "reliance" on the former reinstatement provision, the Fifth Circuit cited with approval the dissent in *Castro-Cortez:*

> [section] 241(a)(5) "does not deal with any vested rights or settled expectations arising out of the alien's wrongdoing. Nor does it impose any new duties or new liabilities."

290 F.3d at 302, *citing Castro-Cortez,* 239 F.3d at 1056 (Fernandez, Circuit Judge, dissenting).

The applicant in this case married her Lawful Permanent Resident (LPR) spouse several years prior to the enactment of section 241(a)(5) of the Act and prior to her reentry after removal. The applicant therefore had a reasonable expectation, when she reentered the United States unlawfully, that she would be able to obtain a waiver of her inadmissibility under pre-IIRIRA laws. Thus, as applied to the applicant, section 241(a)(5) of the Act does not impose any new duties or new liabilities. Section 241(a)(5) of the Act will therefore not be applied to the applicant retroactively.

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

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

(A) Certain alien 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.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

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 to U.S. citizens and LPR's, an approved I-130 relative petition, the absence of any criminal record since entering the United States, and the potential of general hardship to her family.

The unfavorable factors in this matter include the applicant's illegal entry into the United States in 1976, her reentry subsequent to her 1982 removal, and her presence in the United States without a lawful admission or parole.

While the applicant's entry without inspection in 1976 and her subsequent entry without inspection after her removal are very serious matters that cannot be condoned, the AAO finds that given all of the circumstances in the present case, 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.