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

U.S. Citizenship and Immigration Services

[redacted]

PUBLIC COPY

FILE: [redacted] Office: CHICAGO, IL Date: FEB 19 2004

IN RE: [redacted]

PETITION: 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 PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nigeria who entered the United States as a visitor on October 18, 1985 and subsequently overstayed his authorized period of stay. On September 17, 1987, the applicant was removed from the United States. The applicant entered the United States with a fraudulent Nigerian passport on June 14, 1989. On May 13, 1992, the applicant married a U.S. citizen. He is the beneficiary of an approved Petition for Alien Relative. The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), in order to live with his U.S. citizen wife and children.

The district director determined that the unfavorable factors outweighed the favorable factors in the application. The I-212 application was denied accordingly. *See* Decision on Application for Permission to Reapply After Deportation, dated January 5, 1999.

On appeal, counsel asserts that the applicant presents a compelling and favorable set of facts concerning his family connections, his family's dependence on him, his wife's illness and his straightforward approach to addressing his immigration problems. In support of these assertions, counsel submits a letter from a social worker counseling the applicant's wife; a letter from a licensed clinical psychologist counseling the applicant's wife and a letter from an administrator representing the Community Counseling Centers of Chicago.

The record also contains an affidavit signed by the applicant's father, mother and six additional family members, dated November 2, 2001; copies of the naturalization certificates for the applicant's mother and father; a copy of the permanent resident card issued to a sister of the applicant; copies of the naturalization certificates for four additional family members and a copy of the U.S. birth certificate of a sister of the applicant. The entire record was reviewed and considered in rendering a decision.

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 factor in the application is the hardship imposed on the applicant's spouse and children by his inadmissibility to the United States.

The unfavorable factors in the application include the many years that the applicant has lived and worked in the United States in violation of immigration law; the fact that the applicant is subject to reinstatement of his removal order as per section 241 (a) (5) of the Act, and the applicant's inadmissibility to the United States owing to his procurement of admission by fraud or willful misrepresentation in 1989 which requires him to seek an approved Waiver of Grounds of Excludability (Form I-601). The applicant offers no evidence of reformation or rehabilitation from his disregard for the immigration laws of this country nor does the record demonstrate that the applicant possesses a moral character or respect for law and order.

Section 241(a) states in pertinent part:

> (5) Reinstatement of removal orders against aliens illegally reentering. - If the Attorney General [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. (emphasis added)

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). The Circuit Courts of Appeals have held that they do have jurisdiction to review section 241(a)(5) decisions. However, the issue of whether section 241(a)(5) provisions apply retroactively to illegal reentries made prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provisions on April 1, 1997, has been the subject of conflicting decisions by the circuit courts.

The Ninth and Sixth Circuits have held that Congress did not intend for section 241(a)(5) of the Act to be retroactive. *See Castro-Cortez v. INS,* 239 F.3d 1037 (9th Cir. 2001). *See also Bejjani v. INS,* 271 F.3d 670 (6th Cir. 2001). The Fourth, Fifth and Eighth Circuit Courts of Appeals, on the other hand, have held that section 241(a)(5) of the Act is retroactive unless an alien can demonstrate that she or he had a reasonable expectation of relief prior to the enactment of the law.

It is noted that the applicant in the present case resides within the jurisdiction of the Seventh Circuit Court of Appeals. The Seventh Circuit has not ruled on the issue of retroactivity under section 241(a)(5) of the Act. The applicant will therefore be bound by the AAO's determination regarding whether section 241(a)(5) applies retroactively to the applicant.

The Fourth Circuit Court of Appeals addressed retroactivity in *Velasquez-Gabriel v. Crocetti,* 263 F.3d 102 (2001). The Fourth Circuit rejected the argument that it must make a negative inference as to section 241(a)(5) of the Act because it lacks an express statement of retroactivity. *Id.* at 106-107. The court 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:

> [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 Congressional intent regarding application of section 241(a)(5) to pre-enactment entries was unclear. The Court 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:

> 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 *INS v. 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 stated further that there was 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 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. did not attempt to meet either of these requirements until after the effective date of § 241(a)(5)
>
> . . . .
>
> Accordingly, 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.

In *Alvarez-Portillo v. Ashcroft,* 280 F.3d 858 (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." 280 F.3d at 864. (Citing *Velasquez-Gabriel, supra*, quotations omitted).

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:

> 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, 280 F.3d at 865 (*citing INS v. St. Cyr, supra,* 121 S.Ct. at 2290-91).

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:

> 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 [the Immigration and Naturalization Service, now Immigration and Customs Enforcement (ICE)] conducts reinstatement proceedings commenced after IIRIRA's enactment using the procedures adopted to implement § 241(a)(5). . . .

Id. at 865-866.

The Court 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] had 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, 299 (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.

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 [ICE] 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,* 290 F.3d at 301-302 (citations omitted).

Based on a reading of the above cases, the AAO rejects the assertion that Congress clearly intended for section 241(a)(5) of the Act to apply only prospectively. The AAO agrees instead with the reasoning set forth in *Alvarez-Portillo v. Ashcroft, supra.* Accordingly, 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 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.

The applicant has failed to establish that he had a reasonable expectation of relief from deportation at the time of his illegal reentry into the United States prior to April 1, 1997. The record fails to make any assertions regarding the applicant's expectations in this respect. At the time of his June 1989 reentry into the United States the applicant had no reasonable expectation that he would be able to collaterally attack his prior final deportation order or that he was entitled to the prior procedural inefficiencies in the administration of immigration laws. *See Alvarez-Portillo* at 865-66. Although the applicant married a U.S. citizen prior to enactment of section 241(a)(5) of the Act, the applicant procured admission to the United States through fraud or willful misrepresentation when he presented a fraudulent Nigerian passport. Therefore, the applicant not only had no reasonable expectation of relief from removal, his actions rendered him inadmissible to the United States. As applied to the applicant, section 241(a)(5) of the Act does not impose any new duties or new liabilities. The section will therefore be applied to him retroactively.

In addition to the grounds for denial of the applicant's Form I-212 identified by the district director, the AAO finds that the applicant reentered the United States illegally after having been deported and that he is subject to section 241(a)(5) reinstatement of his removal order. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the district director did 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); *see also Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

The applicant has not established that the favorable factors in his application outweigh the unfavorable factors. The district director's denial of the I-212 application was thus proper. Furthermore, because the applicant is subject to reinstatement of his removal order pursuant to section 241(a)(5) of the Act, he is ineligible for adjustment of status or any other relief under the Act.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). The applicant failed to establish that he warrants a favorable exercise of the Secretary's discretion. Therefore, the appeal will be dismissed

ORDER: The appeal is dismissed.