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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

HH

MAR 30 2005

FILE:

Office: CALIFORNIA SERVICE CENTER Date:

IN RE:

Applicant:

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:

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 Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the Acting 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 on May 8, 1978 was convicted in the United States District Court, Southern District of California, for the offense of illegal transportation of aliens in violation of Title 8 U.S.C. § 1324 (a)(2). The applicant was sentenced to one year and one day imprisonment. On May 30, 1978, an Immigration Judge ordered the applicant deported from the United States. Consequently, on December 20, 1978, the applicant was deported from the United States pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for entering the United States without inspection. The record reflects that the applicant reentered the United States on an unknown date but prior to September 20, 1983, the date of his marriage to a now naturalized U.S. citizen, 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 applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 U.S. citizen spouse and children.

The Acting 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 and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Acting Director's Decision* dated March 20, 2002.

On appeal counsel asserts that the Acting 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, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009 (IIRIRA) enactment date of April 1, 1997, and the Ninth Circuit Court of Appeals has ruled that section 241(a)(5) of the Act is not retroactive.

Section 241(a) detention, release, and removal of 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 of IIRIRA, 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 Acting Director erred in his 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.-

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(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, letters of recommendation from friends and family regarding the applicant's character, copies of the applicant's children's birth certificates and copies of tax returns filed by the applicant. The brief states that the applicant has resided in the United States since 1978, has made very positive contributions to society through his work ethic and love for his family, participates in his child's school activities and is an active member of the Parent Teacher Association (PTA) at his daughter's school. In addition counsel states that the applicant's separation from his family would result in emotional and financial hardship to every member of the family. Finally counsel states that the applicant's services are needed in the United States because he is an equipment operations manager and is a great asset to the company he works for. Counsel requests that the Form I-212 be granted based on the favorable factors in the applicant's case.

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 favorable factors in this case include the applicant's family ties to his U.S. citizen spouse and children, an approved Form I-130, the fact that he has filed tax returns, as required by law, the potential of general hardship to his family, the numerous favorable recommendations from relatives, friends and employers attesting to his good moral character and the lack of any criminal record for over 20 years.

The unfavorable factors in this matter include the applicant's conviction for illegal transportation of aliens, his reentry subsequent to his deportation in 1978, his misdemeanor criminal convictions and his illegal stay and employment for part of his presence in the United States.

The AAO notes that the applicant's conviction for illegal transportation of aliens is not a deportable offense. The Board has specifically found that "it was the intention of Congress to make it a criminal offense, but not a deportable offense, to transport, conceal, etc., under section 274 an alien illegally in the United States" *Matter of I-M-*, 7 I&N Dec. 389, 391 (BIA 1957).

While the applicant's illegal re-entry subsequent to his deportation and his presence in the United States without a lawful status are serious matters that cannot be condoned, the AAO finds that given all of the circumstances in the present case, and the time that has elapsed since his immigration violations and misdemeanor criminal convictions, 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.