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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: MAY 20 2011 Office: PHILADELPHIA, PA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director (FOD), Philadelphia, Pennsylvania. A subsequent appeal was denied by the Administrative Appeals Office (AAO) on November 10, 2010. The applicant filed a motion to reopen and reconsider the AAO decision, which is now before the AAO. The motion will be granted and previous decisions of the district director and AAO will be affirmed.

The applicant is a native and a citizen of India who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C). He is the son of a U.S. citizen and has one U.S. citizen daughter. The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The FOD concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen father, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), date of service on May 30, 2007. The AAO denied the applicant's appeal on November 10, 2010.

On motion, counsel asserts that prior counsel failed to secure and present evidence and to represent the applicant. *Form I-290B*, received December 16, 2010. He cites to *Matter of Lozada*, 19 I&N Dec. 637 (1988), and states that additional evidence should be considered and requested additional time to file the evidence based on the fact that counsel had been hospitalized and was unable to gather the evidence within the allowable filing period.

As of April 5, 2011, no additional evidence or brief had been received. The AAO sent counsel correspondence requesting a copy of any additional evidence or brief which may have been filed with the motion to reopen or subsequent to counsel's request for additional time.

On April 7, 2011, the AAO received a letter from counsel stating that additional evidence had not been filed because counsel believed United States Citizenship and Immigration Services was withholding adjudication on the applicant's spouse's application for lawful permanent residence. *Statement of Counsel*, April 7, 2011. Counsel asserts that approval of the applicant's spouse's application for lawful permanent residence would improve the equities in favor of granting the present application for waiver of inadmissibility, and asks that the decision in this case be delayed until such time as the applicant's spouse's application for lawful permanent residence is adjudicated.

There is no provision allowing for the withholding of adjudication, or extending the allowable filing period for evidence on a motion to reopen. On that basis the AAO will deny the applicant's request for additional time to file evidence or withholding adjudication until such time as the facts surrounding the applicant's waiver are more favorable to him.

With regard to counsel's ineffective assistance of counsel claim, the Attorney General has recently issued a binding precedent superseding *Matter of Lozada*: *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.

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[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.

In this case, counsel has not submitted any evidence that the applicant was prejudiced by ineffective assistance of counsel, as such his assertions are not persuasive.

The AAO notes, however, that a previously submitted brief had been misfiled and was not in the record when its November 10, 2010, decision was issued. As such, the AAO will now consider that brief and the attached evidence and re-evaluate the merits of applicant's waiver.

In that brief, prior counsel for the applicant asserts that the Field Office Director erred in fact and law in denying the applicant's waiver, and that the applicant's father and daughter will suffer extreme hardship if the applicant is removed from the United States. *Brief Filed in Support of Appeal,* July 26, 2007.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

> (i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record indicates that on May 14, 1990, the applicant presented a false document to the Philadelphia District Office in an attempt to procure an employment authorization card, and thus he is an alien who, by fraud or willful misrepresentation, sought to procure a benefit under the Act. Therefore the applicant is inadmissible pursuant to section 212(a)(6)(C) of the Act. The applicant does not contest this finding on appeal or on motion.[1]

With regard to the applicant's Form I-601 waiver application, the record of proceeding contains, but is not limited to, the following evidence: statements from counsel for the applicant; statements from the applicant's daughter and father; medical documentation related to the applicant's father's medical conditions; a statement from the applicant; copies of records related to the applicant's criminal conviction for use of a fraudulent document; the applicant's father's naturalization certificate; a statement from [redacted], dated June 18, 2007; a statement from [redacted], dated May 7, 2006, discussing medical treatment of the applicant's father; copies of reciepts for college tuition for the applicant's daughter; copies of tax returns for the applicant; statements in support of the applicant's moral character; and the applicant's daughter's birth certificate.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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[1] The AAO notes that prior counsel for the applicant contested that he was inadmissible under section 212(a)(2)(A) of the Act for a conviction under 18 U.S.C. § 1028(a)(4), Possession and Use of a False Identification, based on the fact that it qualified for the petty offense exception under § 212(a)(2)(A)(ii) of the Act. The applicant's waiver was not denied based on a section 212(a)(2)(A) inadmissibility, and as such, the AAO will not address it here.

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

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's father is the qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be

considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant's qualifying relative, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The AAO will first consider hardship upon relocation. The applicant previously asserted that his father suffers from numerous medical issues, and is dependent on him physically and financially. *Statement of the Applicant*, February 10, 2005. He asserts that his father would experience extreme hardship if he had to relocate to India.

The applicant's father has submitted a statement explaining that he has had two heart attacks, has had to spend many months in rehabilitation and is required to take ten different prescription medications a day to treat his cholesterol, blood pressure, prostate, bladder, arthritis and allergies. *Statement of the Applicant's Father*, February 10, 2005. The applicant's father states that all of his children and grandchildren reside in the United States. His father states that he resides with each of

his sons for several months during the year, and that he relies on the physical, emotional and financial assistance of the applicant to sustain him. He further states that it would 'tear his family apart' if the applicant had to relocate to India.

The record contains sufficient documentation to establish that the applicant's father is in poor health. Documents from his treating physicians indicate that he suffers from coronary artery disease and has been perscribed a number of medications. *Statement of* [redacted]., dated July 24, 2000.

The Field Office Director noted in his decision dated May 30, 2007, that the applicant's father, upon whom the applicant's claim of hardship is predicated, left the United States in 2005, and is currently residing in India. Several medical documents in the record also confirm that the applicant's father is currently residing in India. This fact calls into question the assertion that the applicant's father would experience extreme hardship if he were to relocate with the applicant.

In the original appeal, prior counsel stated:

> In fact, [the applicant's father] has since come back to the United States and he is back with [the applicant]. Moreover, while [the applicant's father] was in India and continuing on till present, [the applicant's father] has always remained dependent on [the applicant]. He simply went to India [for] his healthcare recuperation on a more affordable price. Despite being outside the country he was still dependent on the finances provided by [the applicant] to maintain his healthcare. Now the [applicant's father] is in the United States and getting medical care here . . . if [the applicant] were forced to leave the country then his father's treatment and therapy would not be subsidized by [his] US income, which would make it very hard for [the applicant's father] to continue living.

The record does not contain any evidence to support counsel's assertions. The record contains a statement from [redacted] from [redacted] with a single, hand-written line, stating the applicant's father "is fit to travel." *Statement of* [redacted], dated June 18, 2007. However, there is no evidence that the applicant's father actually returned to the United States and no documentation which establishes his current residence. A 'Progress Note' from the [redacted] in November 1, 2004, indicates that the applicant's father intended to reside with a brother if he returned to India. Regardless of counsel's assertion, the fact that the applicant's father returned to India to reside, and did so for several years without noted hardship, indicates that he would not experience extreme hardship upon relocation.

The applicant has also asserted that his father depends on him financially, and counsel asserts that the applicant provides financial support to his father in India from his employment in the United States. The record does not contain any documentation that the applicant supports his father financially. There is no evidence of medical bills paid by the applicant, either for services in the United States or in India, and nothing which indicates that the applicant otherwise provides for his father financially.

The record does contain a Social Security Statement for the applicant's father indicating that his father receives social security benefits in the amount of $579 per month. There is no breakdown of the applicant's father's cost of living expenses, financial needs or other obligations, and no evidence that his financial obligations exceed his monthly social security income. Even if the applicant's father had returned to the United States, the record contains a Form I-864, filed as an affidavit of support for the applicant, that indicates that one of his other sons earns an annual salary of $250,000.

It has not been established that the applicant's U.S. citizen brothers would be unable to provide for their father financially in order to mitigate any financial impact of the applicant's departure if the applicant were removed and the applicant's father returned to the United States. In light of the fact that the record does not contain any documentation corroborating that the applicant's father depends on the applicant financially, it cannot be determined that the applicant's father will experience any uncommon financial hardship if the applicant were removed from the United States and his father resided in India with him.

With regard to the applicant's assertions that his U.S. citizen daughter would experience extreme hardship, counsel asserts that she cannot relocate to India because she is unfamiliar with the culture and has previously had allergic reactions to the environmental conditions there. *Statement of Prior Counsel*, July 26, 2007. He also asserts that she has family and community ties in the United States, and that severing them would result in hardship to her.

The applicant's daughter is not a qualifying relative in this proceeding. As such, any impact on her is not relative to a determination of extreme hardship except as it relates to the qualifying relative, in this case the applicant's father. In addition, the AAO would note that the applicant's daughter turned 18 on December 21, 2005. Regardless of the fact that she may have been listed as a dependent on the applicant's tax returns, she is now considered an adult and there is nothing in the record which indicates she would not be capable of supporting herself financially. The record fails to establish that the applicant's daughter would experience challenges which lead to an indirect hardship on the applicant's father.

Even when the hardship factors asserted upon relocation are examined in aggregate, the record fails to demonstrate that they would rise to a level of extreme hardship.

With regard to hardship upon separation, the AAO notes that the record indicates the applicant's father currently resides in India. Prior counsel asserts that the applicant's father is financially dependent on the income provided by the applicant from his employment in the United States. However, as noted above, there is no evidence in the record which establishes that the applicant actually provides any financial support for his father, either while he was in the United States or during his residence in India. In addition, the record indicates that the applicant has several siblings who would be capable of providing for his father in the event that the applicant was removed from the United States. *See Statement of the Applicant's Father*, dated February 10, 2005, (stating that he

spends several months a year residing with each of his sons); *Form I-864*, filed August 9, 2006, (indicating that the applicant's brother earned $237,845 in recent tax years).

Counsel asserts that separating the applicant's daughter from her father would be unconscionable, but as noted above, she is not a qualifying relative in this proceeding. There is no evidence that she would experience uncommon emotional hardship rising above that normally experienced by the relatives of inadmissible aliens who remain in the United States.

Counsel asserts that it would be against public policy to uproot the applicant by removing him when his entire family resides in the United States. The applicant is inadmissible to the United States based on a section 212(a)(6)(C)(i) of the Act, a fact that contradicts counsel's assertion that it is against public policy to remove him. In addition, hardship to an applicant is relevant in this proceeding only to the extent that it impacts a qualifying relative.

When considered in an aggregate context, there are no hardship factors in this case which indicate that the impacts on the applicant's father due to the applicant's inadmissibility to the United States will rise to the level of extreme hardship. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.