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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 2 1 2013 Office: SANTA ANA, CALIFORNIA FILE: [redacted]

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:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santa Ana, California, and 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 Mexico 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 attempting to procure an immigration benefit through fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is married to a lawful permanent resident of the United States and is the father of a U.S. citizen son and two Mexican citizen children. He 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.

The Field Office Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated April 1, 2011.

On appeal, the applicant's wife claims that she and their family will suffer hardship should the applicant be denied admission to the United States. *Statement from the applicant's wife, attached to Form I-290B, Notice of Appeal or Motion*, dated April 29, 2011.

On February 27, 2013, the AAO issued a notice of intent to dismiss (NOID) the appeal to the applicant, affording an opportunity to the applicant to respond to the AAO's findings addressed in the NOID. The AAO concurred with the Field Office Director that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act. In addition, the AAO found the applicant inadmissible to the United States pursuant to section 212(a)(6)(E)(i) of the Act, for knowingly assisting an alien to enter the United States illegally.

In response, the applicant, through counsel, submitted a brief, asserting that there is no reasonable basis to conclude that the applicant made any willful material misrepresentation to immigration authorities, and that there is insufficient evidence in the record to support a conclusion that the applicant "knowingly" assisted any individual to unlawfully enter the United States. *Applicant's Response to Notice of Intent to Dismiss Appeal,* March 26, 2013.[1]

[1] The AAO notes that in the response to the NOID, counsel contends that the applicant is not inadmissible under either section 212(a)(6)(C) of the Act or section 212(a)(6)(E) of the Act, and the AAO should find the applicant admissible, and order that his application for adjustment of status be granted. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. The AAO does not have jurisdiction over the denial of the Application to Register Permanent Residence or Adjust Status (Form I-485) filed by the applicant. The Field Office maintains the jurisdiction over the applicant's Form I-485 application. However, the AAO has considered the entire record in reviewing the appeal of the Form I-601.

The record includes, but is not limited to, counsel's response to the NOID, statements from the applicant and his wife, letters of support, medical documents for the applicant's granddaughter, financial documents, employment documents for the applicant's wife, photographs, country-conditions documents for Mexico, and documents pertaining to the applicant's removal proceeding. 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) 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).

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

> (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 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 case, the record indicates that on November 26, 1996, the applicant was apprehended while transporting an undocumented Mexican alien in his vehicle. His Form I-586, Border Crossing Card (BCC), subsequently was cancelled, and he voluntarily returned to Mexico. On November 24, 2000, the applicant applied for a new BCC, and in response to the application's Question 34, "Have you assisted a person obtain a visa or entry into the United States or any other benefit to U.S. Immigration by means of false document?", he replied, "No." He failed to disclose the incident of November 26, 1996, and he was issued another BCC.

With respect to the finding that the applicant is inadmissible under section 212(a)(6)(C), counsel, his response to the NOID dated March 26, 2013, states that there is no evidence in the record that the applicant "assisted anyone to obtain entry into the United States *by means of a false document*." Counsel further notes that question 34 of the application for a border crossing card "did *not* inquire about any assistance that did not involve the use of false documents." Counsel indicates that question 34 of the application is, at the least, ambiguous, and as it is reasonable to interpret the question as allowing a negative response if the applicant provided assistance that did not involve the use of false documents.

Counsel therefore contends that the applicant did not violate section 212(a)(6)(C)(i) of the Act by answering "No" to question 34, and that there is no reasonable basis on the record to conclude that the applicant knew he was making a "misrepresentation" by answering question 34 in the negative.

The AAO finds that the applicant's contention that he is not inadmissible to the United States for attempting to procure an immigration benefit through fraud or the willful misrepresentation of a material fact to be persuasive. Due to the ambiguity in question 34 of the application for a border crossing card, as delineated by counsel, the AAO concedes that the applicant did not make a willful misrepresentation of a material fact, and therefore is not inadmissible under section 212(a)(6)(C)(i) of the Act.

The record indicates that on November 26, 1996, the applicant was apprehended by the U.S. Border Patrol for transporting an illegal alien, and was subsequently granted voluntary departure to Mexico.

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

> (i) Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

In the Record of Deportable Alien, Form I-213, dated November 26, 1996, the Border Patrol agent stated that he personally observed the applicant's white vehicle in a stationary location near the border fence when three individuals ran to his car; only a woman entered the car. He then observed the applicant drive away at a high rate of speed. The agent followed the applicant's vehicle, and observed the applicant and a passenger in the vehicle. The agent observed the vehicle make a right turn. When the agent pulled the applicant over, he was alone in the vehicle. The woman passenger was later found in the bathroom of a restaurant. The Form I-213 reports that, under questioning, the woman stated that she met with an unknown smuggler and was taken to a spot to wait for her ride. She further stated that a white car would drive by and pick her up and take her into Calexico, California. The Form I-213 further reports that the applicant said that he knew that the woman was illegal and that she had climbed the fence and entered illegally. The applicant stated that he was to give her a ride into Calexico (not that he was asked by the woman to give her a ride into Calexico). The record shows that, at that time, the applicant did not contest the charge that he violated the conditions of his admission by knowingly and willingly transporting an illegal alien. The applicant signed a Request for Disposition (Form I-827A) on November 26, 1996 waiving his right to appear before an immigration judge, and voluntarily returned to Mexico. The applicant's Border Crossing Card (Form I-586) was cancelled at that time.

An alien who knowingly participated in a prearranged plan to transport undocumented aliens away from the border after their unlawful entry has been found to fall within the purview of section 212(a)(6)(E)(i) of the Act. *See Hernandez-Guadarrama v. Ashcroft,* 394 F.3d 674 (9th Cir. 2005); *see also Soriano v. Gonzales,* 484 F.3d 318 (5th Cir. 2007) (knowingly transporting illegal aliens after entry based on prearranged plan constitutes knowing encouragement and assistance of alien's unlawful entry under section 212(a)(6)(E) of the Act). Section 212(a)(6)(E)(i) of the Act covers an individual "who participates in a scheme to aid other aliens in an illegal entry" even if the assisting individual did not hire the smuggler or was not present at the point of illegal entry. *Soriano v. Gonzales*, 484 F.3d at 321; *see also Chambers v. Office of Chief Counsel*, 494 F.3d 274, 279 (2d Cir. 2007) (affirming alien smuggling charge where applicant "personally arranged to

provide transportation for [the alien] into the United States and purposefully deceived customs officials at the time of his attempted entry").

The applicant submitted an affidavit dated June 17, 2011, stating that he was driving and saw a woman on the highway. The applicant stated that he stopped to see if she was okay and she asked if he was willing to take her to the downtown part of the city. The applicant stated that he granted her request, that she entered the car. The applicant stated that this was the first time he met the woman, and that, in the car, she confessed that she entered the country illegally.

Counsel claims that the record does not support a finding that the applicant "'knowingly' assisted an unlawful entry into the United States, and states that the courts have adopted "an intent-based approach that requires the government to prove that the defendant willfully transported an illegal alien with the intent of supporting the alien's illegal [entry]." Counsel relies on *Tapucu v. Gonzales*, 399 F.3d 736, 740 (6th Cir. 2005), in support of this assertion. In the present case, however, the Form I-213 indicates that the applicant was driving a white car, the woman was told that a white car would pick her up and take her to town, and the applicant admitted to knowing that the woman had entered illegally and he was to drive her to town.

Counsel contends that the affidavit submitted by the applicant, approximately 15 years after the event, constitutes contravening evidence to counter or discredit the evidence in the record. Although the applicant's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on 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)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further contends that "it is inappropriate to rely exclusively on the 1996 Form I-213 as a basis to conclude that Applicant engaged in alien smuggling." In support of this contention, counsel cites the case of *Murphy v. INS*, which held that a Form I-213 merited little if any weight where the alien disputed the information on the form and the source of the information was in doubt. *Murphy v. INS*, 54 F.3d, 605, 610-611 (9th Cir. 1995). The facts in *Murphy v. INS* are that the Form I-213 relied on the testimony of an informant, constituting hearsay evidence, and that the plaintiff in the case contemporaneously contested critical statements on that Form I-213. In this particular case, the applicant is apparently contesting the information on the Form I-213 fifteen years after the information was recorded. In addition, contrary to the facts in *Murphy v. INS*, the source of the information on the Form I-213 is not in doubt. In this case, the information provided on the Form I-213 is information that the Border Patrol Agent witnessed and observed.

Counsel also cites the case *Hernandez-Guadarrama v. Ashcroft*, which found that the Form I-213 merited "no evidentiary weight." *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 680-81 (9th Cir. 2005). The *Hernandez-Guadarrama v. Ashcroft* case is also distinguishable from the present case. The court in *Hernandez-Guadarrama v. Ashcroft* held that the Form I-213 "merely refers to sworn statements of

[redacted]'s wife and of [redacted]...it provides no additional evidence but simply reiterates the statement provided by [redacted]'s wife...." The court concluded that the Form I-213 in that particular case is of no independent value and therefore is entitled to no evidentiary weight. However, in this case, as noted above, the information provided on the Form I-213 is information that the Border Patrol Agent witnessed and observed, and therefore contains independent value which is entitled to evidentiary weight.

Counsel states the applicant's admissions in the Form I-213 are "ambiguous," at best, claiming that, according to the applicant's 2011 affidavit, the woman only disclosed the facts that she had climbed the fence and entered illegally to the applicant "immediately before they were pulled over." The applicant's statements may be ambiguous, but as noted above, the Form I-213 also contains the Border Patrol agent's own statements regarding what he witnessed. The AAO finds that evidence in the applicant's file reflects that he knowingly assisted an alien to enter the United States in violation of the law.

Counsel further cites the case *Altamirano v. Gonzalez*, contending that there is no reasonable basis to find that the applicant engaged in alien smuggling. The court in *Altamirano v. Gonzalez* held that the plain meaning of section 212(a)(6)(E)(i) of the Act "requires an affirmative act of help, assistance, or encouragement," and that "because Altamirano did not affirmatively act to assist Martinez-Marin, she did not engage in alien smuggling." *Altamirano v. Gonzalez*, 427 F.3d 586, 592 (9th Cir. 2005). However, in the present case, according to the Form I-213 based upon the Border Patrol Agent's own observations, the applicant did affirmatively act to assist an illegal alien to enter the United States in violation of the law. Therefore, the applicant is inadmissible under section 212(a)(6)(E)(i) of the Act.

Section 212(d)(11) of the Act provides:

> The [Secretary] may, in [her] discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The record does not establish that the individual that the applicant aided to enter the U.S. illegally was an immediate family member for purposes of a section 212(d)(11) waiver of inadmissibility. Because the applicant is inadmissible under a ground for which no waiver is available, the appeal must be dismissed.

In proceedings for an application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.