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

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 29 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:

[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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, Vermont Service Center, and 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 Honduras who entered the United States without a lawful admission or parole on April 29, 2000. On the same date the applicant was apprehended by the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) and the applicant was served with a Notice to Appear (NTA) for a removal hearing before an immigration judge. The applicant was released on a $2,500 bond. On January 24, 2001, the applicant failed to appear for a removal hearing and she was subsequently ordered removed in absentia by an immigration judge pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i) for having been present in the United States without being admitted or paroled. The applicant failed to surrender for removal or depart from the United States and on February 8, 2001, a Warrant of Removal/Deportation (Form I-205) was issued. The applicant is the beneficiary of a 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.

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 June 14, 2005.

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

> (A) Certain aliens 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 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 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; (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 reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel states that the Service's decision is arbitrary and capricious. In addition, counsel states that the applicant had very compelling reasons for remaining in the United States and the Service's denial will have profound adverse consequences on the applicant's children, especially her youngest, who requires constant medical attention. Additionally, on the Notice of Appeal to the AAO (Form I-290B) counsel states that he will be submitting a brief and/or evidence to the AAO within 30 days. On July 11, 2006, the AAO forwarded a fax to counsel informing him that this office had not received a brief or evidence related to this matter and unless counsel responded within five business days the appeal may be summarily dismissed. Counsel has not responded to the AAO's fax of July 11, 2006. The appeal was filed on July 18, 2005, and to this date, over one year later, no documentation has been received by the AAO. Therefore, the AAO will adjudicate the appeal based on the documentation within the record of proceeding.

Medical documentation provided shows that the applicant's child was born with several medical problems that require continuous medical attention and the applicant's constant attentiveness. In addition, the applicant's step-children need her care and attention since their mother passed away and they reside with the applicant and her spouse.

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 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 February 13, 2002, approximately two years after she was placed in removal proceedings, and over one year after she was ordered removed from the United States. The applicant's spouse should reasonably have been aware at the time of their marriage of the possibility of being removed. She now seeks relief based on that after-acquired equity. Therefore, hardship to her spouse will not be accorded great weight.

In his decision the Director states that the unfavorable factors in the applicant's case are her failure to attend her removal hearing, her failure to depart the United States after a removal order was issued and the breach of her bond.

The Director concluded that these factors outweigh the fact that the applicant is the spouse and parent of citizens of the United States and that the applicant is the beneficiary of an approved Form I-130.

The AAO finds that the Director failed to consider the other favorable factors including the fact that the applicant has no criminal record since entering the United States, the prospect of general hardship to her family and the serious medical condition of her U.S. citizen child.

The unfavorable factors in this case include the applicant's initial illegal entry, her failure to appear for a removal hearing, her failure to depart the United States after a removal order was issued and her unauthorized presence in the United States.

While the applicant's actions 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 appeal will be sustained and the application approved.

ORDER: The appeal of the denial of the Form I-212 is sustained and the application approved.