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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 14 2009

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:

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).

Michael Shumway

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed.

The record reflects that the applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for using a photo-substituted Ecuadorian passport in someone else's name to enter the United States. The record indicates that the applicant is married to a naturalized United States citizen, and he seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his United States citizen spouse.

The Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Director's Decision*, dated July 31, 2006.

On appeal, the applicant, through counsel, asserts that the "[a]pplicant never presented the 'Ecuadorian Passport' to the Immigration Officer." *Appeal Brief*, dated May 17, 2007. Additionally, counsel claims that the denial of the applicant's waiver would result in extreme hardship to his spouse. *Id.*

The record includes, but is not limited to, counsel's brief; declarations and letters from the applicant, his wife, and friends and family; a Record of Sworn Statement in Administrative Proceedings; and psychological evaluations by [redacted] and [redacted] The entire record was reviewed and considered in arriving at a decision on the appeal.

Counsel contends that "[t]he charge cannot be sustained in regard to someone subject to a primary inspection unless the fraud was practiced on a U.S. government official," and the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act. *Id.*, citing *Matter of Y-G*, 20 I&N Dec. 794 (BIA 1994). The AAO notes that on April 28, 2002, in response to the immigration officer's question regarding what documents the applicant presented to the first immigration officer he encountered, the applicant stated "[t]he airline had [his] documents.... [The airline had his documents] [b]ecause [he] was in transit." *Sworn Statement in Administrative Proceeding*, dated April 28, 2002. The applicant testified that he paid $500.00 to a man in Ecuador for the passport.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (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.
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> . . . .
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> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

TWOV documentation provided by American Airlines, and contained in the record, reflects that the applicant presented a photo-substituted Ecuadorian passport in someone else's name to the airline, and that he represented to the airline that he was traveling to Spain. The evidence in the record reflects that the applicant completed a Form I-94T, TWOV arrival and departure record on April 28, 2002, when he traveled from Ecuador to the United States. In addition to the above TWOV-related documentation, the record contains an April 28, 2002, Record of Sworn Statement in Administrative Proceeding, signed by the applicant. Both reflect that the applicant traveled to the United States from Ecuador, and that he was presented for United States immigration inspection by American Airline agents as a passenger without visa who arrived on board an American Airlines flight from Quito, in transit to Madrid. The documents reflect that the applicant presented himself to American Airlines agents in Quito as an Ecuadorian national, using false identification documents with his picture on it. The documents reflect further that the applicant did not intend to travel to Spain, and that his plan was to work once he arrived in the United States. Upon presentation for United States immigration inspection, the applicant stated his true identity and nationality to the immigration inspector.

Through counsel, the applicant refers to the Board of Immigration Appeals (Board) decision, *Matter of Y-G-,* 20 I&N Dec. 794 (BIA 1994), and the First Circuit Court of Appeals (First Circuit) case, *Ymeri v. Ashcroft*, 387 F.3d 12, 18-20 (1st Cir. 2004), to support the assertion that he is not inadmissible under section 212(a)(6)(C)(i) of the Act, because he did not attempt to gain admission into the United States by misrepresenting himself or making fraudulent claims to a U.S. government official. The AAO finds that the Board and the First Circuit decisions referred to by the applicant fail to establish that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

It is noted that the TWOV program was designed to facilitate international travel, and permitted:

> [A]liens traveling from one foreign country to another, which route entails a stopover in the United States, to proceed "in immediate and continuous transit" through this country without a passport or visa. 8 U.S.C. § 1182(d)(4)(C) (1970). An individual desiring to use the transit without visa privilege must establish, inter alia, that 1) he is admissible under the immigration laws, 2) he has confirmed means of transportation to at least the next country, and 3) he will accomplish his departure within eight hours after his arrival or on the next available transport. 8 C.F.R. § 214.2(c) (1980)[1]

The Board case cited by counsel held that a section 212(a)(6)(C)(i) of the Act, (formerly section 212(a)(19) of the Act of 1952) charge of inadmissibility cannot be upheld unless the fraud or material misrepresentation was practiced upon an authorized U.S. Government official. The AAO notes, however, that *Matter of Y-G-, supra,* was not a TWOV-related case. The AAO notes further that *Matter of Y-G-, supra,* clearly states that its holding does not apply in a TWOV-related context.

[1] The TWOV program was suspended on August 2, 2003.

Matter of Y-G- at 797, refers to and concurs with the holding in *Matter of D-L- & A-M,* 20 I&N Dec. 409 (BIA 1991), regarding TWOV-related cases. *Matter of D-L- & A-M-* states at 412 that:

> [W]e hold that, outside of the TRWOV [TWOV] context addressed in *Shirdel*, an alien is not excludable under section 212(a)(19) of the Act [now section 212(a)(6)(C)(i) of the amended Act] for seeking entry by fraud or willful misrepresentation of a material fact where there is no evidence that the alien presented or intended to present fraudulent documents or documents containing material misrepresentations to an authorized official of the United States Government in an attempt to enter on those documents.

The Board emphasized that its holding applied only outside of the TWOV context, and the Board specifically distinguished its holding from a decision made in the TWOV-related case, *Matter of Shirdel,* 19 I&N Dec. 33 (BIA 1984).

Matter of Shirdel held that two Afghani citizens who posed as Turkish nationals were excludable under the second clause of section 212(a)(19) of the former Act, for seeking to enter the United States by fraud or a material misrepresentation. The decision specifically states that, "[t]he fraud was their flying to the United States posing as TRWOV aliens in order to submit applications for asylum." *Matter of Shirdel, supra* at 36.

The AAO notes that the U.S. First Circuit Court of Appeals held in *Ymeri v. Ashcroft, supra* at FN4, that:

> The transit without visa privilege is a benefit provided under the Immigration laws. An alien who transits through this country as a transit without visa participant has attained one of the benefits listed in section 1182 [212] (a)(6)(C)(i) [of the Act], regardless of whether the alien effects an "entry."

U.S. v. Kavazanjian, 623 F.2d 730, 732 (1st Cir. 1980) held that:

> [T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country's border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.
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> . . . .
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> [W]e think an alien's assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United States before again departing. *See Reyes v. Neely,* 228 F.2d 609, 611 (5th Cir. 1956), ("A misrepresentation may be made as effectively by conduct as by words")…. *Id.* at FN15.

In the present matter, the record clearly reflects that the applicant traveled to the United States posing as a TWOV alien under the TWOV program. The record reflects further that the applicant

intended to remain in the United States to work. Based on the above rulings, the AAO finds that the applicant thereby committed a fraud on the United States, and that he is inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212 of the Act provides, in pertinent part, that:

> (i) (1) The Attorney General [now the Secretary 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 immigrant 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...

In the present application, the record indicates that on April 28, 2002, the applicant entered the United States by presenting a photo-substituted Ecuadorian passport in someone else's name. On the same day, a Notice to Appear (NTA) was issued against the applicant. On March 8, 2004, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On May 1, 2006, the applicant filed a Form I-601. On July 31, 2006, the Director denied the applicant's Form I-485 and Form I-601, finding the applicant failed to demonstrate extreme hardship to his qualifying relative. On January 25, 2008, the applicant filed another Form I-485.

The applicant is seeking a section 212(i) waiver of the bar to admission resulting from a violation of section 212(a)(6)(C)(i) of the Act. A waiver under section 212(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon removal is irrelevant to section 212(i) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's spouse. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (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.

Counsel asserts that the applicant's wife will suffer extreme hardship if the applicant is removed from the United States. *See appeal brief, supra.* Counsel claims the applicant's wife is "undergoing a severe depression due to the uncertain legal status of [the applicant]." *Id.* The applicant claims that his wife is "struggling with her father for three years at bedside, and confronting the fact of the future separation from [him]. It has taken a toll with respect to her behavior and her mental health." *Letter from* [redacted], dated October 14, 2008. [redacted] diagnosed the applicant's wife with adjustment disorder with mixed depression and anxiety. *See psychological evaluation by* [redacted], dated March 10, 2006. states the stress of the applicant's immigration status is affecting the applicant's wife with symptoms of depression and anxiety. *Id.* Additionally, [redacted] indicates that she has been treating the applicant's spouse for depression and states that it will be "unbearable for [the applicant's wife] to continue to living with the uncertainly [sic] that [the applicant] could be deported at anytime, and even more unbearable to be separated from him." *Evaluation by* [redacted], dated October 10, 2008. The applicant's wife states the applicant has helped her emotionally and financially. *See letter from* [redacted] undated. She claims that she is not working or attending school, and she has no one to take care of her. *Id.*

The AAO finds that the applicant has submitted sufficient evidence to demonstrate that she would suffer extreme hardship, in the form of emotional and financial hardship, if she is separated from the applicant. However, though the record shows that the applicant's wife will experience some hardship in relocating to Cuba, the applicant has failed to submit evidence to substantiate assertions that this hardship will be extreme. The applicant's wife states she "will never be able to relocate in a poor and destroyed socialist country, with no future education opportunities." *See letter from* [redacted], *supra.* The applicant states his wife cannot join him in Cuba because her primary language is English. *See letter from* [redacted], *supra.* 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)). The AAO notes that the applicant's wife is a native of Cuba, who spent her first 12 years of her life in Cuba, and it has not been established that she has no family ties in Cuba. The assertions that the applicant's spouse would suffer emotional hardship if the waiver application is denied relate primarily to the prospect of separation from the applicant, which would not be issue if she relocated to Cuba.

United States court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the Board held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. In *Hassan, supra,* the Ninth Circuit Court of Appeals held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather

represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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 application for waiver of grounds of inadmissibility under section 212(a)(6)(C)(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.