U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. N.W. MS 2090
Washington, D.C. 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE AUG 30 2013 OFFICE: VIENNA, AUSTRIA File: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Vienna, Austria, denied the waiver application and the application for permission to reapply for admission into the United States. The applicant, through counsel, appealed the Field Office Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeals. The applicant filed motions to reopen the AAO's decisions. The AAO granted the motions and affirmed its previous decisions. The matter is now before the AAO on subsequent motion. The motion is granted, the prior AAO decisions are withdrawn and the underlying appeals are sustained.

The record reflects the applicant is a native of the [redacted] and citizen of [redacted] 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 having sought to procure admission into the United States by willful misrepresentation. The applicant also was found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within 10 years of his last departure from the United States. The applicant further was found to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed and seeking admission within the proscribed period since his removal. The Field Office Director concluded the applicant failed to establish extreme hardship would be imposed upon a qualifying relative, and denied his Application for Waiver of Grounds of Inadmissibility (Form I-601) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) accordingly. The AAO dismissed the applicant's appeals and affirmed the Field Office Director's decision. The AAO also affirmed its previous decisions upon granting the applicant's motions to reopen a decision.

On subsequent motion, counsel contends new documentary evidence and reconsideration of the record demonstrate the applicant's U.S. citizen spouse and lawful permanent resident parents will continue to suffer extreme hardship because of the applicant's inadmissibility.

A motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). As the applicant has submitted new documentary evidence to support his claim and established reasons for reconsideration, the motion to reopen and reconsider will be granted.

The record includes, but is not limited to: briefs, motions, and correspondence from current and previous counsel; letters of support; identity, psychological, medical, employment, financial, and academic documents; photographs; and documents on conditions in [redacted] and the [redacted] The entire record, was reviewed and considered in rendering a decision on the appeal.

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

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

The applicant was found to be inadmissible for having attempted to procure admission to the United States under the Visa Waiver program on April 26, 2000, by presenting a photo-substituted [redacted] passport that did not belong to him. On motion, the applicant does not contest the finding of inadmissibility. Accordingly, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, and he requires a waiver under section 212(i) of the Act.[1]

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

> (1) The Attorney General [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 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. Hardship to the applicant and his children as well as his in-laws can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and parents are the only demonstrated qualifying relatives in this case. 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).

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*,

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[1] On appeal, the AAO found the applicant to be further inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having accumulated unlawful presence from August 26, 2000, until August 12, 2004, when he was removed to [redacted] On motion, the applicant has not contested the finding of inadmissibility. Accordingly, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and he requires a waiver under section 212(a)(9)(B)(v) of the Act.

10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) 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 BIA 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 BIA 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 Id.* at 568; *In re 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).

However, though hardships may not be extreme when considered abstractly or individually, the BIA 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.*, *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *In Re 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 (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.

In support of the applicant's motion, counsel submits an original letter dated December 1, 2012, from the applicant's father's treating physician at [redacted] which states the applicant's father has been diagnosed with uncontrolled Diabetes Mellitus II, Diabetic Neuropathy, Foot Drop Syndrome, Hypercholesterolemia, Hypertension, Insomnia, and moderate to severe Depression, and he has been recommended to stop working. Counsel also submits a medical report from the [redacted] dated June 4, 2013, which indicates the applicant's father's current medication list and cardiac catheterization discharge instructions. Additionally, counsel contends: the AAO "overlooked the fact that [the applicant's father] has already been prescribed medication for depression and insomnia" by his treating physician; since the applicant's removal, his parents' health "has deteriorated to the point where they either cannot or should not be working"; the applicant's family "will lose their principle source of income and their home" as the applicant's father "can no longer bear the discomfort or he becomes too sick to work"; the applicant's spouse continues to seek treatment for her back pain; and "all of the responsibility for supporting and raising" their children has fallen onto the applicant's wife as their children "are destined to grow up without the love, care and support of their father". The applicant's spouse further contends: she and the applicant's children are living with her in-laws; their children miss the applicant every day; she is working as an Administrative Assistant earning $600/week, making enough money to "just barely get by"; she is "trying very hard to hold things together"; she and her siblings worry about their father as he has been depressed since their mother's death in 2010; and her father has not been working since mid-January as he suffered a heart attack, which resulted in the placement of a stent.

On motion, the AAO finds the record is sufficient to establish the applicant would serve an essential role in the physical, emotional, and financial wellbeing of his parents' and his spouse's household as his father suffers from chronic medical and mental health conditions that require ongoing treatment and for which he has been recommended to limit his employment-related activities, his mother has applied for Social Security Benefits and is scheduled to discontinue her employment on April 30, 2013, and his spouse continues to receive treatment for chronic back pain. The AAO notes the applicant's father-in-law is not a qualifying relative, and the record does not include any evidence of the impact his father-in-law's current health condition would have on his qualifying relative spouse other than what has been self-reported. Nevertheless, the AAO finds, in the aggregate, the applicant's parents and spouse would suffer extreme hardship upon separation from the applicant.

Additionally, the AAO notes that in its previous decision, it determined the applicant's spouse would experience extreme hardship upon relocation to [redacted] due to her strong familial and community ties to the United States, her employment and financial circumstances when she previously resided in [redacted] the general social conditions there along with the normal hardships associated with relocation. The AAO notes the applicant's spouse's circumstances have not improved since the AAO's previous decision. Accordingly, the record continues to reflect the cumulative effect of the hardship the applicant's spouse would experience upon relocation due to the applicant's inadmissibility rises to the level of extreme.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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) …

Id. at 301.

The BIA further stated that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.*

The favorable factors in this case include extreme hardship to the applicant's U.S. citizen spouse, additional hardship to his parents, familial ties, and the absence of a criminal record. The unfavorable factors include the applicant's misrepresentation of his identity upon attempting to be admitted through the Visa Waiver Program and periods of unauthorized presence and employment.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.[2]

The AAO notes that the Field Office Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision.[3] The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(i) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a

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[2] As the applicant has established extreme hardship to his U.S. citizen spouse as required under section 212(i) of the Act, he also has established extreme hardship to his qualifying relative under section 212(a)(9)(B)(v) of the Act.

[3] Previously the Form I-212 was the subject of a separate appeal and motion. However, as both the Form I-601 and Form I-212 were denied in the same Field Office Director decision, the AAO will consider both applications in the current motion.

> place outside the United States or attempt to be admitted from foreign continuous territory, the [Secretary] has consented to the aliens' reapplying for admission.

On [redacted] 2001, the Immigration Judge issued an order, denying the applicant's applications for asylum and for withholding of removal as well as his request for relief under the Convention Against Torture. On [redacted] 2004, the applicant was removed from the United States. As such, he is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The motion is granted. The prior decisions of the AAO are withdrawn, and the underlying appeals are sustained.