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

U.S. Citizenship and Immigration Services

H5

[redacted]

DATE: [illegible] 29 2012 Office: MILWAUKEE, WI FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v), and 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Milwaukee, Wisconsin. The denial was appealed to the Administrative Appeals Office (AAO). The appeal was dismissed. The applicant filed a motion reconsider the AAO decision, which is now before the AAO. The motion will be granted and the appeal will be sustained.

The applicant is a native and citizen of India. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of her last departure, and using a fraudulent passport to re-enter the United States. She is married to a United States citizen. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(i) of the Act, 8 U.S.C. § 1182(i).

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on December 12, 2008. The AAO found that the applicant's spouse would experience extreme hardship upon relocation, but that the record did not contain sufficient evidence to establish extreme hardship due to separation. *AAO Decision*, dated April 28, 2011. The AAO dismissed the appeal accordingly.

On motion, counsel for the applicant asserts that the AAO's decision failed to consider the hardships the applicant's spouse would experience due to separation, and that supplemental documentation will demonstrate that the applicant's spouse will suffer extreme hardship if the applicant is removed from the United States. *Form I-290B*, received May 31, 2011.

A motion to reconsider must: (1) 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 USCIS policy; and (2) 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).

In this case, the counsel for the applicant asserts that the AAO's decision failed to properly examine and apply the extreme hardship analysis to the facts of the applicant's case, and the applicant's spouse will experience uncommon physical or financial hardship due to the extent of his business investments and operations and the impacts arising from being a single parent. Substantial documentation has been submitted on motion to establish the presence of extensive business and investment operations managed by the applicant's spouse. Counsel cites precedent legal decisions and discusses how they support his interpretation of the extreme hardship standard. The AAO finds counsel's assertions sufficient to support granting the Motion to Reconsider.

The record contains evidence previously submitted by the applicant. On motion, the applicant submits: a statement from counsel for the applicant; a statement from the applicant and her spouse; a statement from the applicant's spouse's brother and mother; copies of business records, including

tax returns, loan agreements, property tax statements, commercial and residential property mortgages, insurance statements, and founding documents; a statement from [redacted] pertaining to the mental health of the applicant's spouse; copies of pharmacy receipts for the applicant's spouse's mother; educational records relating to the applicant's children; and country conditions materials on India. The entire record was reviewed and all relevant evidence considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
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> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible. . . .

The record indicates that the applicant entered the United States as a visitor in 1996. She remained beyond her authorized period of stay until she departed in January 2002. The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provision of the Act, until her departure in January 2002. The applicant re-entered the United States in 2003 pursuant to a non-immigrant visa after failing to reveal her prior overstay to the consulate in Mumbai. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within 10 years of her last departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Section 212(a)(6)(C) Misrepresentation, states 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 chapter is inadmissible.

The record indicates that the applicant falsified her passport with an Indian re-entry stamp to conceal her prior overstay when re-entering the United States in 2003. Therefore the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, for having fraudulently sought to procure admission to the United States through misrepresentation.

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

> (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 on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (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*, 138 F.3d at 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.

The Chief, AAO, previously determined that the applicant's spouse would experience extreme hardship upon relocation. The AAO finds no basis to disturb this finding, and will focus on re-examining the impacts on the applicant's spouse due to separation.

Counsel asserts on motion that the applicant's spouse would experience emotional, physical and financial hardship if the applicant is removed. *Memorandum in Support of Motion*, dated May 27, 2011. Counsel explains that the applicant's spouse depends solely on the applicant as the caregiver of their two children and his elderly mother, and the care of their home due to the demands of his employment, and that if the applicant were removed all of these responsibilities would be thrust onto the applicant's spouse, resulting in extreme physical and financial hardship. Counsel further explains that the applicant's spouse is suffering emotionally and continues to seek therapy to cope with the emotional impacts of the applicant's inadmissibility.

The AAO finds the evidence of the applicant's spouse's business and property investments compelling, and it demonstrates a sophisticated and complex business arrangement involving substantial money and risk. Based on the size of the applicant's spouse's business operations, and the evidence which is probative of its demands, the AAO is persuaded by the applicant's assertion that suddenly becoming a single parent would create an uncommon level of disruption. Although it has not been demonstrated that the applicant's spouse would be unable to afford adequate child care, this factor nonetheless constitutes a hardship factor and should be weighed in the aggregate with other hardship factors due to separation.

Adding to the demands of being a single parent upon removal of the applicant would be the need for the applicant's spouse to provide for care for his aging mother to replace that provided by the applicant. *Memorandum in Support of Motion*, dated May 27, 2011. The record includes copies of medical receipts, a statement from the applicant's spouse's mother attesting to the fact that the applicant helps care for her, and other statements in the record which corroborate counsel's assertions.

The record contains a statement from the applicant's spouse's therapist. The record also contains documents previously filed in relation to the emotional impact on the applicant's spouse. In her letter dated May 23, 2011, [redacted] states that the applicant's spouse suffers from an anxiety and adjustment disorder, noting the need for additional therapy. Based on the cumulative evidence in the record, the AAO can determine that the applicant's spouse will experience significant emotional hardship, and this factor will be considered when aggregating the impacts on him due to separation.

When these hardship factors are considered in the aggregate, they rise above the common hardship impacts due to separation to a degree of extreme hardship. As such, the applicant has established that a qualifying relative will experience extreme hardship upon relocation and separation. The AAO may now move to consider whether she warrants a waiver as a matter of discretion.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (Citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's misrepresentations when applying for a visa and entering the United States and unlawful presence. The favorable factors in this case include the presence of the applicant's spouse, the hardship impact the applicant's spouse would experience due to her inadmissibility and the lack of any criminal record while residing in the United States. Although the applicant's violations of immigration law are serious matters, the favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The prior decisions of the field office director and AAO will be withdrawn and the appeal will be sustained.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The motion is granted and the application is approved.