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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: California Service Center Date: JUL 11 2003

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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador who was present in the United States without a lawful admission or parole on October 25, 1981. He was deported from the United States on January 20, 1982. Therefore, he is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). In February 1982 the applicant was present in the United States again 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 (a felony).

The applicant married [redacted] in May 1989, and his wife is a naturalized U.S. citizen. He is the beneficiary of an approved Petition for Alien Relative. 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 with his wife and four minor children.

The director determined that, pursuant to section 241(a)(5) of the Act, 8 U.S.C § 1231(a)(5), the applicant is inadmissible and not eligible for any relief or benefit from the application. The director denied the application accordingly.

On appeal, counsel states that the applicant is not precluded from submitting the present application and is not subject to the provisions of section 241(a)(5) of the Act because his entry was prior to the effective date of the amendment, April 1, 1997. Counsel states that the court held in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001), that section 245(a)(5) of the Act does not apply retroactively to aliens who reentered the United States before the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

Section 212(a)(9)(A) of the Act provides, in part, that:

> (i) Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years 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.
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> (ii) Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 of the Act or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who 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) 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 of Homeland Security] has consented to the alien's reapplying for admission.

Section 241(a)(5) of the Act provides that:

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 reentry.

The applicant unlawfully reentered the United States in February 1982 and prior to April 1, 1997, the effective date of section 241(a)(5) of the Act. Therefore, he is not subject to the provisions of section 241(a)(5) of the Act.

In weighing the positive and negative factors in considering an application for permission to reapply for admission, it is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. *Matter of Acosta*, 14 I&N Dec. 361 (D.D. 1973).

The favorable factors in this matter are the applicant's family ties, the absence of a criminal record, need for the applicant's presence to care for four minor children, the approved Petition for Alien Relative, and the prospect of general hardship to the family. The applicant has resided in the United States for more than 20 years, and he is the sole source of income for his wife and four minor children.

The unfavorable factors in this matter include the applicant's unlawful entry, his deportation, his reentry without permission to reapply, and his unlawful presence in the United States.

Although the applicant's actions in this matter cannot be condoned, considerable weight must be given to the needs of his four minor U.S. citizen children, his good behavior, and the high degree of hardship the family would endure if he remained abroad for at least ten years. The applicant has now established by supporting evidence that the favorable factors outweigh the unfavorable ones, therefore, the director's decision will be withdrawn.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States that are not outweighed by adverse factors. After a careful review of the record, it is concluded that the applicant has established that he warrants a favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The director's decision is withdrawn, and the application is approved.