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FILE: [REDACTED] Office: HOUSTON, TX Date: JUN 02 2008

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:



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 District Director, Houston, Texas 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 May 7, 1989, was placed into immigration proceedings after she entered the United States without inspection. The applicant filed a Request for Asylum in the United States (Form I-589) before the immigration court. On June 13, 1990, the applicant withdrew her asylum and withholding of removal applications and the immigration judge granted the applicant voluntary departure until December 15, 1990. The applicant waived her right to appeal this decision. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On November 2, 1996, the applicant married her U.S. citizen husband, [REDACTED]

On April 30, 2001, [REDACTED] a filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved. On the same day, the applicant concurrently filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the Form I-130. On January 21, 2003, the applicant appeared at Citizenship and Immigration Services' (CIS) Houston District Office. During the applicant's interview it was discovered that the applicant had an outstanding order of removal. On July 22, 2004, the applicant's Form I-485 was returned to her for lack of jurisdiction. On August 6, 2004, a warrant for the applicant's removal was issued. The applicant appealed the rejection of the Form I-485 to the Board of Immigration Appeals (BIA). On September 30, 2005, the BIA dismissed the applicant's appeal for lack of jurisdiction. The applicant filed a motion to reopen immigration proceedings before the immigration judge. On August 4, 2006, the immigration judge denied the applicant's motion to reopen. The applicant filed a second motion reopen before the immigration judge, which was denied on October 23, 2006. On October 26, 2006, the applicant was removed from the United States and returned to El Salvador, where she has since resided. On January 10, 2007, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside in the United States with her U.S. citizen spouse and children.

The district director determined that no purpose would be served in adjudicating the Form I-212 because the applicant was inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure and she needed to file an Application for Waiver of Grounds of Inadmissibility (Form I-601). *See District Director's Decision* dated March 20, 2007.

On appeal, counsel contends that a waiver for the applicant's grounds of inadmissibility is available and submits a Form I-601 on appeal. *See Form I-290B*, dated April 6, 2007. In support of her contentions, counsel submits a brief, a completed Form I-601 and copies of documentation previously provided. The entire record was considered in rendering a decision in this case.

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

(A) Certain aliens 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 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 on a 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 Secretary has consented to the alien's reapplying for admission.

Counsel, on appeal, contends that she is filing a Form I-601 with the appeal in order to waive the applicant's grounds of inadmissibility. The AAO finds that counsel has not filed the Form I-601 but merely submitted a completed Form I-601 with the appeal. An application is not properly filed with Citizenship and Immigration Services (CIS) until it is submitted to the office with jurisdiction, with the appropriate filing fee. *See* 8 C.F.R. § 103.2(a). In the applicant's case, the Form I-601 may be submitted to the U.S. Embassy or Consulate at the time she applies for a visa to come to the United States for forwarding to the appropriate CIS overseas office for adjudication. The AAO notes however, that the district director erred in finding that the applicant's Form I-212 should be denied because she also found the applicant to be inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant's inadmissibility under 212(a)(9)(B)(i)(II) of the Act may be waived under section 212(a)(9)(B)(v) of the Act by filing a Form I-601. It is only appropriate to deny an applicant's Form I-212 without making a determination as to whether the applicant warrants a favorable exercise of discretion when the applicant is *mandatorily* inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964).

Counsel, on appeal, asserts that the applicant did not pay a bond for the grant of voluntary removal, which became an order of removal, and she is therefore not subject to the bar for failure to depart the United States. Counsel's rationale for this assertion is not clear and she has cited no precedent legal decisions to support her reasoning. The AAO also notes that the applicant is inadmissible under section 212(a)(9)(A)(ii) for having been previously removed from the United States and not for failure to depart the United States. Moreover, contrary to counsel's statement, the AAO finds that an immigration bond was filed on behalf of the applicant

on May 9, 1989, and it was breached at the time the applicant failed to depart the United States pursuant to the grant of voluntary departure. *See Immigration Bond (Form I-352)*, dated May 9, 1989.

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant has a 17-year old daughter and a 15-year old son who are both U.S. citizens by birth. The AAO notes that the record does not contain birth certificates for the applicant's daughter and son. The applicant is in her 40's and [REDACTED] is in his 50's.

The AAO now turns to a consideration of positive and adverse factors in the present case.

On appeal, counsel asserts the applicant resided in the United States from 1989 to 2006 and did not realize that she was still subject to the original order of removal because she was permitted to apply for and received employment authorization through an Application for Temporary Protected Status (TPS). She asserts that the applicant is a person of good moral character who has never been arrested and has filed income taxes along with her spouse when she was working. She asserts that the applicant has sent money to support her mother and children in El Salvador. She asserts that the applicant encourages her children to do well in school and is a supportive wife. She asserts that the applicant and her spouse were the victims of an unscrupulous notary public who failed to identify the need to submit a motion to reopen the applicant's immigration proceedings for changed circumstances. She asserts that, had the applicant filed an affirmative motion to reopen, the outcome of her case might have been different and the family would still be together. Counsel asserts that the applicant's U.S. citizen spouse is a veteran being treated for Post Traumatic Stress Disorder (PTSD) who is raising his two stepchildren in the absence of the applicant. She asserts that one of the children has been experiencing difficulty in school since the applicant's removal.

[REDACTED], in his letter, states that his wife is very helpful in many ways, as his wife and a home nurse. He states that she kept him up to date on his medication and doctor's appointments. He states that his wife worked and was the person who made sure that the children's health, school and morals were cared for. He states that it is difficult for him since he is disabled. He states that he needs his wife to talk to and discuss things. He states that he loves his wife and needs her by his side.

The applicant's daughter, in her letter, states that she is a troubled teenager, whose problems are partially caused by her separation from the applicant. She states that she has been under a lot of pressure since the applicant left the United States and life is harder in her household. She states that her father is disabled and she has been forced to work because his disability check would otherwise be the only money coming into the household and it is insufficient. She states that her father has to not only take care of their household bills but also her mother's bills and other necessities. She states that she has been caring for her father and brother and she no longer has a social life, extracurricular activities or free time. She states that the applicant was her best friend and life is harder without her advice and help.

The applicant's son, in his letter, states that he needs his mother because he misses her. He states that when he has problems she is no longer there for him to be able to talk to. He states that his father cannot do a lot of things because he is getting old and that is why he needs his mother at home. He states that his mother used to take him to practice and races, cooked for him, did the laundry and dropped him off at school, all things that he misses.

A form letter written by [REDACTED], a psychiatrist with the Department of Veterans Affairs, indicates that [REDACTED] is a veteran being treated for PTSD who is taking psychotropic medication.

Documentation in the record indicates that the applicant was granted work authorization from June 13, 1991, until December 31, 1994, from October 31, 1997, until October 31, 1998, from July 20, 2001, until July 19, 2002, and from February 2, 2005, until February 1, 2006.

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 7<sup>th</sup> Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 U.S. citizen spouse, two U.S. citizen children, the hardship that family members would suffer if the applicant is denied admission, in particular with regards to her husband’s medical problems, payment of federal taxes, and an approved immigrant visa petition for alien relative. The AAO notes that the applicant’s marriage, the birth of her children and the filing of the immigrant visa petition benefiting her occurred after the applicant was placed into immigration proceedings. All of these factors are “after-acquired equities” and the AAO accords them diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant’s original illegal entry into the United States; her failure to comply with an order of voluntary departure; her failure to comply with an order of removal; periods of unauthorized presence and employment in the United States; and her inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for more than one year, between April 1, 1997, the date of enactment of unlawful presence provisions under the Act, and October 26, 2006, the date on which she was removed from the United States.

The applicant’s immigration violations 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.