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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 05 2013 OFFICE: SAN FRANCISCO, CA

IN RE:

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:

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,

Ron Rosenberg,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the Field Office Director, San Francisco, California, and an appeal of the decision was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion is granted and the underlying application is approved.

The applicant is a native and citizen of India, who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission and a benefit provided under the Act through willful misrepresentation of a material fact. The applicant is married to a U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to live in the United States with his spouse and family.

The applicant is also inadmissible under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been ordered excluded and removed at the end of proceedings initiated upon his arrival and seeking admission within ten years of departure or removal.[1] A Form I-601 waiver of inadmissibility does not correspond to this ground of inadmissibility. Rather, the applicant must request permission to reapply for admission into the United States by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). Counsel included a completed Form I-212 with his motion; however the record contains no evidence that the application has been filed or adjudicated at the field office.

In a decision dated May 27, 2010, the director concluded the applicant had failed to establish that his U.S. citizen spouse would experience extreme hardship if he were denied admission into the United States. The waiver application was denied accordingly. In a decision dated August 6, 2012, the AAO agreed that the applicant had failed to demonstrate extreme hardship to his spouse, either in the United States or in India. The appeal was dismissed accordingly.

In the present motion to reopen, counsel contends the applicant is requesting that his case be reopened based on the ineffective assistance of his former counsel. Counsel asserts that although the applicant provided evidence relating to his child's medical treatment and his wife's ongoing psychiatric counseling, former counsel failed to submit the evidence with the applicant's waiver application or on appeal. Counsel contends the documentation could have changed the outcome in the applicant's case and that the ineffective assistance by former counsel amounts to a violation of the applicant's due process rights. Counsel indicates further that new medical, financial, and psychological evaluation evidence establishes that the applicant's U.S. citizen spouse will experience extreme emotional, physical and financial hardship if the applicant is denied admission into the United States.

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[1] The applicant was ordered excluded and removed *in absentia* on March 10, 1994. He has not departed the United States.

In support of these assertions counsel submits evidence that former counsel has been informed of the allegations made against him and has been given an opportunity to respond; evidence that the applicant filed a complaint against former counsel with the California State Bar; and an affidavit from the applicant. Counsel additionally submits a new psychological evaluation for the applicant's wife, medical evidence for the applicant's wife and their child, and financial information. The entire record was reviewed and considered in rendering a decision on the motion.

The regulations state in pertinent part at 8 C.F.R. § 103.5(a):

> (a) Motions to reopen or reconsider
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> . . . .
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> (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.
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> . . . .
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> (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed

Counsel asserts that ineffective assistance by former counsel amounts to a violation of the applicant's due process rights. It is noted that the AAO does not have appellate jurisdiction over constitutional issues. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). The issue of whether the applicant's due process rights were violated therefore cannot be addressed in this decision.

An appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond; and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

In the present matter, the record contains evidence that former counsel was informed of the allegations made against him and that he was given an opportunity to respond. The record also reflects that the applicant filed a complaint against former counsel with the California State Bar. The applicant has failed, however, to establish *Matter of Lozada's* first requirement. The applicant asserts in a sworn affidavit that he retained former counsel as his attorney, that he provided him with all available information to submit an application for adjustment of status and a waiver application on his behalf, and that he informed former counsel about ongoing medical and

psychological matters for his child and wife, the employment status of his wife and their financial circumstances. The affidavit does not, however, set forth in detail the agreement that was entered into between the applicant and former counsel with respect to the actions to be taken, and what representations former counsel did or did not make to the applicant in this regard. Accordingly, the applicant has not established a *prima facie* case for ineffective assistance of counsel.

Counsel has nevertheless, met the requirements for a motion to reopen, in that the motion to reopen was filed in a timely matter, new facts to be considered in a reopened proceeding have been presented, and the facts are supported by documentary evidence. The motion to reopen the August 6, 2012, AAO decision is therefore granted.

Section 212(i) of the Act states:

> The Attorney General [now Secretary, Department of Homeland Security, "Secretary"] may, in the discretion of the [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 [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.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *Matter of Mendez-Moralez,* 21 I&N Dec. 296 (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,* 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

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.*

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 v. I.N.S.*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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.

The August 6, 2012 AAO decision found that the evidence contained in the record, when considered in the aggregate, failed to establish that the applicant's wife would experience extreme hardship in the United States or in India, if the applicant's waiver application were denied. The decision noted that the value of the conclusions reached in a psychological report submitted on appeal were diminished, as there was no indication the evaluator independently verified the information provided, and the record lacked evidence to corroborate key information used in making the diagnoses. The decision noted further that evidence reflected the applicant's wife planned to resume her work as a nurse assistant when their child became old enough to enter daycare, and the record lacked evidence to corroborate assertions that the applicant's wife would not be covered by health insurance, that she depended on the applicant to manage her health

conditions, or that she would experience emotional hardship beyond that normally experienced upon removal or inadmissibility if she remained in the United States separated from the applicant. In addition, the decision noted that evidence failed to establish the applicant's wife would sever close family or other ties in the United States if she moved to India, that she would be unable to receive medical treatment in India, or that she would experience financial or other hardship beyond that normally experienced upon removal or inadmissibility if she relocated to India.

On motion, the applicant's wife states that their daughter has "severe allergic reactions from certain foods", is "seriously sick," and requires "regular medical treatment." She cannot work because she must care for their daughter, and she is dependent on the applicant for financial and moral support. She hopes for an eventual reconciliation with her family in the United States. Nevertheless, her parents remain angry with her for marrying against their wishes, they are "well connected" with politicians and police in India, and because they threatened her by saying she "would have been a dead person" had she been in India, she fears her family's lives are in danger in India. She additionally does not want to risk their daughter's health by returning to India.

A September 2012 psychiatric evaluation submitted on motion reflects that since July 2010, the applicant's wife has received psychiatric care and treatment once a month on a regular basis. She has been diagnosed with recurrent major depressive disorder with severe anxiety and panic attacks, due in large part to the possibility that the applicant may be deported to India. The applicant is her only source of support since her family has abandoned her, she worries "constantly" about being separated from the applicant, and she is "morbidly afraid" that their child will become sick in India. She has experienced "bouts of depression and anxiety" over a 10-year period; she currently takes anti-anxiety, anti-depressant and mood stabilizer medication, which allow her to be "somewhat stable." The psychiatrist states the applicant's wife needs ongoing psychiatric care, treatment and medications, and that "she is not able to have any gainful employment" with her recurrent depression. The psychiatrist additionally expresses concern that the applicant's wife is "at risk of having a full blown relapse of her depressive disorder" if the applicant is deported to India and that "she could become a serious suicide risk if she loses the emotional, physical, and financial support" of the applicant.

Medical evidence confirms the applicant's wife had four miscarriages prior to their daughter's birth in 2009, reflects that she suffered depression after her miscarriages, and indicates she became pregnant in 2010 but miscarried. Evidence reflects further that their daughter has food allergies to milk, peanuts and wheat flour, that she has been diagnosed with eczema, and that she has a history of skin rashes on her arms, hands, feet and eyes. Previously submitted medical evidence reflects the applicant's wife has also been diagnosed with and prescribed medication for diabetes and hyperlipidemia.

Federal tax evidence reflects that the applicant is a self-employed taxi driver, he has been the sole income earner for their family since 2009, and he earns between $28,000 and $30,000 a year.

The AAO finds that the evidence in the record, when considered in the aggregate, establishes the applicant's wife would suffer hardship beyond that normally experienced upon removal or

inadmissibility if the applicant were denied admission and she remained in the United States. Evidence reflects the applicant's wife has no family support in the United States, she is unable to work due to recurrent depression, and the applicant is the sole income earner in their family. The applicant's wife requires ongoing psychiatric therapy and medication to stabilize her depression, and evidence reflects she is at risk of deepening depression and suicide if she is separated from the applicant. The factors, when considered in the aggregate, establish that the hardship the applicant's wife would suffer if she remains in the United States go beyond the common results of removal or inadmissibility, and rise to the level of extreme hardship.

The cumulative evidence also establishes the applicant's wife would experience hardship beyond that normally experienced upon removal or inadmissibility if she relocates to India with the applicant. The applicant's wife requires ongoing treatment and medication for depression, she has insulin dependent diabetes, and their child has food-related allergies and a skin condition that requires monitoring. A U.S. Department of State report reflects that adequate medical care "occasionally" meeting Western standards can be found in major cities in India. *See* *http://travel.state.gov/travel/cis_pa_tw/cis/cis_1139.html*. It is noted, however, that the applicant is from Dhilwan, Punjab, India, which is not a major city, and the report reflects that adequate medical care is very limited or unavailable in rural areas; moreover, most hospitals require advance payment or confirmation of insurance prior to treatment. *Id.* Evidence also reflects that the applicant's wife has been in the United States for over 15 years, she has no close ties in India, and although she is estranged from her parents and family in the United States, she remains hopeful that they will eventually reconcile. The cumulative evidence establishes the applicant's wife would experience extreme hardship if she relocated to India with the applicant.

Because the applicant has established that the bar to his admission would result in extreme hardship to his wife, the AAO now turns to consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the

alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The unfavorable factors in this case are the applicant's attempt to procure admission into the United States in December 1993 using a false identity; his failure to appear at exclusion proceedings and his exclusion and deportation order on March 10, 1994; his failure to disclose his previous use of the name and that he had been placed into exclusion proceedings upon arrival on his asylum application; and his unlawful presence in the United States from May 1999, when his grant of asylum was revoked, until October 11, 2005, when he filed his adjustment of status application.

The favorable factors are the applicant's U.S. citizen wife and child, the hardship they would face if the applicant were denied admission into the United States, letters attesting to the applicant's good character, and the applicant's lack of a criminal record. The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Taken together, however, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

Upon review of the totality of the evidence, the AAO finds that the applicant has established extreme hardship to a qualifying family member as required under section 212(i) of the Act. It has also been established that the applicant merits a favorable exercise of discretion. The applicant has therefore met his burden of proving eligibility for a waiver of his ground of inadmissibility pursuant to section 212(i) of the Act.

ORDER: The motion is granted and the underlying waiver application approved.