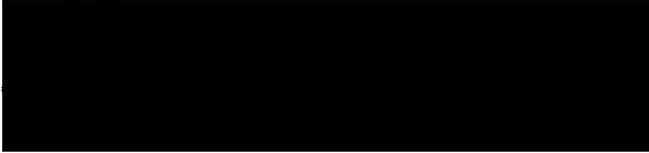


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H4

FILE:



Office: EL PASO, TEXAS

Date: MAY 16 2006

IN RE:

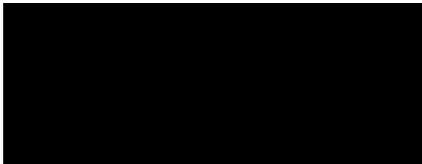
Applicant:



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, Chief
Administrative Appeals Office

7

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, El Paso, Texas, 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 deported twice, first on January 1, 1982, and secondly on August 12, 1985, pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for entering the United States without inspection. The record reflects that the applicant reentered the United States in September 1985 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 daughter. She is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 remain in the United States and reside with her U.S. citizen spouse and children.

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 or benefit from the Act and denied the Form I-212 accordingly. *See District Director's Decision* dated May 12, 2004.

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

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "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.

On appeal, counsel states that the courts 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, date of enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (IIRIRA). Counsel referred to decisions made by the Fourth, Sixth and Ninth Circuit Court of Appeals, which state that section 241(a)(5) of the Act is not retroactive and does not apply to illegal reentries that occurred prior to April 1, 1997. In addition, counsel states that the grant of a Form I-212 is discretionary and the applicant's Form I-212 should be granted since she is the spouse and mother of U.S. citizens, has never been convicted of any crime, has been gainfully employed and has been a model citizen. Finally, counsel states that the applicant wants to continue residing in the United States where she has been living since 1977.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. The record of proceedings clearly reflects that the applicant was deported from the United States on January 1, 1982, and August 12, 1985, and illegally reentered in September 1985. The applicant's illegal reentry into the United States occurred prior to the April 1, 1997 enactment date of the 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.

The Ninth Circuit has held that Congress did not intend for section 241(a)(5) of the Act to be retroactive. The Sixth Circuit Court of Appeals has also held that section 241(a)(5) does not apply retroactively. The Fourth, Fifth and Eighth Circuit Courts of Appeals, on the other hand, have held that section 241(a)(5) of the Act is not retroactive if an alien can demonstrate that he or she had a reasonable expectation of relief prior to the enactment of the law. The applicant in the present case resides within the jurisdiction of the Fifth Circuit Court of Appeals.

In *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002), the Eighth Circuit Court of Appeals discussed the varying conclusions reached by the Ninth, Sixth and Fourth Circuit Courts of Appeals regarding the retroactivity of section 241(a)(5) of the Act. The Eighth Circuit stated that it agreed with the Fourth Circuit, “that Congress by its silence has not unambiguously indicated either that § 241(a)(5) applies to all aliens or that it applies only to aliens that reentered the country after the statute’s effective date.” *Alvarez-Portillo* at 864.

The Court disagreed, however, with the Fourth Circuit’s determination that an alien who would have been eligible to adjust his status prior to the enactment of section 241(a)(5), had failed to establish that he had a reasonable expectation of relief from deportation.

The Eighth Circuit stated that:

A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.

Alvarez-Portillo at 865

The Court held that, in general, “[n]o illegally reentering alien has a reasonable expectation that his prior deportation order will not be reinstated for purposes of effecting a second removal” and that “[i]llegally reentering aliens have no reasonable expectation that they will be entitled to collaterally attack their prior, final deportation orders in a subsequent removal proceeding.” The Eighth Circuit additionally held that:

In IIRIRA, Congress intended to reduce the delays incident to removing aliens who have illegally reentered. Illegal reentrants have no entitlement to such delays and no reasonable expectation that prior inefficiencies in the administration of our immigration laws would continue indefinitely. Thus, there is no impermissible retroactive effect when INS conducts reinstatement proceedings commenced after IIRIRA’s enactment using the procedures adopted to implement § 241(a)(5). . . .

Id. at 865-866.

The Eighth Circuit found, however, that the petitioner in that case had married a United States citizen prior to the enactment of section 241(a)(5) of the Act, and that pursuant to a long-standing Service practice, “if the INS had commenced a deportation proceeding under [the] prior statutory regime for illegal reentry, his

marriage would have made him a likely candidate for adjustment of status to [a] lawful permanent resident”. *Id.* at 862. The Court stated that, as a result:

[U]nder prior law, [REDACTED] a reasonable expectation he could either file for a discretionary adjustment of status, or wait and seek the adjustment as a defense to a later deportation proceeding. He chose to wait, and § 241(a)(5) as applied by the INS has now deprived him of that defense. To this extent, we conclude the statute has an impermissible retroactive effect on his reinstatement and removal proceeding. *Id.* at 867.

In *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292 (5th Cir. 2002), the Fifth Circuit Court of Appeals held that “Congress did not clearly indicate whether it intended to apply § 241(a)(5) retroactively” and that section 241(a)(5) of the Act did not have an impermissible retroactive effect as applied to the petitioner in that case. *See Ojeda-Terrazas* at 299.

Using reasoning similar to that set forth in the Eighth Circuit case, *Alvarez-Portillo, supra*, the Fifth Circuit stated that in most cases an illegal reentrant has “no reasonable expectation of having a hearing before an immigration judge rather than an INS official when he illegally reentered the United States (prior to the enactment of section 241(a)(5)), and that in general, section 241(a)(5) “does not deal with any vested rights or settled expectations arising out of the alien’s wrongdoing. *See Ojeda-Terrazas* at 301-302 (citations omitted).

Based on a reading of the above cases, the AAO finds that as a general matter, illegal reentrants have no reasonable expectation of deportation relief. The AAO also finds, however, that section 241(a)(5) will not apply retroactively to an alien who illegally reentered the United States prior to the April 1, 1997, enactment of section 241(a)(5) of the Act, if the alien establishes that he or she 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.

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 imposes new duties or new liabilities. Section 241(a)(5) of the Act will therefore not be applied to the applicant retroactively.

The AAO finds that although the applicant is not subject to section 241(a)(5) of the Act, she is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

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

(A) Certain alien 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 alien 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 Secretary has consented to the alien's reapplying for admission.

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 AAO finds that the favorable factors in this case are the applicant's family ties to U.S. citizens, her spouse and three children, the approval of a Form I-130, the absence of any criminal record since entering the United States and the numerous letters of recommendation from relatives and friends attesting to her good moral character.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States and her illegal reentries subsequent to her deportations.

While the applicant's entry into the United States without a lawful admission or parole and her reentries after her deportations are 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.