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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 18 2007

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 into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center, 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 citizen of Mexico who entered the United States without a lawful admission or parole on or about January 15, 1987. On March 16, 1994, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and an Order to Show Cause (OSC) for a hearing before an immigration judge, was issued. On December 21, 1994, an immigration judge found the applicant deportable, pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) and granted her voluntary departure until June 21, 1995, in lieu of deportation. On June 21, 1995, the applicant's attorney filed an Application for Stay of Deportation or Removal (Form I-246). The Form I-246 was granted with a stay of deportation until August 31, 1995. The record of proceedings reflects that the applicant departed the United States on August 31, 1995. On September 5, 1995, the District Director, San Diego, California issued a Warrant of Deportation (Form I-205). The record reveals that the applicant reentered the United States on an unknown date, but prior to December 23, 1995, the date she appeared at an INS office, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326. The immigration judge's alternate order of deportation was reinstated and the applicant was removed from the United States on December 16, 1999. The applicant reentered the United States several days after her removal, without a lawful admission or parole and without permission to reapply for admission. She is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her Lawful Permanent Resident (LPR) spouse. She 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 in order to remain in the United States and reside with her Lawful Permanent Resident spouse and U.S. citizen 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 for any relief for benefit from her Form I-212. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Director's Decision* dated October 11, 2004.

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

> (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.

On appeal, counsel submits a brief in which she states that the applicant should not have been considered to have failed to depart under the immigration judge's voluntary departure order and the alternate order of deportation should had not been reinstated. In addition, counsel states that the applicant was not under a deportation order when her previous attorney erroneously filed a Form I-246, instead of applying for an extension of voluntary departure. Counsel further states that according to the decision in *Castro-Cortez v.*

INS, 239 F.3d 1037 (9th Cir. 2001) the Service cannot reinstate a deportation order prior to April 1, 1997. In addition, counsel refers to the decision in *Morales-Izquierdo v. Ashcroft,* 388 F.3d 1299 (9th Cir. 2004) that states that the Service does not have jurisdiction to reinstate deportation orders. Finally, counsel states that based on the decision in *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004) permission to reapply is available on a *nunc pro tunc* basis to an individual after he or she has already reentered the country. Counsel requests that the decision be reversed because the factors it relies on are due to misapplication of the law in reinstating a deportation order.

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. However, on June 22, 2006, the Supreme Court of the United States held in *Fernandez-Vargas v. Gonzalez,* 548 U.S. ____(2006), that section 241(a)(5) of the Act applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on the individual. Therefore, *Castro-Cortez* is not controlling.

Pursuant to *Morales-Izquierdo v. Ashcroft,* in the Ninth Circuit only an immigration judge can determine whether an individual is removable under section 241(a)(5) of the Act. The Director does not have jurisdiction over the issue of reinstatement. Although in his decision the Director states that a Warrant of Deportation was reinstated, the record of proceedings does not reveal that the Director initiated a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) and therefore, the order of deportation has never been reinstated.

In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft, supra,* the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated may nonetheless obtain adjustment of status if his Form I-212 is granted. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez* that: "Given the fact that Perez-Gonzalez applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred **from applying for relief." The Court further states: "Prior administrative decisions of the Bureau of** Immigration Appeals confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in which the petitioner receives permission to reapply for admission after he or she has already reentered the country." Finally the Court states: "... if the alien has applied for permission to reapply in the context of an application to adjust status, the INS is required to consider whether to exercise its discretion in the alien's favor before it can proceed with reinstatement proceedings..."

Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. The AAO agrees with counsel and finds that the Director erred in denying the Form I-212 based on the fact that section 241(a)(5) of the Act is applicable in this case. The applicant is not currently subject to section 241(a)(5) of the Act and she is eligible to file a Form I-212.

The fact remains that the applicant was removed on December 16, 1999. The AAO does not have the authority to revisit removal orders. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act.

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

(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 contiguous territory, the Attorney General [now Secretary, Homeland Security, "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 favorable factors in this matter are the applicant's family ties in the United States, her LPR spouse and U.S. citizen children, the approval of a Form I-130, the fact that she departed the United States after she was granted an extension of her voluntary departure order, and the lack of a criminal record.

The unfavorable factors in this matter include the applicant's initial entry without inspection, her reentries subsequent to her August 31, 1995 departure and her December 16, 1999, removal, and her illegal stay for part of her presence in the United States.

While the applicant's immigration violations cannot be condoned, the AAO finds that given all of the circumstances of 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.