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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: APR 11 2006

IN RE:

Applicant:



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:



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 Acting Director, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who on September 28, 1993 was ordered deported by an Immigration Judge in Baltimore, MD pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The applicant was removed from the United States on November 2, 1993. The record reflects that the applicant then reentered the United States without a lawful admission or parole and without permission to reapply for admission, on or about September 20, 1996. The applicant is inadmissible under section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i). He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to remain in the United States and reside with his U.S. citizen spouse and children.

The Acting Director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for having been ordered removed from the United States and then reentering the United States without being admitted. The Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *Acting Director's Decision* dated October 1, 2004.

On appeal, counsel asserts that the applicant warrants a favorable exercise of the Secretary's discretion as the favorable factors in the applicant's case outweigh the unfavorable factors. *Counsel's Brief* dated October 18, 2004.

The district director erred when he addressed the applicant's eligibility for a Form I-212 because the applicant is subject to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), reinstatement of deportation order provisions. Thus, the applicant is statutorily ineligible for benefits or relief under the Act.

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 Board of Immigration Appeals, ("Board") has held that:

The plain language of the statute and the regulation preclude a hearing by the Immigration Judge, and consequently, this Board We therefore find that we lack any jurisdiction to consider challenges to a reinstated order of deportation under section 241(a)(5) of the Act.

In Re G-N-C, 22 I&N Dec. 281 (BIA 1998). Because the Board has been silent on this issue the AAO must turn to the Circuit Courts of Appeals for guidance in adjudicating the applicant's claim. The Circuit Courts of

Appeals have held that they do have jurisdiction to review section 241(a)(5) decisions and the issue of whether section 241(a)(5) provisions apply retroactively to illegal reentries made prior to April 1, 1997, has been the subject of conflicting decisions by these Courts.

It is noted that the applicant in the present case resides within the jurisdiction of the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals addressed the issue of section 241(a)(5)'s retroactivity in *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102 (4th Cir. 2001). The Fourth Circuit rejected the argument that, because Congress expressly stated that several other provisions of Title III in IIRIRA applied retroactively, the Court must make a negative inference as to section 241(a)(5) of the Act. *Id.* at 106-107. The Fourth Circuit reasoned that "although Congress certainly made several provisions in Title III explicitly retroactive, it also expressly provided that other provisions apply only prospectively" *Id.* at 107. The Fourth Circuit stated further that:

[A]ll of the expressly retroactive statutory provisions on which [the petitioner relied] appear in separate, unrelated subtitles of the Act. Specifically, they are contained in Subtitle B, IIRIRA §§ 321-334 (Criminal Alien Provisions), and Subtitle C, IIRIRA §§ 341-353 (Revision of Grounds for Exclusion and Deportation), of IIRIRA, Title III. Those subtitles govern different conduct and have no relation to the comprehensive revision of removal procedures contained in Subtitle A, which are at issue in this case. Unlike Subtitles B and C, Subtitle A includes a general effective date that applies to almost all of its provisions. *See* IIRIRA § 309(a). Thus, it is not surprising that many sections of Subtitles B and C have their own effective dates and § 241(a)(5) does not.

Id. The Fourth Circuit concluded that Congress's intent regarding section 241(a)(5)'s application to pre-enactment entries was unclear. They next addressed the issue of whether section 241(a)(5) operated in an impermissibly retroactive manner as applied to the petitioner.

The Fourth Circuit stated that:

The Supreme Court has repeatedly counseled that the judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

Id. at 108 (quoting *St. Cyr*, 121 S.Ct. 2271, 2290). (Quotations omitted). The Court concluded that the petitioner had failed to establish detrimental reliance in his case. The Court concluded further that there was additionally no impermissible effect in the case because although the petitioner had married a U.S. citizen before the enactment of section 241(a)(5) of the Act:

[N]ot until well after § 241(a)(5) took effect did Velasquez-Gabriel apply to adjust his status or did his wife file for a visa petition on his behalf. In order to obtain an adjustment of status, an application must have been filed and an immigrant visa must be immediately available to the applicant. Velasquez-Gabriel did not attempt to meet either of these requirements until after the effective date of § 241(a)(5)

Accordingly, Velasquez-Gabriel's failure to apply to adjust his resident status before the new law took effect fatally undermines his contention that § 241(a)(5)'s application to him "attaches new legal consequences to events *completed* before its enactment."

Id. at 109-110.

Based on a reading of the above case, the AAO finds that section 241(a)(5) will not apply retroactively to an alien who illegally reentered the U.S. prior to the April 1, 1997, enactment of section 241(a)(5) of the Act *if* the alien establishes that she or he had a reasonable expectation of relief from deportation prior to the enactment of section 241(a)(5) of the Act. Absent a reasonable expectation of relief, section 241(a)(5) of the Act will be applied retroactively to an alien.

Although the applicant in this case reentered the United States before the enactment of section 241(a)(5), he has failed to establish he had a reasonable expectation of relief from deportation prior to the enactment of section 241(a)(5). The applicant did not apply for adjustment of status until March 12, 2001, well after the April 1, 1997 enactment of section 241(a)(5). At the time of his September 20, 1996 reentry into the U.S. the applicant had no reasonable expectation of adjustment of status relief. Thus, as applied to the applicant, section 241(a)(5) of the Act does not impose any impermissible effects. Section 241(a)(5) will therefore be applied to the applicant retroactively.

The record in this case reflects that the applicant reentered the U.S. illegally after having been deported and that he is subject to section 241(a)(5) reinstatement of his deportation order. He is thus ineligible for adjustment of status or any other relief under the Act. Accordingly, the applicant's appeal will be dismissed.

ORDER: The appeal is dismissed.