identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: BANGKOK, THAILAND Date: MAY 15 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 Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Bangkok, Thailand, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Korea who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for failing to disclose the fact that her son had attended school in the United States without a proper visa. The record indicates that the applicant is married to a naturalized United States citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 her United States citizen spouse.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on her spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision*, dated August 11, 2006.

On appeal, the applicant, through counsel, asserts that the "District Director erred in failing to consider all of the evidence of record individually and cumulatively, and therefor [sic] violated due process." *Form I-290B*, filed September 18, 2006.

The record includes, but is not limited to, counsel's brief; declarations from the applicant, her husband, and her stepdaughter; a letter from [redacted] regarding the applicant's husband; and medical documents for the applicant. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

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 September 8, 2003, the applicant and her son entered the United States on B-2 nonimmigrant visas, with authorization to remain in the United States until March 7, 2004. During the time that the applicant was in the United States, she secured an allegedly fraudulent lease agreement in order to enroll her son in public school. The applicant's son attended a Los Angeles public school from October 23, 2003 to February 13, 2004. The applicant departed the United States before her period of authorized stay expired.

On June 26, 2004, the applicant again sought admission to the United States. She was found to have willfully failed to disclose the fact that her son had attended school in the United States in violation of his B-2 status. On the same day, the applicant's visa was revoked and she withdrew her application for admission.

The applicant married her naturalized U.S. citizen in Korea on May 9, 2005. On May 26, 2005, he filed a Form I-130 petition naming the applicant as beneficiary. On September 30, 2005, the applicant's husband filed a Petition for Alien Fiancé(e) (Form I-129F). On December 1, 2005, the Form I-130 was approved. On December 14, 2005, the Form I-129F was approved. On March 16, 2006, the applicant filed a Form I-601. On May 4, 2006, the District Director issued a Notice of Intent to Deny (NOID), and the applicant responded with a statement and additional evidence on July 24, 2006. On August 11, 2006, the District Director denied the applicant's Form I-601, finding the applicant failed to demonstrate extreme hardship to her qualifying relative.

Counsel contends that the applicant "was not convicted of any fraudulent misrepresentation, and the District Director's decision never set forth any specific charge of misrepresentation nor defined what 'other benefit' [the applicant] sought to procure by failing to disclose that she enrolled her son in elementary school for a three or four month period." *Appeal Brief*, dated September 12, 2006, at 11. Counsel also states that "the lease agreement presented to school officials reflecting the names of [the applicant] and her son was genuine and valid. It was neither provided to a U.S. government official nor provided with the intention to deceive." *Id.* at 14. Counsel indicates that the applicant "used her brother's home address and provided a lease that included her and her son's name." *Id.* at 3.

The AAO notes that to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), there is no requirement that a conviction must have been obtained.

The regulation at 8 C.F.R. 214.2(b)(7) states that "[a]n alien who is admitted as . . . a B-1 or B-2 nonimmigrant on or after April 12, 2002 . . . violates the conditions of his or her B-1 or B-2 status if the alien enrolls in a course of study."

However, in *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994), the Board of Immigration Appeals (Board) stated:

> It is well established that fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, or other documentation, must be made to an authorized official of the United States Government in order for excludability under section 212(a)(6)(C)(i) of the Act to be found.

The Department of State Foreign Affairs Manual also offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act. For a misrepresentation to fall with the purview of INA § 212(a)(6)(C)(i), it must have been practiced on an official of the United States government, generally speaking, a consular officer or an immigration officer. *See* 9 FAM 40.63 N4.3.

The presentation of the lease agreement, whether fraudulent or not, to local school officials is not a willful misrepresentation made to a United States government official to obtain a benefit under the Act, and cannot therefore support a charge of inadmissibility under section 212(a)(6)(C)(i) of the Act.

However, the applicant is inadmissible under section 212(a)(6)(C)(i) for material misrepresentations made to immigration officers when she again sought admission to the United States on June 26, 2004. A misrepresentation is generally material only if by it the alien received a benefit for which she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964); *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961). Thus, a misrepresentation is material if either the alien is excludable on the true facts, or the misrepresentation tends to shut off a line of inquiry that is relevant to the alien's eligibility and that might well have resulted in a proper determination that she be excluded. *9 FAM 40.63 N61*; *see also Matter of S- and B-C-, supra.*

Immigration officers concluded that the applicant misrepresented her immigrant intent when she attempted to enter the United States with a nonimmigrant visa on June 26, 2004 based on her initial denial that she had enrolled her son in school during the prior visit, and on allegedly inconsistent testimony provided by her son and [redacted], a man who met the applicant at the airport and is referred to in the record as the applicant's fiancé, concerning their intentions in the United States.

The record contains a Record of Deportable/Inadmissible Alien (Form I-213) dated June 26, 2004 in which an immigration officer indicates that the applicant's "son thinks they are coming to live and go to school in the US again." The officer also states: "Spoke to [redacted] her fiancé here in the United Stats and he stated that they will be married and adjust status to stay in the United States." The AAO notes that the record does not include any other evidence of statements made by the applicant's son or [redacted] regarding the applicant's intentions in coming to the United States. When questioned concerning that testimony, the applicant stated that she did not know why her son said he

would attend school during the visit. *Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act*, dated June 26, 2004, at 3. She also indicated that she did not have definite plans to marry [redacted], stating "he has expectation of marriage but I need more time" and "there is talk about visas and marriage but the real reason I came was to travel." *Id.* at 4. The applicant also stated that [redacted] was still married to his wife and she was only considering marrying him. *Id.* The AAO notes that there is no evidence in the record that the applicant ever married [redacted]

The applicant claims she "honestly did not know that enrolling her son in public elementary school was in any way illegal." *Appeal Brief, supra* at 15; *see also Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, supra.* In a brief from counsel submitted in response to the NOID, counsel claims that "when the [applicant] went to the school, she was advised that her son's visa status rendered him ineligible to attend school," but also asserts that the applicant "did not know that it would violate immigration law to send her son to public school" because school officials also informed her that "they could enroll him if [she] provided a family census register and a proof of residence in the area." *Counsel's Brief*, dated July 24, 2006, at 2-3, 12. Concerning the events of June 26, 2004, counsel indicates that the applicant "advised counsel that she initially informed the inspectors that her son did not go to school during their previous stay in the U.S. but that she eventually admitted that her son did in fact attend public schools without paying tuition." *Id.* at 12.

The evidence in the record demonstrates that the applicant was advised that enrolling her son in school constituted a violation of his B-2 nonimmigrant status. That the applicant may also have been advised that she could enroll her son in school if she provided the school with a family census register and proof of residence did not alter the fact that she had been informed that attending school was a violation of B-2 status. Furthermore, the record shows that, contrary to the assertions of counsel, the applicant submitted a fraudulent lease agreement as proof of residency. The applicant indicated in her sworn statement taken July 24, 2006 that she stayed at the house of a friend who "showed [her and her son] the sites," which is inconsistent with the claim that she had a valid lease agreement to reside at her brother's home address. The AAO notes that the applicant has not submitted the lease agreement or a copy thereof, nor has she indicated that she paid rent to reside at her brother's home address. The record shows that the applicant knowingly submitted proof of residency containing an address where she and her son were not actually staying.

The AAO finds the applicant's testimony that she was unaware on June 26, 2004 that enrolling her son in school was a violation of his nonimmigrant B-2 status is not credible. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The applicant has failed to adequately resolve the inconsistencies in the evidence.

The AAO finds that the applicant was aware on June 26, 2004 that enrolling her son in school during their previous visit was a violation of his B-2 nonimmigrant status, and that she willfully concealed this fact from the inspecting officer. The AAO finds that a prior violation of nonimmigrant status is material to the determination of whether an alien is to be admitted again in the same status. The applicant's visa was revoked once the true facts were known concerning her prior immigration violation. The applicant is therefore inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides that:

> (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 upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and his children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The qualifying relative is the applicant's U.S. citizen spouse. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

U.S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." ***Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted);** *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In a declaration dated July 24, 2006, the applicant states that it would be hard for her spouse to adjust to life in Korea because he has spent the last 30 years in the United States. She indicates that it would be difficult for him, because of his age and economic conditions, to find employment in Korea. She asserts that even though they are happy, they are "both having [a] very hard time" because of their separation and "would be so much happier" together.

In an undated declaration, the applicant's husband states that he has suffered emotional instability as a consequence of the separation from the applicant, and has had "no choice but to quit" one of his jobs and seek psychiatric treatment. He indicates that if the waiver is denied, he would be required to leave his employment of twelve years prior to the age of retirement and relocate to a country where he was absolutely no employment prospects. He states that he has no current assets, but only his current and future wages to use when he retires. He indicates that the applicant has "received substantial inheritance and money from her wages and divorce settlement," income that they hoped to invest in the United States. He contends that investment opportunities in Korea are limited. He asserts that his health is "not great" and that he would lose his health insurance and access to hospitals operated by the Veteran's Administration if he relocated to Korea, all of which could result in diminished care. He states that moving to Korea would result in the hardship of separation from his daughter, fellow church members and co-workers. He indicates the he is the primary caregiver for his daughter, and that he would suffer hardship if he is unable to continue providing her care.

In a letter dated June 15, 2006, recounts the applicant's spouse's history and states the following:

> If his wife can't come, he's alone again, faced with a possible divorce. At the thought of separating from his new wife and son (with whom he has become very close) he startles out of sleep. He has no appetite. He feels tired and has had some suicidal thoughts. He feels his life is set up to fail and he feels trapped and hopeless. He's also outraged that the woman, he finally feels at peace with, is slipping away from his reach because she had sent her son to school.

In a letter dated June 23, 2006, [redacted] states that the applicant's spouse has been a dedicated member of the Solid Rock Church of Southern California for at least four years, and has become worried and preoccupied at the prospect that the applicant will not be allowed to join him or that he will be compelled to relocate to Korea.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

The AAO acknowledges that the applicant's spouse will experience emotional hardship if he chooses to relocate to Korea and is separated from his daughter and other acquaintances, or if they chooses to remain in the United States and is separated from the applicant, but the applicant has failed to show that this hardship, when combined with other demonstrated hardship factors, will be extreme. The AAO notes that the applicant and her spouse have never lived together in the United States, having met online in October 2004. They spent eight days together in Korea in November 2004, and then an unspecified amount of time together when they were married in May 2005. Furthermore, although the input of any mental health professional is respected and valuable, there is no indication that [redacted] evaluation is based on more than self-reporting by the applicant's spouse in a single interview between the applicant's spouse and the psychologist. [redacted] provides no evidence of tests administered or therapy provided to the applicant, and no diagnosis of a recognized mental health condition. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for a mental health condition suffered by the applicant's spouse. It is unclear that the conclusions reached in the submitted evaluation reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

The applicant has failed to submit any independent evidence to substantiate the assertion that the applicant's spouse will be unable to obtain employment in Korea. The applicant has also failed to demonstrate that he would be subjected to diminished healthcare there, or that otherwise adjusting to his native country would cause him extreme hardship. The testimony of the applicant and her spouse are evidence and have been given appropriate weight, but going on the 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)). Likewise, without documentary evidence to support a claim, the assertions of counsel will not satisfy the applicant's

burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO also notes that the applicant has admitted to having considerable financial means, and the record does not show that the applicant's spouse would suffer financial hardship in Korea. Further, the applicant's adult daughter indicates in her letter dated July 24, 2006 that she is "employed and self-sufficient," and the record does not reflect that she requires the care of the applicant's spouse.

The AAO acknowledges the significance of family separation as a hardship factor, but concludes that the hardship demonstrated by the evidence in the record is the common result of removal or inadmissibility. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). 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 this case, 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 her U.S. citizen spouse as required under section 212(i) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests 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.