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U.S. Citizenship
and Immigration
Services

HL4

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 23 2006

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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who entered the United States without a lawful admission or parole in January 1992. On March 15, 1995, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On July 28, 1995, the applicant was interviewed for asylum status. On August 11, 1995, her application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an immigration judge was served on her. On September 14, 1995, the applicant was ordered deported by an immigration judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on October 22, 1996, and she was permitted to depart from the United States voluntarily within 30 days from the date of the BIA's order. On November 20, 1996, the District Director extended the applicant's voluntary departure order until December 20, 1996. A request for another extension was denied on December 19, 1996. The applicant's failure to depart the United States on or prior to December 20, 1996, changed the voluntary departure order to an order of deportation. The applicant filed a Motion to Reopen (MTR), which was denied by the BIA on October 27, 1997, as untimely filed. On June 11, 1998, a Warrant of Removal/Deportation (Form I-205) was issued. The applicant applied for and received Temporary Protected Status (TPS), and was issued Employment Authorization Cards (EAD) from the year 2001 to date. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. The applicant is inadmissible pursuant to 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 spouse and child, and her Lawful Permanent Resident (LPR) children.

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 5, 2005.

The AAO notes that the record contains a Notice of Entry of Appearance as Attorney or Representative (Form G-28) submitted by an individual who is not eligible to represent the applicant in this proceeding. The individual mentioned on the Form G-28 is a qualified entity under section 245(a)(c)(2) of the Act for individuals applying for benefits under 245A of the Act. The applicant in this case is not applying for benefits under section 245A of the Act. Therefore, the AAO will not be sending a copy of the decision to the attorney mentioned on the Form G-28, but this office will accept the submitted information.

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

(A) Certain alien 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 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 in 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 from being present in the United States without lawful admission or parole.

On appeal, the applicant's representative submits a brief in which he states that the Director failed to consider all pertinent facts, failed to consider that the applicant is eligible to apply for adjustment of status based on the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and that the decision contradicts the current administration policy of Family Reunification. The applicant's representative states that the applicant's entry into the United States without permission was reasonable given her fear for her life in El Salvador. In addition, the applicant's representative states that the length of residence in the United States should be considered a relevant factor. The applicant's representative states that the applicant has been in the United States for approximately 13 years and during her presence in the United States she has shown that she is a person of good moral character, has never been arrested or convicted of a crime, has established a strong and personal relationship with her U.S. citizen spouse and child, and, her removal would disturb their psychological and psychosocial health. Additionally, the applicant's representative states that the applicant has high regard and respect for the laws of the United States and the fact that she violated immigration laws does not support a finding of lack of good moral character. Furthermore, the applicant's representative states that the applicant had only two violations of United States immigration laws: entered without authorization, and remained after being ordered removed. Other than the above, she has shown good moral character and respect for the laws of the United States. The applicant's representative states that the applicant is a model citizen; she is married to a U.S. citizen, has children, is dedicated to her family and is contributing member to society, and serves an important role as a wife and mother. Moreover, the applicant's representative states that the applicant's spouse and son are completely and totally dependant on her for emotional and social support, and a separation would be devastating for the family. According to the applicant's representative, if the applicant were removed from the United States she and her spouse would be psychologically and emotionally devastated which would lead to severe depression. Her spouse completely relies on her for emotional, social and economical support. In addition, her child would lose his mother because the applicant would not take her child to El Salvador due to her concerns for her own safety there. The applicant's representative states that the applicant is eligible for adjustment of status, and section 212(a)(6)(A) is not a

ground of inadmissibility that would categorically bar the applicant's application for adjustment of status. The applicant's representative refers to the decision *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793-94 (9th Cir. 2004) that states that if permission to reapply is granted, the approval of Form I-212 is retroactive to the date on which the alien entered the United States, and the applicant would no longer be inadmissible under section 212(a)(9) of the Act. The applicant's representative then refers to the Legal Immigration Family Equity Act (December 21, 2000) (LIFE Act) that allows individuals present in the United States, on the date of enactment of the LIFE Act, who qualify for permanent residency, but are ineligible for adjustment of status because of an immigration violation, to pay a penalty to continue the process of adjustment of status. The applicant's representative states that the applicant was present in December 2000, the date of enactment of the LIFE Act and, therefore, she should qualify to continue the process of her application for adjustment of status. Finally, the applicant's representative requests that the Form I-212 be granted.

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's possible eligibility for adjustment of status under section 245(i) of the Act. These proceedings are limited to the issue of 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. That is the only issue that will be discussed.

The applicant's representative's assertions are not persuasive. The applicant's representative states that the applicant's illegal entry and continued presence in the United States after she was order removed were reasonable given her fear for her life in El Salvador. The applicant entered the United States in January 1992 and applied for asylum over three years later. In addition, after she was granted voluntary departure she could have traveled to Mexico or Guatemala as she had requested during her deportation proceedings. Through her actions the applicant has shown disregard for the immigration laws of this country. Additionally, the applicant's representative's statements are speculative as to the future effects the separation may cause to the applicant and her spouse.

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. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's spouse and child, but it will be just one of the determining factors.

The AAO is aware of the Ninth Circuit Court of Appeals decision, *Perez-Gonzalez, supra*. In this decision, the U.S. Ninth Circuit Court of Appeals held that if, as a matter of discretion, CIS approved the Form I-212, the approval would open the way for the alien to apply for adjustment of status under section 245(i) of the Act. *Perez-Gonzalez* concerned "the availability of adjustment of status once a favorable determination of permission to reapply has been made." See *Perez-Gonzalez* at 795. In addition, the AAO notes that *Perez-Gonzalez* states that "... if permission to reapply is granted the approval of Form I-212 is retroactive ... and therefore, the alien is no longer subject to the grounds of inadmissibility under section 212(a)(9)." The operative word is "if." In the present case permission to reapply was not granted and, therefore, the applicant remains inadmissible.

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 be a condonation of the alien's acts and could encourage others to enter without being admitted and work in the United States 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 court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter married her U.S. citizen spouse on October 13, 2001, over six years after she was placed in deportation proceedings and over four years and eight months after her voluntary departure order expired. The applicant's spouse should reasonably have been aware, at the time of their marriage, of the applicant's immigration violations and the possibility of her being removed. She now seeks relief based on that after-acquired equity. Therefore, hardship to her spouse will not be accorded great weight.

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her U.S. citizen spouse and child, and her 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 into the United States, her failure to depart the United States after she was granted voluntary departure, and after her voluntary departure order became a final order of deportation, her periods of unauthorized employment, 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. Her equity, marriage to a U.S. citizen, gained after she was placed in deportation proceedings, and after her voluntary departure order expired, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

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.