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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
*Office of Administrative Appeals*, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: Office: WASHINGTON, D.C. Date: JUN 05 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

**DISCUSSION**: The District Director, Washington, District of Columbia, 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 September 17, 1987, was placed into immigration proceedings after entering the United States without inspection two days earlier. On December 21, 1987, the applicant filed a Request for Asylum in the United States (Form I-589). On June 7, 1988, the immigration judge denied the applicant's applications for asylum and withholding of removal and granted her voluntary departure until August 1, 1988. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On February 5, 1990, the BIA dismissed the applicant's appeal and granted her thirty days of voluntary departure. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. The applicant applied for Temporary Protected Status (TPS). The applicant was granted an Advance Parole Document (Form I-512) and work authorization based on her TPS, valid until October 15, 1991. In 1991, the applicant utilized the Form I-512 to travel to El Salvador and reenter the United States.

On August 26, 1997, pursuant to ABC settlement procedures, the applicant was interviewed in regard to her Form I-589. On August 26, 1997, a Notice of Intent to Deny the Form I-589 was issued. On April 29, 1999, Unicco Serv. filed a Petition for Alien Worker (Form I-140), based on an approved Alien Labor Certification (ALC), on behalf of the applicant, which was approved on August 24, 1999. On June 26, 2000, the applicant filed an Application for Suspension of Deportation or Special Rule Cancellation of Removal (NACARA) (Form I-881). On August 31, 2002, the applicant's Form I-881 and Form I-589 were denied. On May 15, 2006, the applicant filed the Form I-212. The district director found the applicant inadmissible under section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A) and 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 remain in the United States with her three U.S. citizen children.

The district director determined that a favorable exercise of discretion was not warranted and denied the Form I-212 accordingly. *See District Director's Decision* dated August 11, 2008.

On appeal, counsel contends that the district director's denial misrepresents the facts, fails to adequately weigh relevant factors and misrepresented BIA decisions, which have been superseded. *See Counsel's Brief,* dated September 3, 2008.[1] In support of the appeal, counsel submits the referenced brief, copies of taxes and employment authorization documents issued to the applicant. The entire record was reviewed in rendering a decision in this case.

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

> (A) Certain aliens previously removed.-
>
> . . . .

[1] The AAO notes that counsel states the applicant filed the Form I-212 in anticipation of consular processing her Form I-140. The AAO finds that the applicant has accrued unlawful presence from August 31, 2002, until the present time, and would become inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for seeking admission within ten years of her last departure, if she were to leave the United States.

> (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 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.

The above provision holding aliens inadmissible for a period of ten years applies to exclusion or deportation orders issued both before and after April 1, 1997, the effective date of section 212(a)(9)(A) of the Act. The AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), and, therefore, must receive permission to reapply for admission to the United States.

The record reflects that the applicant is single. The applicant has a 17-year-old daughter, a 12-year-old son and a 9-year-old son who are all U.S. citizens by birth. The applicant is in her 40's.

On appeal, counsel asserts that the district director erred in stating that the applicant has unlawfully resided in the United States for more than 18 years. Counsel states that the applicant registered for TPS in 1991 and employment authorization during the pendency of her asylum application as a registered class member of the ABC settlement until the present. He states that the applicant has resided in the United States, despite her failure to comply with voluntary departure, under the color of law. The AAO finds that, while the applicant received TPS in 1991, she did not reapply for TPS until August 25, 2008. The applicant's 2008 TPS application remains pending.[2] While the applicant was issued employment authorization from May 23, 1990 to October 15, 1991, from August 7, 1995 until August 7, 2003, and from October 14, 2005 until September 25, 2008, except for 1991, all employment authorizations issued to the applicant were subject to her pending Form I-589 or Form I-881. As such, the applicant began to accrue unlawful presence as of August 31, 2002, the date on which her Form I-589 and Form I-881 were denied. While the AAO finds that there is no evidence to establish that the applicant made any misrepresentations in applying for employment authorization

[2] The AAO notes that the applicant does not appear to be eligible to file late registration TPS because she did not file within 60 days of the denial of the Form I-589 and Form I-881.

since 2002, the record reflects that the applicant was not entitled to employment authorization as an asylum or NACARA applicant from 2002 until 2008.[3]

On appeal, counsel states that the applicant has three U.S. citizen children, she has not been arrested since 1987 and she has been financially responsible since 1991. Counsel asserts that the district director failed to perform any analysis of the need for the applicant's services in the United States as reflected by the approved Form I-140. Counsel states that no consideration was given to the applicant's good moral character or the fact that she has raised three children as a single-mother who has diligently paid her taxes. Counsel states that no consideration was given to the letters of recommendation issued in support of the applicant. Counsel states that no consideration was given to the hardship that the applicant's children will experience if separated from the applicant, their sole custodian. Counsel states that no consideration is given to the conditions the applicant will face in El Salvador, a country which remains a TPS-designated country. Counsel states that the economic and social conditions in El Salvador are significantly worse than in other countries.

The applicant, in a letter accompanying the Form I-212, states that the civil war in El Salvador made her life difficult and made her seek a better life in the United States. She states that she has always tried to obey the law and obtain legal permanent resident status in the United States. She states that she has started a family and has tried to secure her future. She states that, while the fathers of her children are U.S. citizens, they pay minimal support and care very little about the wellbeing of her children. She states that she currently has the wages of her children's fathers garnished in order to ensure payment of child support. She states that she regrets not obeying the judge's order, but she spoke very little English at the time and her attorney was not very helpful. She states that she was also preoccupied with helping her father and mother, who remained in El Salvador. She states that she has been a good member of society, has never been arrested or detained by the police, has paid her taxes and focused on building a better future for her three U.S. citizen children who all go to school. She states that the lives of her children would be emotionally and economically devastated if she were not allowed to remain in the United States. She states that she is their physical and legal custodian and that without her involvement, the children's readiness for classes would be gravely disturbed. She states that each of her children will lose the warmth and tenderness of her motherly love and that her children's performances in school and elsewhere would suffer a sharp decline. She states that if she is not with her children, she fears that they would fall into neglect and would ultimately require the assistance of the U.S. government. She states that she would also suffer from the grief of an untimely separation from her children. She states that, while she could take the children with her to El Salvador, there is a likelihood that they would fall prey to gang violence. She states that her return to El Salvador would also fill her with memories of the atrocities that occurred during the civil war. She states that she has lost any contacts in El Salvador and will have no one to turn to. She states that the family would also suffer economical difficulties because she lacks an education and would find it difficult to find work in El Salvador and practically impossible to send money to her children if they remained in the United States. She states that she has been continuously employed in the United States and currently provides the majority of the income needed to support her family.

[3] The record establishes that the applicant's employment authorization documents during this time were issued subject to asylum or NACARA regulations and that there was no underlying TPS application.

Letters of recommendation from friends and employers, state that the applicant is honest, hard-working, upstanding, reliable, self-sufficient, friendly, conscientious, responsible and trustworthy. They state that the applicant has a great character and that she has a strong commitment to her family.

Police Clearance letters from Fairfax, Virginia, indicate that the applicant has no arrest record. Tax records establish that the applicant has paid federal taxes from 2000 through 2005 and in 2007. Social Security records establish that the applicant has been employed in the United States since 1989 to 1998.

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 three U.S. citizen children, general hardship to the applicant and her family if she were denied admission to the United States, the absence of a criminal background, her extended presence in the United States under pending ABC settlement related applications, her payment of federal taxes, and the approved immigrant visa petition filed on her behalf. The AAO notes that the birth of the applicant's children and the filing of the immigrant visa petition benefiting her occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's original illegal entry; her failure to comply with an order of voluntary departure; her failure to comply with an order of removal; her unlawful presence in the United States since 2002; and her unauthorized employment in the United States from 1991 until 1995.

The applicant's original illegal entry, her failure to comply with an order of voluntary departure, her failure to comply with an order of removal, her unlawful presence and unauthorized employment 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.