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

PUBLIC COPY

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DEC 30 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

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:

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 Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the Director, California 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 first entered the United States without a lawful admission or parole on or about October 2, 1979. On October 24, 1979, an Immigration Judge granted the applicant voluntary departure in lieu of deportation until November 24, 1979. The applicant failed to submit documentary evidence that he departed the United States on or prior to November 24, 1979. The applicant reentered the United States on an unknown date and on April 25, 1983, in the United States District Court, Southern District of California he was convicted of illegal entry pursuant to 8 U.S.C. § 1325 and sentenced to 40 days imprisonment. On June 3, 1983, the applicant was ordered deported by an Immigration Judge pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act) and on the same day he was deported from the United States. The record reflects that the applicant reentered the United States on or about July 25, 1983, 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 married a U.S. citizen on December 16, 1993, and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant is inadmissible under 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 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 and may not apply for any relief. In addition the Director determined that the applicant is inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more and that the applicant is not eligible for a waiver under this section of the Act. Furthermore the Director determined that the applicant is not a person of good moral character and that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212). *See Director's Decision* dated September 3, 2003.

On appeal, counsel states that the Director abused his discretion in denying the Form I-212, that the applicant was held to a higher level of good moral character and he is being unjustly denied a waiver of inadmissibility. Counsel further asserts that the decision ignores the applicant's family ties and self-evident rehabilitation and that the criminal convictions in the applicant's record are not crimes involving moral turpitude or grounds of inadmissibility In his brief counsel states that the Director erroneously states that the applicant's prior deportation order is reinstated pursuant ot section 241(a)(5) of the Act because he did not provide the applicant with a notice pursuant ot 8 C.F.R. § 241.8(b). In addition counsel states that even if the deportation order is reinstated the applicant is not precluded from Consular Processing. Furthermore counsel states that the applicant is not inadmissible under section 212(a)(9)(B) of the Act until he departs the United States and that if he were found inadmissible under section 212(a)(9)(B) of the Act, he would be eligible to file a Form I-601. Counsel asserts further that the applicant is eligible for adjustment of status pursuant to section 245(i) of the Act, based on an approved Form I-130.

The AAO finds that the Director erred in his decision stating that the applicant is inadmissible without exceptions or waivers pursuant to section 212(a)(9)(B) of the Act. If the applicant is found inadmissible under section 212(a)(9)(B) of the Act, he is eligible to file an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The proceeding in the

present case is for the application for permission to reapply for admission into the United States after deportation or removal and therefore the AAO will not discuss the applicant's inadmissibility under section 212(a)(9)(B) of the Act or whether the applicant is eligible for adjustment of status under section 245(i) of the Act.

In his brief counsel states that the applicant is the beneficiary of a Form I-130 filed by his U.S. citizen spouse, and that he has children, grandchildren, siblings and a parent who are U.S. citizens or Lawful Permanent Residents (LPR) of the United States. Counsel states that his family would suffer extreme hardship if the applicant were not permitted to immigrate to the United States

Before the AAO can weigh the favorable and unfavorable factors in this case it must first determine if the applicant is eligible to apply for any relief under the Act.

The United States Court of Appeals for the Fifth Circuit in *Ojeda-Terrazas v. Ashcroft,* 290 F.3d 292 (5th Cir. 2002) held that section 241(a)(5) of the Act applies to illegal reentries made before April 1, 1997. As the applicant resides in the Fifth Circuit, that ruling is controlling in the present proceeding.

Section 241(a) detention, release, and removal or aliens ordered removed.-

> (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.

Counsel states that the applicant did not receive a notice pursuant to 8 C.F.R. § 241.8(b) and therefore his deportation order is not reinstated.

The regulation at 8 C.F.R. § 241.8 states in pertinent part:

> Reinstatement of removal orders.
>
> (a) Applicability. An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:
>
> (1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.

> (2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. . . .
>
> (3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. . . .
>
> (b) Notice. If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.
>
> (c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

Counsel does not dispute the fact that the applicant was subject to a prior order of deportation, the identity of the alien or the fact that the applicant unlawfully reentered the United States on July 25, 1983. Based on the above 8 C.F.R. 241.8(c) applies and the applicant shall be removed under the previous deportation order pursuant to section 241(a)(5) of the Act. In any event, a clear reading of section 241(a)(5) of the Act shows that after an alien illegally reenters the United States after being removed "the prior order is reinstated..." and the alien is not eligible for any relief under the Act.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

No purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act as the applicant is subject to section 241(a)(5) of the Act. The applicant is not eligible for any relief under the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.