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U.S. Citizenship and Immigration Services

H4

FILE: [redacted] Office: HARTFORD, CONNECTICUT Date: JUL 22 2005

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

DISCUSSION: The application for permission to reapply for admission after removal was denied by the District Director, Boston, Massachusetts, 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 entered the United States without a lawful admission on or about January 21, 1985. The Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on January 22, 1985, an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued. On September 25, 1987, an Immigration Judge found the applicant deportable and granted him voluntary departure in lieu of deportation. An appeal to the Board of Immigration Appeals (BIA) was dismissed on April 3, 1989 and the applicant was granted voluntary departure until May 3, 1989. The applicant failed to depart from the United States. The applicant's failure to depart on or prior to May 3, 1989, changed the voluntary departure order to an order of deportation. The applicant states that he did not receive any documentation regarding the BIA's decision until he received a Notice to Deportable Alien (Form I-166), which informed him to report for his deportation on September 25, 1989. On September 27, 1989, the applicant was deported from the United States pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for entering without inspection. The record reflects that the applicant reentered the United States in 1992 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 record of proceedings reveals that the applicant departed the United States in 1993 in order to apply for an immigrant visa in El Salvador. The application was denied and the applicant reentered again illegally in violation of section 276 of the Act. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen son. He 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 his Lawful Permanent resident (LPR) spouse and children and his U.S. citizen children.

The District Director determined 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 Deportation or Removal (Form I-212) accordingly. *See District Director's Decision* dated October 10, 2003.

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

> (A) Certain aliens previously removed.-
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> . . . .
>
> (ii) Other aliens.- Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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 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 for others, (2) has added a bar, with limited exceptions, 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 states that the District Director erred as a matter of law in denying the Form I-212. Counsel states that the District Director based his decision on the fact that the applicant failed to demonstrate that his spouse and children would suffer extreme hardship if the Form I-212 were not granted. Counsel states that section 212(a)(9)(A)(iii) of the Act does not require that an applicant demonstrate extreme hardship to a family member. In addition, counsel states that the applicant has substantial family ties in the United States, an LPR spouse; two LPR children; two U.S. citizen children; one child with Temporary Protected States (TPS); and five U.S. citizen grandchildren. Further, he has filed taxes since 1993, has no criminal record in the United States, a long and stable work history, is an active member of his church and has been a law-abiding citizen. Counsel states that the applicant's spouse suffers from several medical conditions that do not permit her to work full time and she is dependent on the applicant for support. Counsel does not dispute the fact that applicant departed the United States after the expiration of his voluntary order, but states that he did so because he was never informed of the BIA's decision by his prior attorney. Counsel further states that immediately after receiving the Form I-166 the applicant contacted the proper authorities in order to arrange for his departure thus showing that he was not trying to evade the immigration laws. In addition counsel does not dispute the fact that the applicant reentered illegally twice after his deportation but attests that the favorable factors in the applicant's case outweigh the negative factors and the Form I-212 should be granted.

The AAO agrees with counsel in parts. 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. In addition, the fact that the applicant's family members were granted legal permanent resident status after he was placed in proceedings should not be considered an unfavorable factor.

The AAO conducts the final administrative review and enters the ultimate decision for USCIS 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 *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *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).

Before the AAO can adjudicate the appeal and weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for any relief under the Act.

Section 241(a) states in pertinent part:

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

The record of proceedings clearly reflects that the applicant was deported from the United States on September 27, 1989, and illegally reentered on two separate occasions the last being in 1993. The applicant's illegal reentry into the United States occurred prior to the April 1, 1997, enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("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.

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

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.

[redacted]

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] 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 (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 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 or prior to April 1, 1997. At the time of his 1993, reentry 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. The applicant therefore had no reasonable expectation of adjustment of status relief under pre-IIRIRA laws. *See id.* at 867. Thus, 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.

The record in this case reflects 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 deportation order. He is thus ineligible for adjustment of status or any other relief under the Act. As such, no purpose would be served in granting permission to reapply for admission. Accordingly, the applicant's appeal will be dismissed.

ORDER: The appeal is dismissed.