U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

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FEB 23 2012

DATE: OFFICE: SAN SALVADOR FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Immigration and Nationality Act section 212(i); 8 U.S.C. § 1182(i) and INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Salvador, El Salvador, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of El Salvador, was found inadmissible under Immigration and Nationality Act (INA or the Act) § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation of a material fact due to her admission under oath of her material misrepresentation and use of fraudulent documents in order to obtain an immigration benefit in the United States. She was also found inadmissible under INA § 212(a)(9)(B)(i)(II), 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. The applicant seeks a waiver of inadmissibility pursuant to INA § 212(i), 8 U.S.C. § 1182(i), and INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her U.S. citizen mother.[1] The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her mother.

On December 4, 2009, the Field Office Director concluded that the hardship that the applicant's U.S. lawful permanent resident mother would suffer did not rise to the level of extreme as required by the statute.

On appeal, the applicant, through her mother, alleges that her misrepresentation in connection with her prior application for Temporary Protected Status (TPS) in the United States was due to the actions of her prior counsel. Additionally, the applicant states that her mother will suffer extreme hardship if she is not admitted to the United States.

In support of the waiver application, the record includes, but is not limited to, a letter from attorney [redacted] a country conditions report on El Salvador, letters from the applicant's mother, documentation concerning the applicant's mother's medical conditions, letters from the applicant's family members, biographical information for the applicant's family members, photographs of the applicant with her family members, and documentation of the applicant's immigration history in the United States.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal. The AAO will first address the question of whether the applicant is admissible to the United States.

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[1] The record indicates that the applicant's mother became a U.S. citizen on September 28, 2010 through naturalization.

[2] The record does not contain a Form G-28 Notice of Entry of Appearance for Attorney [redacted] The AAO will consider the evidence submitted by Attorney [redacted] although we cannot recognize his representation of the applicant.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. - (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 establishes that the applicant sought and obtained Temporary Protected Status (TPS) in the United States by making a misrepresentation regarding her date of entry into the United States and through the use of fraudulent documentation to support that misrepresentation. The record indicates that the applicant admitted under oath to a consular officer that she made a material misrepresentation in order to obtain an immigration benefit, TPS, which she would not have otherwise been eligible to obtain. Although the applicant's mother states that the applicant's actions were the result of the misleading advice of her prior counsel, the requirements of a claim of ineffective assistance of counsel have not been met in this case.

In *Matter of Compean,* , the Attorney General addressed deficient performance of counsel claims. 24 I&N Dec. 710, 728 n.6 (A.G. 2009). Although the Attorney General's decision was in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review.

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.

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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.

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.

The applicant has not met these requirements and remains inadmissible under INA § 212(a)(6)(C).

The applicant is also inadmissible under INA § 212(a)(9)(B)(i)(II), 8 U.S.C. §1182(a)(9)(B)(i)(II).

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

> (B) ALIENS UNLAWFULLY PRESENT.-
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> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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> ...
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> ...
>
> (v) The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The applicant was apprehended at the U.S. border for attempted unlawful entry on June 28, 2001, June 30, 2001 and July 1, 2001. The record establishes that the applicant entered the United States on or around July 2, 2001 without inspection by an immigration officer and submitted an initial application for Temporary Protected Status on July 19, 2002 using fraudulent documentation indicating that she entered the United States in January 2001. The applicant departed the United States on October 21, 2008. The applicant accrued more than one year of unlawful presence prior to her departure and is applying for admission to the United States within ten years of her departure. As such, she is inadmissible under INA § 212(a)(9)(B)(i)(II). The applicant does not contest this ground of inadmissibility on appeal.

A waiver is available to the applicant under INA § 212(a)(9)(B)(v) and INA § 212(i) dependent on her showing that the bars to her admission impose extreme hardship on a qualifying relative. The applicant's U.S. citizen mother is the only 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).

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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).

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.*

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.*, *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

We will first consider the hardship claimed by the applicant's U.S. citizen mother if she were to remain in the United States without the applicant. The applicant's mother claims physical, psychological, and financial hardship based on separation from the applicant. The applicant's mother is 70 years old, married, a homemaker, and has 12 children. The applicant's siblings submitted letters indicating that their mother relied on the applicant for financial support and is suffering financially in her absence. No details, however, were provided regarding the applicant's mother's current financial situation, her sources or income, or why her husband or other 11 children are not able to provide for her financially.

In regards to physical/medical hardship, the applicant's mother submitted doctor's letters and medical records for treatment that she has received in El Salvador and medical records for treatment that she has received in the United States. The applicant's mother's medical records from the United States illustrate that she suffers from kidney disease, "other cardiac disease," diabetes, and has a history of hypertension. The records also indicate that she receives Medicare. There is no letter from the applicant's mother's medical physician in the United States and some of the medical records submitted are illegible. A doctor's note in the medical record from September 28, 2010, indicates that the applicant's mother was receiving dialysis three times per week and was adjusting well to the treatment and diagnosis. The doctor's note also indicates that the applicant's mother lives with her husband and one of her sons. The record also contains letters from treatment that the applicant's mother received in El Salvador in 2008. The letters were translated from Spanish to English without certification as required by 8 C.F.R. § 103.2(b)(3). The medical records were not translated. Because of the deficiencies in translation these records are of limited use; however, they do illustrate that the applicant's mother was able to obtain medical care for her conditions in El Salvador. The records do not establish a connection between the applicant's inadmissibility and her mother's medical condition. Although the record establishes that the applicant's mother clearly suffers from serious medical conditions, the documentation submitted does not show that her conditions are affected by her daughter's inadmissibility. The applicant's mother stated in her letter dated October 7, 2010 that she hopes that her daughter can return to the United States to care for her, but she does not provide an explanation for why her husband or her eleven other children unable to provide the required assistance.

In regards to emotional and psychological hardship, the applicant submitted a letter from [redacted], stating that her evaluation of the applicant's mother indicates that the applicant's mother is suffering from major depression. [redacted] states that the applicant's

mother reports that separation from her daughter is the reason for her feelings of restlessness and hopelessness. Additionally, [redacted] reports that the applicant's mother's concern for her daughter "has had a marked impact on her level of functioning." No details are given concerning the impact on the applicant's mother's functioning, aside from noting that the applicant's mother reported to her that she has interrupted sleep, isolates herself, and has limited interest in pleasurable activities. The doctor notes that the applicant's mother reports that she often isolates and withdraws herself and has expressed recurrent thoughts of death wishes. The doctor goes on to note, however, that the applicant's mother is not suicidal and that recent medication changes have helped the applicant's mother. A list containing 18 medications was provided in connection with Dr. [redacted] report, however, no explanation is provided for those medications. The doctor reported that she recommends that the applicant's mother continue treatment with her. Although the applicant's mother appears to be experiencing depression, it is not possible from the information provided to establish a connection between the applicant's mother's psychological condition and the applicant's inadmissibility. Although the applicant's mother's depression and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. Separation nearly always results in considerable hardship to individuals and families, but in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress made clear that the law requires that, in order to meet the "extreme hardship" standard, hardship must be greater than the normal hardship involved in such cases. In this case, the record does not establish that the hardship to the applicant's mother as a result of separation from the applicant rises to the level of extreme.

We must also consider whether the applicant's U.S. citizen mother would suffer extreme hardship should she relocate to El Salvador with the applicant. Although the AAO notes the country conditions in El Salvador, the applicant has submitted evidence indicating that her mother has been able to obtain the necessary medical care in that country. The applicant's mother states that she does not believe that she can afford the appropriate medical care in El Salvador, but the record does not support that statement. The record illustrates that the applicant's mother received health care in El Salvador as recently as November 2008 and no documentation was provided regarding the costs of that care or the applicant's mother's inability to cover those costs. The applicant's mother is a native of El Salvador and speaks Spanish. She does not indicate that she would be unable to adapt to life in El Salvador. Although the applicant's mother states that she could not afford to live in El Salvador, no documentation was provided regarding the applicant's mother's financial situation, or whether she does and could rely on family support. As a result, the record does not establish that the hardship that the applicant's mother would experience if she were to relocate to El Salvador to reside with the applicant would be extreme.

The record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to a qualifying relative as required under sections 212(i) and 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility 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.