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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: NEWARK, NJ

Date:

FEB 18 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)

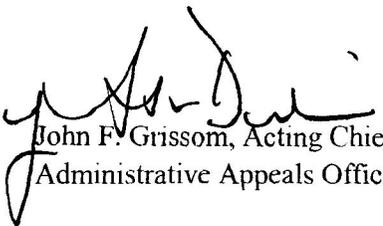
ON BEHALF OF APPLICANT:

[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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, Newark, New Jersey 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 Peru who, on February 26, 1994, appeared at the Miami International Airport. The applicant presented her Peruvian passport and a valid U.S. nonimmigrant visa. The applicant was placed into secondary inspections, where she admitted that she intended to enter the United States in order to reside and work there. The applicant admitted that she knew that it was illegal for her to enter the United States and seek employment. The applicant was found inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant without valid documentation. The applicant was permitted to withdraw her application for admission and return to Peru. On December 29, 1994, the applicant filed a Request for Asylum in the United States (Form I-589). The applicant indicated that she had entered the United States without inspection on October 6, 1994. On December 15, 1995, the Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On August 30, 1995, the applicant withdrew her applications for asylum and withholding of removal and the immigration judge granted her voluntary departure until March 1, 1996. The applicant failed to surrender for removal or depart from the United States, thereby changing the grant of voluntary departure to a final order of removal. On January 11, 1998, a warrant for the applicant's removal was issued. On December 15, 1999, the applicant married her U.S. citizen spouse, [REDACTED]. On February 7, 2001, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On March 14, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the Form I-130. On August 8, 2002, the applicant filed the Form I-212. On January 8, 2007, the Form I-485 was administratively closed for lack of jurisdiction. On the same day, the Form I-130 was approved. The applicant is inadmissible under 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 reside in the United States with her U.S. citizen spouse and two U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated February 20, 2007.

On appeal, counsel contends that the district director erred in denying the Form I-212. Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated April 19, 2007. In support of his contentions, counsel submits the referenced letter, an affidavit from [REDACTED], employment, educational and financial documentation and copies of documentation previously provided.

On December 23, 2008, the AAO issued a notice to the applicant and counsel informing the parties that it was this office's intent to dismiss the applicant's appeal based upon evidence establishing further unfavorable factors in the applicant's case, such as her attempt to enter the United States by fraud in 1994 and inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act. *See AAO's NOID*, dated December 23, 2008. The applicant and counsel were granted fifteen days to provide evidence to overcome, fully and persuasively, these findings. On January 7, 2009, the AAO received a response from counsel which included medical documentation related to the applicant and her

spouse. The AAO notes that the applicant obtained new counsel to file the response. As such, the AAO will acknowledge prior counsel's arguments, but will only forward a copy of this office's decision to the applicant's new counsel. The entire record was reviewed 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.

The record reflects that [REDACTED] is a native of Colombia who became a lawful permanent resident in 1985 and a naturalized U.S. citizen in 1997. The applicant and [REDACTED] have an eight-year old son and a seven-year old daughter who are both U.S. citizens by birth. The applicant is in her 40's and [REDACTED] is in his 50's.

On appeal, counsel contends that the district director failed to identify or consider the vast majority of the applicant's positive factors and failed to give her positive factors sufficient weight. He contends that the district director overstated and gave too much weight to the applicant's adverse factors. The AAO finds counsel's contentions to be unpersuasive. The AAO finds that the district director did not overstate or give too much weight to the applicant's negative factors.

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 such, the district director was justified in according less weight to the equities that the applicant acquired after she was placed into removal proceedings.

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

Counsel asserts that the applicant is the spouse of a U.S. citizen and the devoted mother of two U.S. citizen children. Counsel asserts that the applicant has no criminal record. Counsel asserts that the applicant has been a loving and supportive wife to her U.S. citizen husband. Counsel asserts that the district director failed to consider the applicant's two U.S. citizen children and the profound hardship the applicant, [REDACTED] and the children will suffer if the applicant's application is denied.

Counsel asserts that the applicant would suffer permanent separation from her children if she was returned to Peru and the children remained in the United States with [REDACTED]. Counsel asserts that the applicant's children would suffer a life without their mother. Counsel asserts that the children would be deprived of the security and loving support of their mother, who serves her family as a full-time, stay-at-home mother. Counsel asserts that it is the applicant who tends to their personal, medical, educational, social and household needs. Counsel asserts that [REDACTED] would lose his loving wife, confidante and partner of more than seven years. Counsel asserts that [REDACTED] would be forced to raise his children alone. Counsel asserts that [REDACTED] would be forced to find additional employment in order to afford care for his children, which would in turn lead to his inability to spend time with his children.

Counsel asserts that, if the family accompanied the applicant to Peru, her children would suffer a life in a foreign country unfamiliar to them and devoid of the security, comfort and privileges that [REDACTED] has worked his entire life to secure. Counsel asserts that the children would forfeit their right to reap the benefits of being raised in a secure, loving, supportive and stable environment in the United States. Counsel asserts that they would be subject to the inferiority of the Peruvian educational and medical facilities. Counsel asserts that it would be traumatic if the children were exposed to a foreign country, culture, school and life at such a tender age. Counsel asserts that [REDACTED] will forfeit everything that he has worked for in the United States. Counsel asserts that [REDACTED] has been employed by Paramount Hotel for almost 23 years and is thoroughly integrated into American life. Counsel asserts that [REDACTED] would confront an uncertainty of life in a foreign country he has never visited or lived in. Counsel asserts that the family would lose [REDACTED] current yearly income of \$60,000, and [REDACTED] would be able to earn only a fraction of that

income in Peru. Counsel asserts that the family would lose the health and employment benefits that it currently has through [REDACTED] employment. Counsel asserts that the family's dislocation would not be ameliorated by the support of extended family in Peru. Counsel asserts that the applicant is an only child and her parents, while they reside in Peru, are of retirement age and would be able to offer limited support.

Counsel asserts that, if [REDACTED] did not accompany the applicant and his children to Peru, the applicant would be forced to raise her children alone and have the added emotional trauma of losing her husband and support network in the United States. Counsel asserts that the loss of his children would be catastrophic to [REDACTED], especially at his relatively advanced age.

[REDACTED], in his affidavit and letter accompanying the Form I-212, states that his family would be destroyed if the applicant's Form I-212 is denied. He states that he thought he would never find love again after his former spouse abandoned him. He states that the applicant is a good woman, who is very serious, honest, sincere, warm and centered in her mind and heart. He states that the applicant stopped working in 2005 and now cares for the children on a full-time basis. He states that, at his age, it would be near impossible for him to raise the children alone. He states that his son has been absent from school in 2006/2007 on fourteen occasions due to a throat problem. He states that the children need the applicant and would be traumatized by the loss of their mother. He states that he needs the applicant on an emotional and spiritual level and would be devastated without her. He states that he must continue to support his family by working and would have to take a second job to make ends meet, which would cause his children to suffer terribly and be neglected if he were to raise them alone.

[REDACTED] states that relocating the family to Peru would be a terrible hardship that would deny his children everything that he has worked to achieve in the United States. He states that the children will be unable to receive a decent education and have a stable life in a country as depressed as Peru. He states that he would fear for the children's safety and wellbeing in Peru. He states that he has never been to Peru and does not have family there. He states that although the applicant's parents reside in Peru, they are old and the applicant is an only child. He states that the family would be subjected to a life of dislocation and poverty. He states that he does not believe he could find a decent job in Peru and any job that he found would be insufficient to support the family. He states that he has worked for Paramount Hotel for 23 years, earns \$60,000 per year, and receives employment benefits such as health insurance and 401(k). He states that he is attached to U.S. customs, laws and its system. He states that he cannot imagine giving this up to relocate the family to Peru. He states that if the children chose to live with their mother in Peru and he remained in the United States, he would be alone, with no family or support and the loss would be too much for him to bear.

Country conditions reports in the record reflect that Peru is a poor country that suffers from high unemployment (9.6 percent) and that more than half of the country (54.9 percent) is underemployed and lives below the poverty line. The reports also reflect that serious human rights problems exist in Peru, including violence and discrimination against women, violence against children, as well as sexual abuse and trafficking in children. *See U.S. Department of State, Country Reports on Human Rights Practices, 2006, Peru* and *U.S. Department of State Country Background Notes, Peru, 2006*. The evidence, however, does not establish that Mr. Rivera, the children or the applicant would be

unable to earn sufficient income nor does it establish the characteristics of the population that earns only a minimum wage, or that the family would be subject to the human rights problems listed.

Documentation establishes that [REDACTED] the applicant and their children receive health insurance, as well as accident, sickness and accidental death and life insurance benefits through [REDACTED] employment. A letter from [REDACTED] Human Resource Coordinator for Paramount Hotel, confirms that the applicant has been employed with them since 1984. Letters from [REDACTED] and [REDACTED], School Principals in the Elizabeth Public Schools system, confirm that the applicant's children are enrolled in school. A computer printout indicates that the applicant's son has been absent from school during the 2006 through 2007 school year on 13 occasions. A hand-written note in the margin of the computer printout from [REDACTED], School Counselor, states that the applicant's son has been absent for illness due to tonsil and adenoid problems.

In response to the AAO's NOID, counsel submitted medical documentation. This documentation consists of a letter from [REDACTED], M.D., a letter from [REDACTED], and photocopies of prescriptions.

The letter from [REDACTED], dated December 30, 2008, states that the applicant has been under his care since October 28, 2004, for systemic lupus erythematosus. He states that this is a potentially debilitating auto-immune disease which requires the applicant regularly visit a rheumatology specialist. He states that the applicant's medications include plaquenil and prednisone. Copies of prescriptions indicate that the applicant was issued prescriptions for prednisone and hydroxychloroquine in October and December 2008.

The letter from [REDACTED], dated December 31, 2008, states that [REDACTED] has been under his care for hypertension, hyperlipidemia, and benign prostate enlargement. He states that [REDACTED] is currently on **multiple** medications and requires close medical follow-up. Copies of prescriptions indicate that [REDACTED] was issued prescriptions for hyzaar and simvastatin in December 2008.

In response to the AAO's NOID, counsel contends that the applicant's family will suffer emotional, financial and psychological hardship if the applicant is removed from the United States. Counsel asserts that there are additional medical hardships the family would suffer because [REDACTED] suffers from hypertension, hyperlipidemia and prostate enlargement, and the applicant suffers from systemic lupus erythematosus. He asserts that [REDACTED] and the applicant require specialized treatment for their conditions and the availability and quality of such treatment in Peru would be limited. Counsel asserts that the family will not have the financial resources to undertake the required treatments or purchase medication in Peru, which could be hazardous to their long-term health and survival. The AAO notes that there is no evidence in the record to establish that the applicant would be unable to receive appropriate care or medication in Peru. The AAO also notes that there is no evidence in the record to establish that [REDACTED] would be unable to receive appropriate care or medication in the absence of the applicant or in Peru. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA

1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that the applicant was not aware of the warrant of removal issued against her in 1998 because the notice was sent to her old address and, therefore, her failure to comply with her removal order cannot be used as a negative factor. However, the record reflects that the applicant was informed in person that she was required to depart the United States prior to March 1, 1996, in order to avoid an order of removal and that her discretionary relief would be limited as a consequence of her failure to depart. Additionally, the applicant was notified of the consequences of failing to inform the immigration court of any changes in her address. The record does not contain a notice of change of address prior to the notice filed by the applicant in 2002. As such, the applicant was aware that a removal order would be issued against her and that her failure to depart the United States was a failure to comply with voluntary departure and subsequently a failure to comply with a removal order once voluntary departure expired.

Counsel asserts that the district director erred in finding the applicant's February 1994 attempted entry, withdrawal of her application for admission and her voluntary return to Peru to be negative factors. He asserts that the applicant's honesty in regard to her intent to seek work in the United States should be viewed as a positive factor. The AAO finds, however, that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud on February 26, 1994, by presenting her nonimmigrant visa for admission while she had immigrant intent, as reflected by her admission that she intended to reside and work in the United States and was aware that it was not legal for her to do so without proper documentation. While counsel asserts that the applicant was honest in her dealings with the immigration officers at the airport, the record reflects that the applicant admitted to her intentions only after she had been placed into secondary inspections and confronted with documentation establishing her intent to work in the United States. *See Notice of Visa Cancellation/Border Crossing Card Voidance (Form I-275), Record of Sworn Statement and Attached Documents*, dated February 26, 1994; *Also See AAO's NOID*, dated December 23, 2008.

In response to the AAO's NOID, counsel contends that the AAO's finding of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act is erroneous as a matter of law under 8 C.F.R. § 103.2(b)(16)(i), because the applicant has not been afforded an opportunity to rebut the evidence against her. However, the AAO finds that the applicant has been provided with an ample opportunity to rebut such a finding. The record reflects that the applicant was provided with an opportunity to review and was given a copy of her sworn testimony and the Form I-275 at the time she was permitted to withdraw her application for admission in 1994.¹ Additionally, the applicant was provided with an opportunity to rebut the evidence against her through the AAO's issuance of the NOID. While, in response to the AAO's NOID, counsel makes the contentions listed below in regard to why the applicant's actions should not render her inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, counsel does not provide evidence to establish that the applicant did not present a nonimmigrant visa to immigration officials at the port of entry while she had the intent to reside and work in the United States in knowing violation of admission under a nonimmigrant visa.

¹ If the applicant no longer possesses such documentation she may file a Freedom of Information Act (FOIA) request to obtain a copy.

Counsel contends that the applicant should not be found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act because, when confronted by immigration officials, she spoke the truth and as a result her visa was cancelled. However, as noted by the AAO in its NOID, the record contains a Form I-275, which establishes that the applicant was placed into secondary inspections after the applicant presented her nonimmigrant visa to immigration officials and indicated her intent to enter the United States as a nonimmigrant. The Form I-275 shows that documentation was found in the applicant's belongings establishing her intent to work in the United States. The applicant was then confronted with that documentation. The applicant only admitted to her intentions to engage in unauthorized employment in the United States after she had been placed into secondary inspections and been confronted with documentation establishing her immigrant intent. Furthermore, the applicant testified that she was aware that she was seeking to enter the United States illegally by presenting her nonimmigrant visa while intending to work in the United States.

Counsel contends that the applicant should not be found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act because she received no immigration benefits and she did not present false documents or misrepresent her intentions at the U.S. Consulate in obtaining her nonimmigrant visa. However, the statute does not require an alien to obtain an immigration benefit in order to be found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and the AAO does not find that the applicant is inadmissible under this section of the Act for any fraud or misrepresentation she made in regard to obtaining her nonimmigrant visa. As set forth in the AAO's NOID, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in seeking to procure admission into the United States, i.e., in attempting to obtain admission to the United States by presenting a nonimmigrant visa and representing herself to be a nonimmigrant to immigration officers at the port of entry, while she was an intending immigrant.

Counsel contends that the AAO has the authority to waive the applicant's inadmissibility for fraud or misrepresentation when determining whether to grant the applicant's Form I-212. Counsel contends that the legislative intent of Congress was for the Form I-212 to overcome all preceding issues of inadmissibility whether known or unknown to the applicant. Counsel's contentions are unpersuasive. In order to seek a waiver of inadmissibility under section 212(i) of the Act, an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).

Finally, in response to the AAO's NOID, counsel contends that the applicant's alleged violation occurred more than fourteen years ago and that the applicant is of upstanding moral character and the immigration violations are outweighed by the positive factors in her case.

Counsel contends that the applicant filed for adjustment of status and failed to file a motion to reopen before the immigration judge due to improper advice rendered to her by prior counsel. The Attorney General has recently issued a binding precedent superseding *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988): *Matter of Compean, Bangaly and J-E-C-, et al.*, 24 I&N Dec. 710 (A.G. 2009). In *Compean*, the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-27. Although the Act and regulations also do not afford aliens a right to effective assistance of counsel, USCIS may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727.

Compean establishes three elements of proof and six documentary requirements that an alien must meet to prevail on a claim of deficient performance of counsel. *Id.* Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

To prevail on a deficient performance of counsel claim, the alien must show:

1) that counsel's failings were egregious; 2) in cases where the alien moves to reopen beyond the 30-day limit, the alien must show that he or she exercised due diligence in discovering and seeking to cure the lawyer's deficient performance; and 3) that the alien was prejudiced by the attorney's error(s). To establish prejudice, the alien must show that but for the deficient performance, it is more likely than not that the alien would have been entitled to the relief he or she was seeking.^[1] *Id.* at 732-34.

To establish these three requirements, the alien must submit six documents: 1) the alien's detailed affidavit setting forth the relevant facts and specifically stating what the lawyer did or did not do and why the alien was consequently harmed; 2) a copy of the agreement, if any, between the lawyer and the alien. If no written agreement exists, the alien must specify what the lawyer agreed to do in his or her affidavit; 3) a copy of the alien's letter to the attorney setting forth the attorney's deficient performance and a copy of the attorney's response, if any; 4) a completed and signed complaint addressed to the appropriate State bar or disciplinary authorities; 5) any document(s) the alien claims the attorney failed to submit; and 6) when the alien is subsequently represented, a signed statement from the new attorney attesting to the deficient performance of the prior attorney. *Id.* at 735-38. If any of the latter five documents are unavailable or missing, the alien must explain why the documents are unavailable or summarize the contents of any missing documents. *Id.* at 735.

The three substantive requirements must be met for all deficient performance claims filed before and after *Compean* was issued on January 7, 2009. *Id.* at 741. For claims pending prior to January 7, 2009, the alien is not required to meet the six new documentary requirements, but must still comply with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Lozada* required an alien to submit: 1) an affidavit attesting to the relevant facts, detailing the agreement that was entered into, what actions were supposed to be taken and what the attorney did or did not do; 2) evidence that former counsel was informed of the allegations, given an opportunity to respond and former counsel's response, if any; and 3) evidence that a complaint has been filed with the appropriate disciplinary authorities regarding such representation or an explanation of why such a complaint was not filed. *Id.* at 638-39. Here, the record does not contain any evidence that responds to any of the listed requirements. Accordingly, counsel's arguments on this issue are not persuasive.

Tax records reflect that the applicant and her spouse filed joint tax returns from 1999 through 2006. The record reflects that the applicant was employed in "odd jobs" prior to December 1994, and as a housekeeper from 1996 until 2005. The applicant was issued employment authorization in the United States from February 1, 1995, until February 1, 1996; June 7, 2001 until June 6, 2002; and November 7, 2002 until November 6, 2003. Counsel asserts that, while the applicant engaged in

^[1] Where the alien sought discretionary relief, the alien must not only show that he or she was eligible for such relief, but also would have merited a favorable exercise of discretion. *Matter of Compean*, 24 I&N Dec. at 734-35.

unauthorized employment, this should be mitigated by the fact that the applicant needed to work to support her family.

Finally, counsel asserts that, if the applicant's Form I-212 is denied and she has to depart the United States, she will 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 accruing unlawful presence of more than one year and seeking admission to the United States within ten years of her last departure, and would be required to seek a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. Counsel contends that the AAO should take this factor into consideration in adjudicating the Form I-212 because the applicant is a non-criminal alien, long-time, bonafide spouse of a U.S. citizen and mother to two U.S. citizen children. Counsel contends that the applicant would be precluded from seeking a waiver because the AAO's denial of the Form I-212 would find that the applicant does not warrant a favorable exercise of discretion. The AAO finds counsel's contentions to be unpersuasive. Moreover, as discussed above, the applicant is required to apply for a waiver under section 212(i) of the Act, a waiver which has identical requirements as section 212(a)(9)(B)(v) of the Act.

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. *Supra*.

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.*

As established by the record, the favorable factors in this matter are the applicant's U.S. citizen spouse, her two U.S. citizen children, the general hardship to her family if she were denied

admission to the United States, her and her husband's medical conditions, her otherwise clear background, her payment of joint taxes and the approved immigrant visa petition filed on her behalf. The AAO notes that the applicant's marriage, birth of her children and the filing of the immigrant visa petition occurred after the applicant was placed into immigration proceedings. They are, therefore, "after-acquired equities," to which the AAO accords diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's attempt to enter the United States by fraud in 1994; her inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act; her 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; her extended unlawful presence in the United States; and her unauthorized employment in the United States except for her dates of employment authorization.

The applicant in the instant case has multiple immigration violations. The totality of the evidence demonstrates 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 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.