U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

#4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 1 1 2008

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, Director
Administrative Appeals Office

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 a citizen of El Salvador who was present in the United States without a lawful admission or parole on June 27, 1990. On June 28, 1990, the applicant was served an Order to Show Cause for a hearing before an Immigration Judge and he was released on a $1,000 bond. On December 4, 1990, the applicant failed to appear for a deportation hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation was issued on May 8, 1991. On April 26, 1992, the applicant departed the United Stares executing the pending order of deportation. The record reveals that in December 1992 the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission in violation of section 276 the Act. On May 1, 1996, the applicant married a U.S. citizen and filed an application for adjustment of status. The record reflects that the applicant divorced his first spouse on October 3, 2001, and married his current spouse, a U.S. citizen, on July 6, 2002. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He now 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 the unfavorable factors outweigh the favorable ones and that section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) applies in this matter and denied the application according. *See Director's Decision* dated September 9, 2003.

On appeal counsel asserts that the Director erred in stating that section 241(a)(5) of the Act applies in this matter because the applicant's reentry was prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) enactment's date of April 1, 1997, and the Ninth Circuit Court of Appeals has ruled that section 241(a)(5) of the Act was not retroactive.

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.

The applicant reentered the United States prior to the April 1, 1997 enactment date of the IIRIRA of 1996, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009. The Ninth Circuit Court of Appeals held in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001) that section 241(a)(5) of the Act was not retroactive and did not apply to illegal reentries that occurred prior to its April 1, 1997, enactment. Since this case arises in the Ninth Circuit, *Castro-Cortez* is controlling and section 241(a)(5) of the Act is not applicable in this case. For this reason, the AAO agrees with counsel and finds that the Director erred in his decision finding that section 241(a)(5) of the Act is applicable in this case.

However, the applicant is clearly inadmissible under section 212(a)(9) of the Act.

Section 212(a)(9). Aliens previously removed.-

(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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

A review of the 1996 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 for 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 reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel submits a brief, in which he states that the Director misstated facts and failed to consider all pertinent factors in adjudicating the applicant's Form I-212. In addition counsel states that the applicant's deportation took place 11 years ago, he has a U.S. citizen spouse and three U.S. citizen children, he does not have a criminal history, is a person of good moral character and that his family would suffer hardship if the waiver application were denied. In addition counsel states that the applicant has been residing in the United States for approximately eleven years and has been authorized advance parole and employment authorization.

The record reveals that the applicant was issued an advance parole on March 27, 1998, after he filed an application for adjustment of status based on his marriage to his first spouse whom he divorced on October 3, 2001. The applicant married his current spouse on July 6, 2002, and filed a new application for adjustment of status based on this marriage.

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 of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

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.*

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 be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *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 entered the United States in June 1990 was ordered deported in December 1991, self deported himself in April 1992, reentered the United States in December 1992 and married his present spouse on July 6, 2002, years after his removal and reentry without permission. He now seeks relief based on that after-acquired equity.

The favorable factors in this case include the applicant's family ties, his U.S. citizen spouse and three children, the approval of a petition for alien relative, the absence of a criminal record and the potential of general hardship to his family.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States in June 1990, his failure to appear for deportation proceedings, his failure to depart the United States after a final removal order was issued by an Immigration Judge, his unlawful reentry without permission after he self deported himself on April 26, 1992, 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 his deportation from the United States, 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 that the he is eligible 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.