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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 15 2008**

IN RE:

[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 Director, California Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 El Salvador who, on August 13, 1993, filed a Request for Asylum in the United States (Form I-589), which was referred to the immigration judge on August 10, 1995, when the applicant was placed into immigration proceedings. The Form I-589 indicates that the applicant entered the United States without inspection on October 22, 1991. On December 1, 1995, the immigration judge ordered the applicant removed *in absentia*. On June 10, 1996, a warrant for the applicant's removal was issued. The applicant failed to depart the United States. In 2001, the applicant applied for Temporary Protected Status (TPS). The applicant was granted TPS and she has extended her TPS yearly since that date. On April 4, 2003, the applicant's lawful permanent resident spouse, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on April 25, 2006. On August 14, 2006, the applicant filed the Form I-212. The applicant 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). 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 reside in the United States with her spouse and adult children.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated February 13, 2007.

On appeal, counsel contends that the director abused her discretion in weighing the favorable and unfavorable factors in the applicant's case. *See Form I-290B and Attachment*, dated February 22, 2007. In support of his contentions, counsel submits only the referenced Form I-290B and the attachment. The entire record was considered in rendering a decision in this case.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- 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 five 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.
- (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 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 on a 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 Secretary has consented to the alien's reapplying for admission.

In analyzing whether an applicant who was placed into removal proceedings prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), may be found inadmissible pursuant to section 212(a)(9)(A) of the Act, the Department of State has issued guidance:

New 212(a)(9)(A)(i) and (ii) roughly correspond to former 212(a)(6)(A) and (6)(B), relating to aliens previously excluded/deported. The main change from the previous law is that the periods of inadmissibility have been substantially lengthened:

Arriving aliens denied admission and removed (excluded), who were previously ineligible for one year, are now generally ineligible for either: five years, if the removal order was issued on/after April 1, 1997, or ten years, if the removal (exclusion) order was issued prior to 4/1/97; *aliens ordered removed after having been admitted or after having entered without inspection, who were previously ineligible for five years, are now generally ineligible for ten years . . .* (emphasis added)

INA Section (Class Code)	Applies to:
. . . . 212(a)(9)(A)(ii) (92A or 92B or 92C) other aliens previously ordered removed	whether the order was issued before, on, or after 4/1/97

Department of State Cable (R 040134Z APR 98), P.L. 104-208 Update No. 36: 212(a)(9)(A)-(C), 212(a)(6)(A) and (B), (April 4, 1998), Ref: 96-State-239978, 97-State-62429, 97-State-235245, 98-State-51296.

The record of proceedings indicates that the applicant entered the United States without inspection and was ordered removed *in absentia* prior to April 1, 1997. The applicant failed to comply with the order of removal. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that [REDACTED] is a native and citizen of El Salvador who became a lawful permanent resident in 2003. The applicant and [REDACTED] have a 46-year old daughter who is a native of El Salvador who became a lawful permanent resident in 1992 and a naturalized U.S. citizen in 2001. The applicant and [REDACTED] have a 39-year old daughter who is a native of El Salvador who became a lawful permanent resident in 2001 and a naturalized U.S. citizen in 2008. The applicant and [REDACTED] have a 41-year old daughter and a 38-year old daughter who are both natives and citizens of El Salvador who became lawful permanent resident in 2006 and 2003, respectively. The AAO notes that the record does not contain evidence establishing that these children were born to the applicant. However, the AAO will consider these children as

positive factors in determining whether the applicant warrants a favorable exercise of discretion. The applicant is in her 60's and [REDACTED] is in his 70's.

The AAO now turns to a consideration of positive and adverse factors in the present case.

On appeal, counsel asserts that the applicant did not appear at her immigration hearing because she did not receive notice of the hearing and only learned of the removal order after her husband received a copy of the warrant of removal. Counsel's assertions are unpersuasive as the record contains an Order to Show Cause and Notice of Hearing (Form I-221), dated August 10, 1995, informing the applicant that she was to appear before the immigration judge on December 1, 1995. The applicant executed the Form I-221's certificate of service section which indicates that she received a copy of the Form I-221 in person on August 21, 1995.

On appeal, counsel contends that the director erred in finding the removal order to be a negative factor to be weighed in the exercise of discretion. While the BIA in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), declined to limit the factors to be considered in the exercise of discretion, the AAO will not consider the applicant's removal order itself to be a negative factor in the exercise of discretion. However, the applicant's failure to appear at an immigration hearing and her failure to comply with the order of removal are negative factors that will be considered in exercising our discretion.

On appeal, counsel asserts that the applicant is a 64-year old female whose husband is a lawful permanent resident. He asserts that the applicant has seven children living in the United States and that, while only four of those children have legal status in the United States, the others are in the process of receiving legal status in the United States. He asserts that it is reasonable to expect that the entire family will remain in the United States and the applicant will be separated from her family indefinitely if her application is denied. He asserts that the applicant has resided in the United States for fifteen years, has never been convicted of a crime and has an approved immigrant relative petition. He asserts that the applicant has family responsibilities and her family will suffer hardship if the applicant is not permitted to remain in the United States.

[REDACTED], in a declaration, states that if the applicant is forced to leave the United States the entire family will suffer. He states that he will suffer without the applicant's presence and will find himself lonely. He states that he will be sad, depressed and the separation will cause him much stress and anxiety. He states that his health will be in jeopardy and he will probably have another heart attack. He states that there will be no one to be by his side and see after his wellbeing. He states that the applicant is the one who is always there for him. He states that he will be miserable without her presence, support and love. He states that together they are able to care for and help the family to subsist in the United States and abroad. He states that he could not imagine continuing with everyday life without the applicant. He states that the applicant will suffer tremendously because she will miss her children and grandchildren. He states that the applicant's health will be placed at risk because she has a heart condition and such a traumatic event will bring her much sadness and depression. He states that he does not want his wife to suffer another heart attack. He states that the doctor has told his wife that she needs to be calm and he wants to be next to his wife and care for her health and wellbeing. He states that the applicant is the cornerstone of the family's lives and is the one who keeps the family together. He states that he and his wife instill in their children and grandchildren to be moral and ethical individuals. He states that his children and grandchildren in the United States will be miserable and worry about the applicant's health if she is forced to leave.

The applicant's children, in their declarations, state that their mother is an individual willing to sacrifice for others, has given her children much love, support and guidance and has always been there for the family. They state that she has instilled in them the desire to be moral, ethical and spiritual individuals. They state that their respective spouses and children love the applicant and that she looks after their well-being. They state that the applicant has always worked hard and it will be difficult for them to see her leave the United States. They state that they are concerned about their mother's heart condition for which she goes to a doctor and receives treatment in the United States. They state that if she is forced to leave her health will deteriorate. They state that they do not want their mother to perish in a country that has so much violence and poverty. One of the applicant's daughters states that the applicant helps her with her children, especially with her child who suffers from Down Syndrome.

The AAO notes that, even though [REDACTED] and his children state that the family has medical issues there is no evidence in the record, besides their declarations, to establish that any family members suffer from any physical or mental illnesses. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 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 7th Circuit Court of Appeals 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-Munoz 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 AAO finds these precedent legal decisions to establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

As established by the record, the favorable factors in this matter are the applicant's lawful permanent resident spouse, her two U.S. citizen daughters, her two lawful permanent resident daughters, the general hardship the applicant's family will suffer if the applicant is denied admission, her attempts to legalize her status in the United States, her current grant of TPS, her otherwise clear background and an approved immigrant visa petition. The AAO notes that the adjustment of status of the applicant's spouse and three of her daughters, as well as the filing of the immigrant visa petition benefiting her occurred after the applicant was placed into immigration proceedings and ordered removed. These factors are, therefore, "after-acquired equities" and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry into the United States; her failure to appear at an immigration hearing; her failure to comply with an order of removal; and her unauthorized presence in the United States prior to the filing of her application for asylum and from December 1, 1995, the date she was ordered removed, until she was granted TPS in 2001.

The applicant's original illegal entry into the United States; her failure to appear at an immigration hearing; her failure to comply with an order of removal; and her unlawful presence in the United States cannot be condoned. However, 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application approved.