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

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[redacted]

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FILE: [redacted] Office: CHICAGO, ILLINOIS Date: MAR 19 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, Chief
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 Mexico who was present in the United States without a lawful admission or parole as early as May 5, 1974, the date she gave birth to a child. The record reflects that the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant. The record further reflects that on October 19, 1984, the applicant was deported to Mexico pursuant to section 241(a)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(1), for being inadmissible at time of entry. The applicant reentered the United States in February 1985 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 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen child. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 remain in the United States and reside with her U.S. citizen and Lawful Permanent Resident (LPR) children.

The District 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 under the Act. The District Director then denied the Form I-212 accordingly. *See District Director's Decision* dated January 31, 2005.

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 states that the adjudicating officer erred in denying the Form I-212 based on section 241(a)(5) of the Act, because the Seventh Circuit Court of Appeals in its decision in *Faiz-Mohammad v. Ashcroft*, 395 F3d 799 (7th Cir. 2005) held that any individual who illegally reentered the United States prior to the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) effective date and filed an application for adjustment of status prior to IIRIRA's effective date is not subject to section 241(a)(5) of the Act. In addition, counsel states that the applicant is a member of the class action lawsuit *Proyecto San Pablo v. INS* No. Civ. 89-456-TYC-WDB. Counsel asserts that based on *Proyecto San Pablo* the applicant's application for legalization may be adjudicated again and that she is protected from reinstatement of a removal order.

On the Notice of Appeal to the AAO (Form I-290B) counsel states that he will be submitting a brief and/or evidence to the AAO within 90 days. On December 13, 2006, the AAO forwarded a fax to counsel informing him that this office had not received a brief or evidence related to this matter and unless counsel responded within five business days the appeal may be summarily dismissed. Counsel has not responded to the AAO's fax of December 13, 2006. The appeal was filed on March 1, 2005, and to this date, approximately two years

later, no documentation has been received by the AAO. Therefore, the AAO will adjudicate the appeal based on the documentation contained in the record of proceeding.

The record of proceeding clearly reflects that the applicant was deported from the United States on October 19, 1984, and that she illegally reentered in February 1985. The applicant's illegal reentry to the United States occurred prior to the April 1, 1997, enactment date of 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. 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.

The applicant, in the instant case, has failed to establish that she had a reasonable expectation of relief from deportation at the time of her illegal reentry to the United States prior to April 1, 1997. At the time of her February 1985 reentry, the applicant had no reasonable expectation that she would be able to collaterally attack her prior deportation order or that she was entitled to the prior procedural inefficiencies in the administration of immigration laws. The applicant, therefore, had no reasonable expectation of adjustment of status relief under pre-IIRIRA laws. Thus, as applied to the applicant, section 241(a)(5) of the Act does not impose any new duties or new liabilities. Therefore, section 241(a)(5) of the Act applies to the applicant.

The AAO notes, however, that the applicant's prior deportation order was not reinstated at the time she filed the Form I-212, and, therefore, the AAO will weigh the discretionary factors in this case.

Although counsel did not submit documentation to show that the applicant is a member of the class action lawsuit *Proyecto San Pablo,* the AAO notes that Service file [redacted] may relate to the applicant.

The AAO notes that *Proyecto San Pablo* does not automatically confer immigration benefits to an individual. Members of the class action lawsuit are entitled to a new review of their legalization case. The proceeding in the present case is limited to the application for permission to reapply for admission into the United States after deportation or removal under section 212(a)(9)(A)(iii) of the Act, and whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act to be waived. This is the only issue that will be discussed.

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 alien 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 alien's 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.

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 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 deterring aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

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 AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her U.S. citizen and LPR children, an approved Form I-130, and the absence of any criminal record.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry on May 5, 1974, her illegal reentry subsequent to her deportation, her employment without authorization and her 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. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility 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.