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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 0 1 2013 OFFICE: SAN FRANCISCO, CA FILE:

IN RE:

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:

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Francisco, California, and the subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the underlying waiver application will be dismissed.

The record reflects that the applicant is a native and citizen of the Philippines 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 procured admission into the United States by willful misrepresentation of a material fact. The record indicates that the applicant is the spouse of a U.S. citizen and 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, in order to remain in the United States with her spouse and children.

The director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on her qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Field Office Director's Decision,* dated July 14, 2009. The AAO also found that the applicant had not established that denial of her waiver application would cause extreme hardship to her spouse and dismissed the appeal accordingly. *See AAO's Decision*, dated November 28, 2011.

On motion, counsel for the applicant states that the applicant did not make a willful misrepresentation of a material fact and she is not inadmissible. Counsel also states that in the event that the applicant is found inadmissible, new evidence establishes that her U.S. citizen spouse would suffer extreme hardship as a result of her inadmissibility.

On motion, the applicant through her counsel submits a statement from her spouse, medical records and a modified work schedule for her spouse, her children's birth certificates, a bankruptcy document, a letter from a family member, family photographs, and evidence of family ties to the United States. The record also includes another statement from the applicant's spouse, medical documentation for the applicant, and documents establishing relationships. The entire record was reviewed and considered in rendering a decision on the motion.

A motion to reopen must state the new facts to be proved in the reopened proceedings 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). The applicant's motion meets the requirements of a motion to reopen, and therefore the motion is granted.

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.

The record indicates that on May 19, 1995, the applicant obtained admission into the United States by presenting a passport and a U.S. nonimmigrant visa in the name and date of birth of another person. On motion, counsel states that the applicant's misrepresentation was not material, because she was not inadmissible at the time of her entry or when she applied to adjust her status to lawful permanent resident. Counsel concedes that the applicant's misrepresentation of her identity shut off a line of relevant inquiry but also asserts that further inquiry would not have resulted in a denial of the applicant's visa application or exclusion, because she was not excludable on the true facts. We disagree.

A misrepresentation is generally material only if by making it the alien received a benefit for which she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* 495 U.S. at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or

2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

Here, whether the applicant would have been granted a nonimmigrant visa to visit the United States had she attempted to obtain one in her true identity is not the question before us. The question is whether the applicant's true identity was material at the time she presented herself for admission. Under the true facts, namely if the applicant had presented her true identity at the port-of-entry, the applicant would have been denied admission under section 212(a)(7)(B) of the Act as a nonimmigrant not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission. The applicant's identity was material when she presented herself for admission at the U.S. port-of-entry, because the applicant was inadmissible on the true facts and her misrepresentation of her identity shut off a line of inquiry relevant to her eligibility for admission into the United States. The applicant received a benefit, admission into the United States, for which she would not otherwise have been eligible. As such, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C) of the Act.

Section 212(i) of the Act provides:

> (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 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 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 sections (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 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). Here, the applicant's spouse is her qualifying relative.

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, 631-32 (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, "[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 *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 AAO now turns to the question of whether the applicant in the present case has established that her qualifying relative would experience extreme hardship as a result of her inadmissibility.

On motion, counsel states the applicant's spouse's workplace injury in May 2011 affects his ability to work and support his family. The applicant's spouse works for a mattress company as a deliveryman. Medical documents corroborate that he had surgery to repair a tear in his right shoulder rotator cuff tendon on April 26, 2012. His physical therapy provided little improvement in his condition and the radiology report indicates that he has persistent pain and numbness in his right shoulder. His physician indicates that his improvement is "slower than expected." He has been put on a modified work schedule because of physical activity limitations.

The applicant's spouse states that he needs the applicant for his daily activities because he cannot lift heavy items and his right arm movement is limited. The applicant's spouse also states that

his work hours have been reduced by 20 hours a week, which impacts his income and ability to support his family. The record indicates that the applicant is not employed. The applicant's spouse is concerned that he may be laid off due to his inability to perform his work. He states that he needs the applicant to assist him financially. The record indicates that the applicant and her spouse filed for bankruptcy and a bankruptcy court discharged some of their debt in October 2012. The applicant's spouse states that he cannot support their children in the U.S. or in the Philippines without the applicant's assistance.

Having reviewed the evidence in the record, the AAO concludes that the applicant has demonstrated that her spouse would experience extreme hardship if he separates from her. In reaching this conclusion, we note that the applicant's spouse had surgery and receives physical therapy for a shoulder injury, which minimally improved his condition. He continues to be limited in his physical activities. He requires the applicant's assistance. The record indicates that the applicant's spouse was placed on a modified work schedule and responsibilities due to restrictions specified by his physician. The record establishes that the applicant and her spouse filed for bankruptcy in October 2012, and the applicant's spouse is concerned about his ability to financially provide for his family should he be laid off from work due to his condition. Considering the evidence in the aggregate, the AAO finds that the applicant's spouse would experience extreme hardship if he were to separate from the applicant.

The record, however, does not establish that the applicant's spouse would experience extreme hardship if he relocates to the Philippines. The AAO notes that the applicant's spouse is from the Philippines. The record fails to provide documentary evidence to establish that the applicant or her spouse would be unable to obtain employment there. The applicant makes no other hardship claims to her spouse if he relocates to the Philippines. Without assertions from the applicant and supporting evidence, the AAO cannot conclude that her spouse would experience extreme hardship if he relocates. Therefore, the AAO concludes, considering the evidence in the aggregate, the hardship the applicant's spouse would experience, should he relocate, would not rise to the level of extreme.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

The applicant has not established statutory eligibility for a waiver of her inadmissibility under section 212(i) of the Act. As the applicant has not established extreme hardship to her qualifying

family member if he relocates to the Philippines, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the waiver application remains denied.

ORDER: The motion is granted and the waiver application remains denied.