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

U.S. Citizenship and Immigration Services

H5

[redacted]

DATE: DEC 0 4 2012 Office: DETROIT, MICHIGAN FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

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 waiver application was denied by Field Office Director, Detroit, Michigan, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Somalia 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 having procured admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his U.S. citizen spouse and five U.S. citizen children.

In a decision, dated January 14, 2011, the field office director found that the applicant's family would suffer extreme hardship as a result of the applicant's inadmissibility. He then states that the reason for the applicant's denial, "has nothing to do" with his family's extreme hardship, but rather with the applicant's overall lack of credibility. He stated further that the applicant's continued lack of credibility and misrepresentation makes it impossible to determine when he is being truthful. The waiver application was denied accordingly.

On appeal, counsel states that the field office director mistakenly alleges that the applicant had continually misrepresented himself to the immigration service, when this allegation is not supported by the record. Counsel states that the misrepresentations that occurred in the applicant's case were brought to the attention of the immigration service by the applicant as soon as he had an opportunity to do so and, but for the applicant's initial entry, he did not receive an immigration benefit as a result of these misrepresentations. Counsel states further that the applicant received no positive credit for voluntarily correcting the error on his asylum application and that the field office director's decision was based on speculation and conjecture. Counsel also states that the substantive use of the applicant's answers to an English test as a basis for the alleged continuing misrepresentation is illogical and violates the applicant's right to due process.[1]

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

> (i) 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) of the Act provides:

> (1) The [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

[1] Constitutional issues are not within the appellate jurisdiction of the AAO, therefore this assertion will not be addressed in the present decision.

> 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 case, the record reflects that on September 15, 1995, the applicant used a Kenyan passport belonging to a Hamad Adan to enter the United States. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or misrepresentation. The applicant's qualifying relative is his U.S. citizen spouse.

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. *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,* 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board 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 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).

However, 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 (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 record of hardship includes: a hardship statement from the applicant, a statement from the applicant's spouse, a statement from the applicant's mother-in-law, medical documentation pertaining to the applicant's spouse, court documentation awarding custody of the applicant's two children from a prior relationship to him, and financial documentation.

The record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

The record indicates that the applicant's spouse was born in Korea and entered the United States as a lawful permanent resident when she was six months old. The record indicates further that she has lived in the United States since her entry and she suffers from a hearing impairment, Attention Deficit Disorder, and a speech defect. The applicant states that his spouse would suffer extreme hardship as a result of relocating to Somalia because she does not know the language or the culture and he would not be able to find employment in Somalia to support his wife and children given the unstable situation in the country.

The AAO notes that the applicant has received temporary protected status (TPS) since 2001. The Department of Homeland Security (DHS) has granted TPS to nationals of Somalia residing in the United States through March 17, 2014. This TPS designation was granted to Somali nationals due to the conditions in the country since 1991 with two re-designations in 2001 and 2012. Countries are designated for TPS in situations where: there is an ongoing armed conflict within the state and due to

that conflict, return of nationals to that state would pose a serious threat to their personal safety; the state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or there exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety. Furthermore, the AAO notes that there is a current U.S. State Department Travel Warning for Somalia, dated June 15, 2012, which recommends U.S. citizens avoid all travel to Somalia. The warning goes on to state that there is no U.S. Embassy or other U.S. diplomatic presence in Somalia and the U.S. government is not in a position to assist or effectively provide services to U.S. citizens in Somalia. This warning describes the security situation inside Somalia as unstable and potentially dangerous with the possibility of kidnapping, murder, illegal roadblocks, banditry, and other violent incidents and threats to U.S. citizens and other foreigners occurring in any region; terrorist operatives and armed groups demonstrating their intent to attack air operations at Mogadishu International Airport; and inter-clan and inter-factional fighting flaring up with little or no warning. The warning states that this instability and violence has resulted in the deaths of countless Somali nationals and the displacement of more than one million people. Thus, taking into consideration the applicant's spouse's residence in the United States; unfamiliarity with the Somali language or culture, her hearing, speech, and learning impairments; the fact that the family would relocate with at least three young children; and the unstable and dangerous security situation in Somalia, the AAO finds that the applicant's U.S. citizen spouse would suffer extreme hardship upon relocation.

In regards to separation, the applicant states that because of his wife's disabilities she has trouble communicating with strangers and requires his help when dealing with matters outside the home. The record indicates that the applicant has sole custody of his two U.S. citizen children from a prior relationship and that these children's mother has abandoned them and is thought to have moved to Canada. The applicant also has three children with his current spouse and he states that she requires his help with raising their children because she and the children cannot always communicate effectively and the children try to take advantage of their mother's disabilities. The applicant states further that his spouse's disabilities hinder her employment opportunities and that he is the sole source of income for the family. We note that because relocating to be with the applicant in Somalia would be such an extreme hardship, in this case, the applicant's spouse is facing the prospect of permanent separation from her husband and the permanent separation of her children from their father. Thus, taking into consideration the emotional and financial hardships in the applicant's case, particularly the fact that the applicant's spouse, who has documented disabilities, would be left a single mother of five young children, we find that the applicant's spouse will suffer extreme hardship as a result of separation. Considered in the aggregate, the AAO finds that the applicant has established that his spouse would face extreme hardship if his waiver request is denied.

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.

The field office director found that the applicant was not credible and therefore did not warrant the favorable exercise of discretion. The AAO has reviewed the entire record and finds that a favorable exercise of discretion is warranted.

The unfavorable factors in the applicant's case include his fraudulent entry into the United States and an adverse credibility finding by an immigration judge during the applicant's asylum hearing. The AAO notes that the record includes documentation showing that at the beginning of the applicant's asylum hearing he came forward to correct a discrepancy in his initial asylum application in regards to his Somali sub-clan that was allegedly due to an error in translation. We note further that the record is not clear as to the nature of this discrepancy and whether it was willful or not. As such, the discrepancy will be considered, but will be weighted appropriately against any positive factors in the applicant's case.

The positive factors in the applicant's case include the extreme hardship the applicant's U.S. citizen wife and five U.S. citizen children would face if the applicant was found inadmissible; the applicant's consistent record of employment and filing of income taxes in the United States; the applicant's home ownership in the United States; his lack of any criminal record in the United States; his active participation in his community in northern Detroit; and, as evidenced by statements in the record from his employer, his wife, and his mother-in-law, the applicant's value as a caring and hardworking employee, father, and spouse.

The AAO notes that the field office director gave the positive factors in the applicant's case less weight because he found them to be after-acquired equities. Courts have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal order has been issued ("less weight principle"). See *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991) and *Bothyo v. Moyer*, 772 F.2d 353, 357 (7th Cir. 1985). Moreover, in *Wang v. INS*, 622 F.2d 1341, 1346 (9th Cir. 1980) (overruled on unrelated grounds) the Ninth Circuit held that, "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country." In this case, the applicant was ordered removed by an Immigration Judge on October 8, 1999, as a result of a denied asylum application. The applicant appealed this decision to the BIA and then to the Sixth Circuit Court of Appeals. In 2008, at the request of counsel, the Sixth Circuit remanded the applicant's case to the BIA, who then remanded the case to the immigration judge in Detroit, Michigan. On July 8, 2008, the immigration judge ordered that the applicant's removal proceedings be terminated without prejudice so that the applicant's adjustment application could be adjudicated administratively. Furthermore, expect for the 10 months between the applicant's fraudulent entry and his filing of an asylum application, the record does not indicate that the applicant was ever illegally in the United States. In addition to the appeals of his removal order, the applicant applied for and was granted TPS in 2001. The record indicates that he continually received TPS until at least 2010, when he already had a pending adjustment application filed on November 4, 2008. Thus, the AAO finds that as the applicant's removal proceedings were terminated and the applicant was legally in the United States, the equities he acquired during his residence here are not after-acquired equities.

Although the applicant's violation of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.