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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 16 2013 Office: LOS ANGELES, CA [redacted]

IN RE: [redacted]

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

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
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion. The matter is now before the AAO on a second motion. The motion will be granted, the AAO's previous decision is withdrawn and the underlying appeal is sustained.

The applicant is a native and citizen of Armenia who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside with her husband and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. The AAO dismissed the appeal, finding that although the applicant established that her husband would suffer extreme hardship if he relocated to Armenia, there was insufficient evidence in the record to show that he would suffer extreme hardship if he remained in the United States. The AAO granted a subsequent motion, but concluded that although the applicant established extreme hardship, the applicant does not warrant a favorable exercise of discretion.

Counsel now submits a second motion contending, among other things, that the favorable factors in the case outweigh the negative factors such that the applicant warrants a favorable exercise of discretion.

A motion to reopen must state the new facts to be proved in the reopened proceeding 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, counsel has submitted a brief and additional new documentary evidence to support the applicant's waiver application. The applicant's submission meets the requirements of a motion to reopen. Accordingly, the motion is granted.

In addition to the documents specified in the AAO's previous decisions, the record also contains, *inter alia*: an updated declaration from the applicant; a letter from the applicant's mother-in-law; a letter from the applicant's church; and a copy of the applicant's March 2, 2002 sworn statement.

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, in pertinent part:

> (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 AAO had previously found that the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act. The record shows that the applicant attempted to enter the United States in March 2002 using a fraudulent passport and visa which indicated she was a citizen of Russia. Counsel contends on motion that the applicant made a timely retraction of her false statement.

A timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. *9 FAM 40.63 N4.6*. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.* The Board of Immigration Appeals has found that "recantation must be voluntary and without delay." *Matter of Namio*, 14 I. & N. Dec. 412, 414 (BIA 1973). The burden of proving admissibility rests with the applicant. INA § 291, 8 U.S.C. § 1361.

In this case, the applicant has not met her burden of showing that she made a timely retraction of her misrepresentation. The record shows the applicant attempted to enter the United States by using a Russian passport and B1/B2 visa under the name [redacted] with a date of birth of July 16, 1977. A copy of the passport and visa are contained in the record. The record shows that the applicant presented the passport and visa to an immigration official upon her arrival at [redacted] International Airport. The applicant was sent to secondary inspection where, according to the applicant's sworn statement in the record, a copy of which counsel submitted on motion, she swore to an immigration inspector that her name was [redacted], that her date of birth was July 16, 1977, that she was 25 years old, and that she was born in Moscow, Russia. The sworn statement also indicates that she stated she earned approximately $400 per month in Russian rubbles and that she had no relatives that are U.S. citizens or lawful permanent residents of the United States. According to the sworn statement, the applicant eventually stated she wanted to tell the truth and admitted her true name of [redacted], that she was twenty-two years old, and that she paid

$9,000 for the passport and visa. This case is therefore distinguished from cases in which aliens used fraudulent documents only *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-,* 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel,* 18 I&N 33 (BIA 1984). In the instant case, the applicant only admitted her true name after unsuccessfully attempting to procure admission to the United States by fraud. Therefore, the applicant did not make a timely retraction and is inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit.

The AAO previously found that the applicant established extreme hardship to a qualifying relative, her husband. Therefore, the sole issue before the AAO on motion is whether or not the applicant is deserving of a favorable exercise of discretion.

After a careful review of all of the evidence, including the additional, new documentary evidence submitted with the motion, the AAO finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

The AAO had previously put great weight on the fact that the applicant failed to appear for removal as she had been instructed numerous times. On motion, counsel explains that the applicant feared persecution if she returned to Armenia and that because of her fear, she did not surrender herself to immigration authorities as instructed. In addition, counsel states that the bag and baggage letter was sent to the applicant's previous legal consultant, and that the applicant did not receive notice of this letter until much later. The applicant submits a new declaration contending that she was so fearful of returning to Armenia after witnessing a politically motivated beating death that it caused her to not act honestly. The applicant expresses remorse for her actions, asks for forgiveness, and states she has lived a "good and clean life" in America.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include: misrepresentation of a material fact in order to procure an immigration benefit and several instances of failing to appear for removal. The favorable and mitigating factors in the present case include the applicant's significant family ties to the United States, including her U.S. citizen husband, two children, and other relatives; the extreme hardship to the applicant's family if she were refused admission; a letter of support from the applicant's mother-in-law describing her as a good and caring person who is a hard worker and who is raising her children to be good citizens; a letter from the applicant's church describing her as a caring wife, devoted mother, and honorable member of the community; and the applicant's lack of any arrests or criminal convictions.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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 and the underlying appeal is sustained.