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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 3 1 2004

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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, Nebraska 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 was removed from the United States on December 5, 1999 pursuant to section 235(b)(1) of the Immigration and Nationality Act (the Act). Subsequently, the applicant reentered the United States without inspection by an immigration officer and without first obtaining permission to reapply for admission to the United States. The applicant married a citizen of the United States on November 30, 2001. 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 reside in the United States with her spouse and child.

The director determined that the applicant failed to establish that the Immigration and Naturalization Service [now Citizenship and Immigration Services (CIS)] should, in the matter of discretion, approve the application. The I-212 application was denied accordingly. *Decision of the Director*, dated August 11, 2003.

On appeal, counsel asserts that the precedent decisions relied on by CIS are not applicable to the applicant and that the applicant has demonstrated equities in the United States that should be given greater weight. *Form I-290B*, dated September 11, 2003. The record does not offer any additional documentation to support the assertions of counsel.

The record contains a copy of a marriage certificate for the applicant and her spouse; a copy of the United States birth certificate of the applicant's spouse and child and copies of bills and financial documents for the applicant and her spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a) of the Act, 8 U.S.C. § 1182(a) states in pertinent part:

> (9) Aliens Previously Removed.-
>
> (A) Certain aliens previously removed.-
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> (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 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) [A]ny alien . . . who-
>
> (I) Has been ordered removed under section 240 or any other provision of law . . . 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 the Secretary of Homeland Security (Secretary)] has consented to the alien's reapplying for admission.

Approval of a Form I-212 Application for Permission to Apply for Admission after Deportation or Removal requires that the favorable aspects of the applicant's case outweigh the unfavorable aspects.

> In determining whether the consent required by statute should be granted, all pertinent circumstances relating to the applicant which are set forth in the record of proceedings are considered. These include but are not limited to the basis for deportation, recency of deportation, length of residence in the United States, the moral character of the applicant, his respect for law and order, evidence of reformation and rehabilitation, his family responsibilities, any inadmissibility to the United States under other sections of law, hardship involved to himself and others, and the need for his services in the United States.

Matter of Tin, 14 I&N Dec. 373, 374 (Comm. 1973).

The favorable factor in the application is the hardship imposed on the applicant's spouse and child by the applicant's inadmissibility to the United States.

The AAO notes that the applicant and her husband wed after the applicant was removed from the United States. The Seventh Circuit Court of Appeals held in *Garcia-Lopez v. INS,* 923 F.2d 72 (1991), that less weight is given to equities acquired after a deportation (removal) order has been entered. Furthermore, 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 (removal) proceedings, and with knowledge that the alien might be deported. *See Ghassan v. INS,* 972 F.2d 631 (5th Cir. 1992). The AAO finds that the applicant's husband should have been aware that the applicant had been previously removed from the United States when he married her. Hardship to the applicant's husband is thus given diminished weight.

The unfavorable factors in the application include the fact that the applicant is subject to reinstatement of her removal orders.

Section 241(a) of the Act states in pertinent part:

> (5) Reinstatement of removal orders against aliens illegally reentering. - If the Attorney General [Secretary] 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. (emphasis added)

The applicant reentered the United States, without inspection, within months of being removed. The applicant failed to apply for permission to reenter prior to her reentry and therefore, is subject to reinstatement under section 241(a)(5) of the Act. Counsel asserts that the recency of the applicant's deportation may not be considered unless the applicant is determined to be of poor moral character. Further, counsel contends that the "applicant's reentry without inspection is a minor violation ... and should therefore be afforded less weight." *Form I-290B*, dated September 11, 2003. The AAO finds that reinstatement provisions are applicable regardless of the applicant's moral character and that the provisions themselves evidence congressional intent to regard the applicant's reentry as more than "a minor violation."

Further, the AAO notes that the applicant may have accumulated time in unlawful presence from the date that she reentered the United States without inspection in 2000 until she obtained Temporary Protected Status in July 2001. The applicant's unlawful presence would render the applicant inadmissible to the United States under section 212(a)(9)(B) of the Act if she departs from the United States and would require the applicant to seek an approved Waiver of Grounds of Excludability (Form I-601).

The AAO notes that an applicant's prior residence in the United States is considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. *See Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). The applicant offers no evidence of reformation or rehabilitation from her disregard for the immigration laws of this country.

The applicant has not established that the favorable factors in her application outweigh the unfavorable factors. The director's denial of the I-212 application was thus proper.

In discretionary matters, the applicant bears the full burden of proving her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). The applicant has failed to establish that she warrants a favorable exercise of the Secretary's discretion. Therefore, the appeal will be dismissed

ORDER: The appeal is dismissed.