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U.S. Department of Homeland Security  
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Washington, DC 20536

U.S. Citizenship  
and Immigration  
Services

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date: MAY 06 2004

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:

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

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

The applicant is a native and citizen of Mexico who, on or about April 7, 1992, was ordered removed pursuant to section 241(a) of the Act, 8 U.S.C. § 1231(a), from the United States and was removed pursuant to the order. On or about May 1, 1992, the applicant reentered the United States without permission or inspection by an immigration officer. On July 2, 1994, the applicant married a naturalized United States citizen in Los Angeles, California. The applicant is the beneficiary of an approved Petition for Alien Relative (WAC-96-148-50461). 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 United States citizen wife and children.

The director determined that the applicant is subject to reinstatement of his removal orders and is inadmissible to the United States. The director denied the Form I-212 application accordingly. *See* Decision of the Director, dated August 10, 2003.

On appeal, counsel asserts that the applicant is the spouse of a U.S. citizen and a parent to two U.S. citizen children. Counsel contends that the applicant's deportation occurred more than 12 years ago and that the applicant has not committed a crime in more than 12 years. *See* Form I-290B, dated August 7, 2003.

The record contains a copy of the marriage certificate of the applicant and his spouse; copies of the naturalization certificates of several relatives of the applicant including his spouse; copies of the U.S. birth certificates of the applicant's children; letters verifying the employment of the applicant and his spouse; copies of tax documents for the applicant and his spouse; copies of court documents relating to the criminal record of the applicant; a statement of the applicant, dated August 3, 1998 and a letter from the church where the applicant and his family are members. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a) of the Act, 8 U.S.C. § 1182(a) states in pertinent part:

(9) Aliens Previously Removed.-

(A) Certain aliens previously removed.-

....

(ii) [A]ny alien . . . who-

(I) Has been ordered removed under section 240 or any other provision of law . . . 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 Attorney General [now the Secretary of Homeland Security (Secretary)] has consented to the alien's reapplying for admission.

Approval of a Form I-212 Application for Permission to Apply for Admission after Deportation or Removal requires that the favorable aspects of the applicant's case outweigh the unfavorable aspects.

In determining whether the consent required by statute should be granted, all pertinent circumstances relating to the applicant which are set forth in the record of proceedings are considered. These include but are not limited to the basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitation, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

*Matter of Tin*, 14 I&N Dec. 373, 374 (Comm. 1973).

The favorable factors in the application are the hardship imposed on the applicant's wife and children by his inadmissibility to the United States.

Section 241(a) of the Act 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. (emphasis added)

The AAO notes that the applicant is not subject to reinstatement of his removal orders. 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 applicant lives within the jurisdiction of the Ninth Circuit and his reentry occurred prior to April 1, 1997, therefore, the applicant is not subject to reinstatement under section 241(a)(5) of the Act.

The unfavorable factors in the application include the applicant's 1992 convictions in the Municipal Court of Los Angeles on charges of Driving Under the Influence and Carrying a Loaded Weapon in a Public Place. The AAO notes, however, that the applicant apparently has had no further arrests since the cited convictions, both of which occurred over 12 years ago. The applicant, therefore, offers evidence of rehabilitation from his disregard for the laws of this country.

The director also states that the applicant has accumulated unlawful presence while illegally present in the United States resulting in grounds of inadmissibility and requiring him to seek an approved Form I-601 Application for Waiver of Grounds of Excludability. See Decision of the Director at 3. The director is correct in stating that the applicant is currently unlawfully present, however the AAO notes that the applicant has not triggered unlawful presence provisions under the Act to date because the applicant has not departed from the United States since accruing the time in unlawful presence cited by the director. See 8 U.S.C. § 1182(a)(9)(B).

The applicant has established that the favorable factors in his application outweigh the unfavorable factors. The director's denial of the I-212 application was thus improper in its result. The appeal will be sustained and the application will be approved.



**ORDER:** The appeal is sustained and the application is approved.