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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER, VT Date: APR 15 2004

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)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(ii)

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, 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 Director, Vermont Service Center. The matter is now before the AAO on a motion to reconsider. The motion will be granted, and the January 29, 2003, AAO order dismissing the appeal will be withdrawn and the application approved.

The applicant is a native and a citizen of El Salvador who was present in the United States without a lawful admission or parole on December 13, 1994. The applicant was placed in removal proceedings and on March 3, 1995, she was ordered deported in absentia. The applicant failed to surrender for removal or depart from the United States and is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant married a native of El Salvador on August 30, 1997, and is a derivative beneficiary of an approved petition for alien relative filed by her husband's brother. 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).

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the application accordingly. *See Director Decision* dated August 30, 2002.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien 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 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 alien's reapplying for admission.

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 removal; the recency of the removal; 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 existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and others; and the need for the applicant's services in the United States.

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 director and AAO decisions state that the unfavorable factors in the applicant's case include her illegal entry to the United States on December 13, 1994, her failure to provide the Service with a change of address, her failure to appear for a removal hearing, her failure to depart the country after a removal order was issued, her illegal stay and employment in the United States and her marriage while in removal proceedings. The director concluded that these factors outweighed the fact that the applicant is a derivative of an approved Form I-130. On appeal the AAO found additional favorable factors. The applicant's family ties in the United States, her approval for Temporary Protective Status (TPS), the absence of a criminal record and the prospect of general hardship to her family members.

In his motion to reconsider counsel states that the director and the AAO did not weigh properly the favorable factors in this case.

After a review of the record of proceedings the AAO finds the director and the AAO erred in their previous decisions. The favorable factor's in this case include the applicant's family ties, the fact that she is the mother of a U.S. citizen child, is the derivative of an approved I-130 relative petition, has been approved for TPS, was issued employment authorization, has no criminal record since entering the United States in 1994, has numerous favorable recommendations from relatives and friends, and the prospect of general hardship to her family members. The AAO finds that these favorable factors outweigh the unfavorable factors.

While the applicant's unlawful entry, her failure to depart the U.S. after a final removal order was issued and her illegal stay and employment in the United States are very serious matters that cannot be condoned, the AAO finds that given all of the circumstances of the present case, the applicant has established that the favorable factors outweigh the adverse factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the motion to reconsider will be granted, the previous decisions withdrawn and the application approved.

ORDER: The previous decisions are withdrawn and the application approved.