U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: PHILADELPHIA, PA Date: JAN 22 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 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).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, Pennsylvania. The Administrative Appeals Office (AAO) dismissed the appeal on other grounds. The case is now before the AAO on motion. The motion will be granted and the underlying application denied.

The applicant is a native and citizen of Italy. The applicant is married to a naturalized U.S. citizen and seeks a waiver of inadmissibility pursuant to sections 212(h) and (i) of the Act, 8 U.S.C. § 1182(h) and (i), in order to reside with his wife and children in the United States. The district director found the applicant to be inadmissible to the United States under section 212(a)(3)(B)(i)(I) of the Act, § 1182(a)(3)(B)(i)(I), for having engaged in terrorist activity. The district director concluded that no waiver was available to the applicant and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated April 19, 2001. On appeal, the AAO found that the applicant had not engaged in terrorist activity, but found him inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having entered the United States by fraud or willful misrepresentation. Specifically, the AAO found that the applicant was an intending immigrant when he procured admission into the United States pursuant to the Visa Waiver Program (VWP) in 1993, 1994, and 1995. In addition, the AAO found that the applicant failed to reveal his prior arrests and convictions when applying for admission pursuant to the VWP. The AAO found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the AAO*, dated October 30, 2003.

In the instant motion to reopen and reconsider, counsel asserts that the applicant was not an intending immigrant when he entered the United States under the VWP. In support of this assertion, three letters from employers in Italy were submitted with the motion, indicating that the applicant's wife, [redacted], sought employment in Italy in the spring of 1994. In addition, counsel asserts that the applicant did not willfully misrepresent his criminal background as he had been granted "rehabilitation" under Italian law. In support of this contention, two documents were submitted with the motion, showing that the applicant has "no criminal record" as the rehabilitation "restored [him] to the condition of an individual who had never been arrested or convicted of a crime." *Motion to Reopen/Reconsider* at 10, dated November 28, 2003; *Letter from* [redacted] dated November 26, 2003; *Declaration from* [redacted] dated November 20, 2003.

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

> 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.

Section 212(i) provides:

> (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 permanent resident spouse or parent of such an alien. . . .

In this case, the applicant first entered the United States on October 29, 1993, under the VWP. The applicant married his wife in Pennsylvania the following week, on November 6, 1993. The applicant and his wife departed the United States. Two letters from prospective employers indicate that the applicant's wife sought employment in Italy during the Spring of 1994. *Letter from* [redacted], dated November 20, 2003; *Letter from* [redacted], dated November 20, 2003. The applicant re-entered the United States on November 20, 1994, under the VWP. According to the motion to reopen/reconsider, the applicant spent the holidays with his wife's relatives, then left the United States again with his wife. The applicant subsequently re-entered the United States for a third and final time on March 15, 1995.

Counsel contends the applicant did not intend on immigrating to the United States as is evidenced by the letters from prospective employers, and the fact that he did not file for any immigration benefits until after his final entry into the United States. Counsel's assertions are unpersuasive as the record evidence indicates the applicant was, indeed, an intending immigrant. According to his wife's affidavit, "[redacted] [the applicant] and I have made our home in the United States since November 20, 1994. We attempted to live in Italy from November 12, 1993 but returned to the U.S. due to extreme financial difficulties. We were unable to find significant employment. . . . I have been employed full-time [in the United States] since February 1995." *Affidavit of* [redacted], dated March 7, 2001; *see also Biographic Information (Form G-325A)*, signed by [redacted] on April 21, 1995 (stating she lived in Italy from November 1993 until November 1994). Based on [redacted] affidavit, the applicant may not have intended to immigrate when he first entered the United States in October 1993. However, when he re-entered the United States in November 1994, according to his wife's affidavit, he intended on immigrating permanently to the United States and making it his home. In addition, by the time the applicant re-entered the United States under the VWP in March 1995, his wife had already obtained full-time employment in the United States and the couple had "made [their] home in the United States."[1] *Affidavit of* [redacted]

[1] Although [redacted] affidavit stated she was employed full-time in the United States beginning in February 1995, documentation in the record shows she was employed full-time in January 1995. *Letter from* [redacted], dated March 24, 1995; *Biographic Information (Form G-325A)*, signed by [redacted] on April 21, 1995 (listing employment at Travelworld beginning in January 1995).

supra. Therefore, the record shows that the applicant was an intending immigrant when he entered the country under the VWP in 1994 and 1995. Accordingly, the applicant is inadmissible under section 212(a)(6)(C)(i) for fraud or willfully misrepresenting a material fact in order to procure admission into the United States.

Furthermore, the record shows the applicant willfully misrepresented that he had never been arrested when he applied for entry under the VWP. The I94W Nonimmigrant Visa Waiver Arrival/Departure Form asks, "Have you ever been . . . *arrested or convicted* for two or more offenses for which the aggregate sentence to confinement was five years . . . .?" (Emphasis added.). Even assuming the applicant believed he had no criminal convictions due to the fact that the Italian government granted him rehabilitation, stating that he had never been arrested was patently untrue. Significantly, there is no declaration or statement from the applicant asserting that he did not willfully misrepresent his previous arrests. Counsel's attempt to show the reasonableness of the applicant's subjective belief that he had no convictions because rehabilitation under Italian law treats the matter as if the matter never was, *Motion to Reopen/*Reconsider at 8-12, is unpersuasive without any statement from the applicant addressing his subjective belief.[2]

Moreover, counsel's assertion that *Marino v. INS*, 537 F.2d 686 (2d Cir. 1976), is inapplicable by relying on *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001), *Motion to Reopen/Reconsider* at 8, is without merit. In *Dillingham*, the Ninth Circuit addressed the "narrow exception for simple possession offenses [that Congress] enacted [in] the Federal First Offender Act ("FFOA")." *Dillingham*, 267 F.3d at 1005. The Court in that case found that because Congress specifically intended to lessen the harsh consequences of certain drug convictions by enacting the FFOA, including their effects on deportation proceedings, whether or not an alien's drug possession offense originated in the United States or abroad was irrelevant. *Id.* at 1005-07. The Court emphasized the limited application of its holding, stating that "[i]t is unsurprising that courts have not found any problematic equal protection implications for aliens . . . deemed inadmissible[] for [other] crimes, given that they would not have qualified for expungment under an applicable federal statute anyway." *Id.* at 1008 (citing *Carr v. INS*, 86 F.3d 949, 952 (9th Cir. 1996)). Unlike in *Dillingham,* in the instant case, there is no applicable federal statute that would have expunged the applicant's convictions. As such, there are no equal protection issues here, as there is no applicable federal statute to expunge the applicant's convictions in this case. *Id.; cf. Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000) (addressing equal protection issues regarding the FFOA).

In addition, in *Pinho v. Gonzales*, 432 F.3d 193, 215 (3d Cir. 2005), a case in the circuit where this cases arises, the Third Circuit announced a categorical test for classifying vacated

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letter to the former INS also indicates that her husband misrepresented that he had never been imprisoned. She writes that her husband "answered **no** to the question that asks if he were ever jailed." *Letter from* [redacted], dated September 30, 1995 (emphasis in original). As such, counsel's unsupported assertion that the applicant "never made any representation whatsoever at his entry in 1993," *Motion to Reopen/Reconsider* at 7, contradicts [redacted] affidavit.

convictions under the INA. The Court held that only orders that vacate a criminal conviction based on a "defect in the underlying criminal proceeding" was no longer a "conviction" under the INA. *Pinho*, 432 F.3d at 215. In the instant case, the applicant's criminal convictions were "rehabilitated" under Italian law not because there was a defect in the underlying proceeding, but rather, because of his good conduct during imprisonment and his assistance with the prosecution of other members of the Prima Linea. *Letter from* [redacted], dated August 11, 1995; *Brief in Support of Appeal*, dated June 14, 2001 ("As a result of his cooperation, . . . he was later awarded a full and complete pardon."). Therefore, under *Pinho*, the applicant's numerous convictions remain convictions under the INA despite the Italian government's rehabilitation of his criminal record. Accordingly, the applicant is inadmissible under section 212(a)(6)(C)(i) for entering the United States as an intending immigrant under the VWP and for misrepresenting his previous arrests, convictions, and imprisonment in order to procure admission into the United States.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C)(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. *See* Section 212(i)(1) of the Act, 8 U.S.C. § 1182(i)(1). Hardship the applicant, his children, or other family members experience upon deportation is not a permissible consideration under the statute. *See* Section 212(i)(1) of the Act, 8 U.S.C. § 1182(i)(1). 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).

The AAO stands by its previous decision holding that the applicant has not shown extreme hardship to a qualifying relative. *Decision of the AAO, supra.* Counsel's assertion that the AAO erred because it failed to consider the children's welfare because "a mother's welfare is intimately connected to the welfare of her children," *Motion to Reopen/Reconsider* at 15, is misplaced. By [redacted]'s own account, "[the couple's] children are comfortable and well adjusted in the United States. It would be disturbing to their social and emotional welfare to be transplanted to a different country." *Affidavit of* [redacted] *supra.* There is no elaboration regarding how a move to Italy would disturb the children's social and emotional welfare such that it would cause extreme hardship to [redacted], the only qualifying relative under the statute. There is no evidence, such as a psychological evaluation, addressing how [redacted] would be affected if her children had to move to Italy. There is no evidence the children have any special needs or medical issues that would cause additional or unusual hardship to [redacted] if they moved to Italy, the country in which both she and the applicant were born.

Regarding [redacted]'s parents, the evidence does not show that [redacted] would suffer extreme hardship if she moved to Italy as a result of her husband's waiver application being denied. Although the AAO recognizes that [redacted]'s parents have medical issues and is sympathetic to their case, the record evidence shows only that [redacted] accompanies her parents to medical appointments and acts as an interpreter. Neither of [redacted]'s parents currently have urgent medical issues; rather, both are going to regular follow up appointments to monitor their health care.

Letter from [redacted]z, dated March 6, 2001 (stating that [redacted]s father "follows [up] with us on a twice a year basis"); *Letter from* [redacted], dated March 6, 2001 (stating that [redacted]s mother "continues follow-up with me every 2 to 3 months"); *Letter from* [redacted] dated February 27, 2001 (stating that [redacted] mother "continues follow-up with me on a bi-yearly basis").

The AAO recognizes that will endure hardship as a result of separation from the applicant. However, their situation, if she remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship based on the record. The Board of Immigration Appeals and the Courts of Appeals have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), 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. *See also Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991) (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).

To the extent claims she would suffer financial hardship, there is insufficient information in the record to substantiate this claim. The record shows that is a forty-seven year old woman who has worked in the travel agency industry since September 1987. *Biographic Information (Form G-325A)*, signed by [redacted] on April 21, 1995. The most recent evidence in the record, from 1999, shows that she was employed as a "Team Leader" at a travel agency, earning over $13 per hour. *Letter from* [redacted], dated December 26, 2000. Although there is a copy of a gas bill for .79 and a water bill for $3.52 in the record, there is no other information regarding the family's expenses, such as documentation of rent or mortgage. Going on record without supporting documentary evidence is insufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (BIA 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In any event, even assuming some economic hardship, as the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *See also Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship).

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) 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 motion will be denied.

ORDER: The motion is granted and the underlying application denied.