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U.S. Citizenship
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[REDACTED]

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 15 2006**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 dismissed.

The applicant is a native and citizen of El Salvador who, in 1994, entered the United States without inspection. The applicant remained in the United States and worked without authorization. On March 24, 1998, the applicant filed an Application For Asylum or Withholding of Removal (Form I-589). On May 14, 1998, the applicant's Form I-589 was referred to an immigration judge. On July 8, 1998, the applicant failed to appear at her immigration hearing and the immigration judge ordered her removed in absentia. The applicant filed a motion to reopen proceedings. On October 27, 1998, the applicant's motion to reopen proceedings was granted because she had failed to appear at her immigration hearing due to circumstances beyond her control. On August 13, 1999, the applicant withdrew her applications for asylum, withholding of removal and convention against torture and the immigration judge granted the applicant voluntary departure until December 13, 1999. The applicant filed a motion to reopen proceedings before the immigration judge, which was denied as untimely filed. 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 filed an appeal of the immigration judge's denial of the motion to reopen proceedings with the Board of Immigration Appeals (BIA). The BIA summarily affirmed the immigration judge's denial of the applicant's motion to reopen. The applicant failed to present herself for removal or to depart the United States and has since remained in the United States. From March 9, 2001, until present, the applicant has applied for and been granted Temporary Protected Status (TPS) with corresponding work authorization documents. On July 28, 2001, the applicant married her naturalized U.S. citizen husband, [REDACTED], filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was granted on August 28, 2003. On May 17, 2004, the applicant filed the Form I-212. The applicant is 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 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.

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The director denied the Form I-212 accordingly. *See Director's Decision* dated August 9, 2005.

On appeal, counsel contends that the applicant is submitting additional documentation to show that she warrants a favorable exercise of discretion. *See Applicant's Brief*, dated August 29, 2005. In support of his contentions, counsel submitted documentation evidencing the applicant's activities with Concept 7 and copies of documentation previously submitted. 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.-

....

(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 . . .

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 record of proceedings indicates that the applicant entered the United States without inspection and, when granted voluntary departure, failed to voluntarily depart the United States. The voluntary departure became a final order of removal with which the applicant failed to comply. Therefore, the AAO finds that the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act and, therefore, must receive permission to reapply for admission.

The record reflects that [REDACTED] is a native of El Salvador who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 2000. The applicant and [REDACTED] do not have any children together. The applicant has a fifteen-year old daughter who is a native and citizen of El Salvador and has resided in El Salvador her entire life. The applicant sends money to her daughter in El Salvador. On January 24, 2000, the applicant was arrested and charged with battery of a cohabitant. The charges against the applicant were dropped. On June 5, 2000, the applicant was convicted of driving a vehicle while having greater than 0.08 percent of alcohol in her blood and was sentenced to 36 months of probation and 3 days in jail.

On appeal, counsel contends that the applicant warrants a favorable exercise of discretion because she is a beneficiary of TPS and an approved immigrant petition, she is dedicated to providing for her daughter economically and she has made changes in her life including caring for abused and neglected children through Concept 7 by becoming a foster parent.

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-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 AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's U.S. citizen spouse, an approved immigrant petition for alien relative and her activities as a foster-parent for abused children.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States, extended unauthorized residence and employment in the United States prior to filing the Form I-589, failure to depart the United States under an order of voluntary departure, non-compliance with an order of removal, her conviction for driving under the influence and her extended unauthorized residence and employment in the United States after failing to comply with voluntary departure and prior to receiving TPS.

The applicant in the instant case has multiple immigration violations and a criminal conviction. The applicant's actions in this matter cannot be condoned. Moreover, the AAO finds that the applicant's marriage, approval of an immigrant petition and support of foster-children occurred after the applicant failed to comply with the order of voluntary departure and the order of voluntary departure became an order of removal in 1999. The AAO finds that these factors are "after-acquired equities" and that any favorable weight derived from the applicant's marriage, immigrant petition or activities as a foster-parent is accorded diminished weight. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

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

ORDER: The appeal is dismissed.