U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: SAN ANTONIO, TEXAS Date: DEC 19 2006

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, Chief
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 District Director, San Antonio, Texas and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who entered the United States without a lawful admission or parole on or about March 13, 1991. On March 20, 1991, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on him. On April 2, 1991, the applicant was ordered deported by an immigration judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. Consequently, on April 17, 1991, the applicant was deported to El Salvador. The record reflects that the applicant reentered the United States on March 22, 1996, 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). On March 31, 1996, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant. An OSC was served on him and the applicant was released on his own recognizance with the stipulation that he report at the San Antonio, Texas District Office on the third Wednesday of each month. On December 26, 1996, the applicant failed to appear for the deportation hearing and he was subsequently ordered deported *in absentia* by an immigration judge, pursuant to section 241(a)(1)(B) of the Act. On March 5, 1997, a Warrant of Removal/Deportation (Form I-205) was issued. The applicant failed to surrender for deportation or depart from the United States. The applicant applied for and received Temporary Protected Status (TPS), and was issued Employment Authorization Cards (EAD) from the year 2001 to date. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 his U.S. citizen spouse, stepchild and child.

The District 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 from the Act and denied the Form I-212 accordingly. *See District Director's Decision* dated May 10, 2005.

Section 241(a) of the Act states in pertinent part:

> (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.

On appeal counsel submits a brief, in which she asserts that section 241(a)(5) of the Act does not apply to the applicant because he is not applying for relief from removal. Counsel further states that the applicant is not seeking a relief, but rather a benefit, which is advance permission to return, ahead of the normal bar for persons who have been removed from the United States, and alleges that the granting of a Form I-212 is similar to the granting of a Form I-130. In addition, counsel states that since the applicant's deportation order has not been reinstated, the bar does not apply. Additionally, counsel states that several Circuit Courts of

Appeals appear divided over whether section 241(a)(5) of the Act can be applied retroactively to illegal reentries that occurred prior to April 1, 1997. Counsel refers to decisions made by the Fifth and Ninth Circuit Courts of Appeals. Furthermore, counsel refers to the decision by the Ninth Circuit Court of Appeals in *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004) which held that a person who has been removed and illegally reentered the country is eligible to file a Form I-212, and have it adjudicated, as long as he filed the Form I-212 before his removal order was reinstated. Finally, counsel states that since there is case law supporting approval of a Form I-212, despite the reinstatement provisions, there is no reason that the applicant's Form I-212 be barred by section 241(a)(5) of the Act, and requests that the case be remanded to the District Director for adjudication of the Form I-212 on its merits.

Counsel's assertion regarding the fact that the Form I-212 is a benefit and not a relief is not persuasive. A Form I-212, if granted, provides relief of an applicant's inadmissibility pursuant to section 212(a)(9)(A)(ii) of the Act. In addition, in *Lattab v. Ashcroft*, 384 F.3d (1st Circ. 2004) the court found that "permission to reenter, like adjustment of status, is relief under the INA, which section 241(a)(5) precludes an illegal reentrant from seeking."

The record of proceeding clearly reflects that the applicant was deported from the United States on April 17, 1991, and that he illegally reentered on March 22, 1996. The applicant's illegal reentry to the United States occurred prior to the April 1, 1997, enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009.

The issue of whether section 241(a)(5) provisions of the Act apply retroactively to illegal reentries made prior to April 1, 1997, has been the subject of conflicting decisions by the Circuit Courts. However, on June 22, 2006, the Supreme Court of the United States held in *Fernandez-Vargas v. Gonzalez,* 548 U.S. ____(2006), that section 241(a)(5) of the Act applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on the individual.

The applicant, in the instant case, has failed to establish that he had a reasonable expectation of relief from deportation at the time of his illegal reentry to the United States prior to April 1, 1997. At the time of his March 22, 1996, reentry the applicant had no reasonable expectation that he would be able to collaterally attack his prior deportation order or that he was entitled to the prior procedural inefficiencies in the administration of immigration laws. The applicant, therefore, had no reasonable expectation of adjustment of status relief 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. Therefore, section 241(a)(5) of the Act applies to the applicant.

The AAO notes, however, that the applicant's prior deportation order was not reinstated at the time he filed the Form I-212, and, therefore, the AAO will weigh the discretionary factors in this case.[1]

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[1] The AAO notes the Director's use of *Fernandez-Vargas v. Aschroft,* 394 F.3rd 881 (10th Cir. Jan. 12, 2005), to support his contention that a prior order need not actually have been reinstated for the restrictions of 241(a)(5) of the Act to apply. *Fernandez-Vargas* was decided in the 10th Circuit. The applicant resides in the 5th Circuit, s, while the findings from the 10th Circuit can be used in an advisory capacity, they are not binding in the 5th Circuit. The 5th Circuit has not made a finding on this issue.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

To recapitulate, on April 17, 1991, the applicant was deported from the United States. He reentered on March 22, 1996, and on December 26, 1996, an immigration judge ordered the applicant deported. Therefore, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act, and must receive permission to reapply for admission.

Section 212(a)(9)(A) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
>
> > (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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (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 in 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 deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

The record of proceeding contains a brief from counsel, copies of the applicant's marriage certificate, copies of his child and stepchild's birth certificates, letters of recommendation from family and friends, pictures of the applicant and his family, and reports of country conditions regarding El Salvador. In her brief, counsel states that if the Form I-212 is not granted the applicant's family would suffer enormous hardship. Counsel states that the applicant is a hard-working husband and father of two. Counsel further states that the applicant has been the only father figure his stepdaughter has had in her life. In addition, counsel states that the applicant's immigration history is the only negative factor. Counsel states that the applicant failed to appear at his removal hearing because he did not receive notice nor was he served with the decision. Counsel further states that if the applicant is forced to depart the United States and his family relocates with him to El Salvador, they will face poverty and would be at constant risk of harm or death because El Salvador may be one of the most dangerous countries on earth. If they decide to remain in the United States, they will be living without a husband and father with all the enormous hardships that entails. Furthermore, counsel states that the applicant is a person of good moral character, he has no criminal record, he works hard to raise his family, including his stepchild whose father abandoned her, and he has been working at a stable job for six years. Finally, counsel requests that the Form I-212 be approved because his family would suffer inordinately if it is not granted.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's family, but it will be just one of the determining factors.

As noted above, the applicant was personally served with an OSC on March 31, 1996, and was released on the condition that he appears once a month at the San Antonio, Texas District Office. The applicant failed to comply with the condition of his release.

It is noted that there are no laws that require the applicant' spouse to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

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 for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

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 condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

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.*

The court held in *Garcia–Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v.INS,* 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS,* 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter married his U.S. citizen spouse on April 10, 2002, over six years after he illegally reentered subsequent to his deportation. The applicant's spouse should reasonably have been aware, at the time of their marriage, of the applicant's immigration violations and the possibility of his being removed. He now seeks relief based on that after-acquired equity. Therefore, hardship to his spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, his U.S. citizen spouse, child and stepchild, an approved Form I-130, the prospect of general hardship to his family and the absence of a criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States, his illegal reentry after his deportation, his failure to report to the District Office as required, his failure to appear for his deportation hearing, his periods of unauthorized employment, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra,* that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen, gained after he was placed in deportation proceedings, and after illegal reentry subsequent to his deportation can be given

only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.