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[REDACTED]

Hy

Date: JUL 30 2012 Office: SAN DIEGO, CALIFORNIA FILE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission after Deportation or Removal (Form I-212) was denied by the District Director, San Diego, California, 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 Peru who was found inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been removed from the United States.¹ The applicant now 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 denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). *Decision of the District Director*, dated January 27, 2012.²

On appeal, the applicant, through counsel, claims that the District Director had "numerous erroneous conclusions of facts" in his decision. *Form I-290B, Notice of Appeal or Motion*, filed February 29, 2012.

The record includes, but is not limited to, counsel's brief in support of the Form I-212, statements from the applicant and her children, letters of support, psychological evaluations of the applicant's husband and children, medical documentation for the applicant's mother and daughter, school records for the applicant's children, financial documents, household and utility bills, photographs, country-conditions documents on Peru, and documents pertaining to the applicant's removal proceeding. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (A) Certain alien previously removed.-
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 - (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

¹ The District Director also determined that the applicant is inadmissible to the United States 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 from the United States.

² The AAO notes that the District Director incorrectly stated that the applicant was ineligible for a waiver of her inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the [Secretary] has consented to the aliens' reapplying for admission.

The record of proceeding reveals that on December 13, 1990, the applicant entered the United States without inspection. On October 9, 1991, an immigration judge granted the applicant voluntary departure to depart the United States by January 9, 1992. The applicant failed to depart the United States. On March 27, 2008, the applicant was removed from the United States. As such, the applicant is inadmissible under section 212(a)(9)(A)(ii)(I) of the Act for being removed from the United States.

In a brief in support of the Form I-212 dated September 16, 2010, counsel claims that the applicant's husband and children are suffering extreme and unusual mental and emotional hardship since the applicant's departure from the United States. In a psychological evaluation dated May 22, 2010, [REDACTED] states the applicant's family is having an "incredibly stressful and difficult time" being separated from the applicant. In a statement dated July 23, 2010, the applicant states that she is worried about her husband because of his stress level. [REDACTED] diagnosed the applicant's husband with major depressive disorder and anxiety disorder. [REDACTED] reports that the applicant's oldest son "has been seriously impacted by the separation;" he has become introverted, shy, and sad; and she diagnosed him with depressive disorder. The applicant states that since she has been separated from her oldest son, his personality has changed and his grades are suffering. [REDACTED] reports that the applicant's husband fears that their son does not have enough parental supervision and he may get into trouble with the wrong crowd. [REDACTED] also diagnosed their daughter with adjustment disorder with depression, and their youngest son with adjustment disorder with depression and anxiety. The record establishes that the applicant's youngest son and daughter reside with her in Peru. [REDACTED] indicates that according to the applicant's husband, it would be impossible for him to move to Peru because of his age and lack of employment options.

Counsel states the applicant's husband has full financial responsibility for three households: the applicant's in Peru, and his own and his in-laws' in the United States. [REDACTED] states that the applicant's husband told her he is suffering financially by having to support himself and the applicant in Peru, as she has been unable to find employment in Peru. Documentation in the record establishes that the applicant's husband transfers money to the applicant in Peru. [REDACTED] reports that the applicant's husband sold two of their cars, rented out a room in his home for extra income, and increased his work hours. Documentation in the record establishes that the applicant's husband also receives monthly Social Security benefits of \$1,092.

Counsel states that when the applicant was in the United States, she financially and physically supported her elderly parents. The applicant states that since she has been separated from her parents, she is worried about them. In a statement dated May 10, 2010, the applicant's mother claims that she is "sad and going through some hard times" since the applicant was deported. She suffers from heart angina, which has worsened since the applicant returned to Peru. Medical documentation in the record establishes that the applicant's mother suffers from numerous medical conditions, including chest pain, coronary heart disease, hypertension, hypercholesterolemia, breast cancer, and colon cancer. The applicant's father states he is blind, and when the applicant resided in the United States, she helped support him. He also states that he suffered a stroke after the applicant returned to Peru.

Regarding the hardship the applicant's husband and children will face, the AAO notes that unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements that must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's husband, children, and parents, but their hardship will be just one of the determining factors.

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 Seventh 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 a discretionary determination. 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 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 AAO finds that the applicant's entry into the United States without inspection, her unlawful presence, and her removal from the United States are unfavorable factors.

The favorable factors in this matter are the applicant's family ties to her U.S. citizen husband and children; hardship to her spouse, parents, and children; her lack of a criminal record; letters of support from her community; and the approval of a petition for alien relative filed by the applicant's husband on her behalf. Despite the diminished weight given to the after-acquired equities, the AAO finds that the favorable factors outweigh the negative factors.

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, the AAO concludes that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

Even though the AAO has now sustained the applicant's appeal and approved her Form I-212, the applicant will need to file an Application for Waiver of Grounds of Inadmissibility (Form I-601), to waive her ground of inadmissibility under 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 from the United States.

ORDER: The appeal is sustained. The application is approved.