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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: NOV 0 6 2013 Office: CHICAGO 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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on motion. The motion will be granted, the prior AAO decision withdrawn, and the underlying appeal sustained.

The record establishes that the applicant is a native of the former Yugoslavia and citizen of Slovenia 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 procuring admission to the United States through fraud or willful misrepresentation. The record shows that the applicant misrepresented himself as a visitor upon entry into the United States under the Visa Waiver Program when he was in fact, based upon his sworn statement, an intending immigrant. The applicant seeks a waiver of inadmissibility in order to remain in the United States as the beneficiary of the approved Petition for Alien Relative (Form I-130) filed by his wife.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, June 25, 2009. The AAO determined on appeal that the record established the applicant was an intending immigrant when he sought nonimmigrant admission to the United States and that there was no evidence to overcome the applicant's sworn statement that when he last entered the United States he had no intention of returning to Slovenia. The AAO found that, although the applicant had shown his U.S. citizen spouse would suffer extreme hardship by relocating abroad to reside with the applicant, he had not established his wife would experience extreme hardship by remaining in the United States while the applicant resided abroad due to his inadmissibility, and dismissed the appeal. *Decision of the AAO on Appeal,* November 9, 2011. When considering the applicant's first motion, the AAO concluded the evidence submitted failed to establish that separation from him would impose extreme hardship on his wife, and affirmed its prior decision. *Decision of the AAO on Motion,* March 21, 2013.

In a second motion, counsel for the applicant submits a brief and new documentary evidence including: a psychological evaluation; a medical report; and financial information, including credit card and bank statements. The record also contains statements from the applicant and his spouse; medical records; birth, death, marriage, and naturalization certificates; copies of passport pages with entry/exit stamps; support letters; financial documentation, including tax returns and W-2s; and photographs. The entire record was reviewed and considered in rendering this decision.

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

> 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)(1) of the Act provides:

> 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 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 [...].

On motion, counsel provides additional evidence limited to the applicant's claim that his wife will suffer extreme hardship by remaining in the United States without him, if he is required to leave the country. He asserts a waiver of his inadmissibility is thus warranted under the Act.

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. The only qualifying relative in this case is the applicant's U.S. citizen wife. Hardship to the applicant can only be considered insofar as it causes extreme hardship to his qualifying spouse. 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. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); conversely, *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 case-by-case whether denial of admission would result in extreme hardship to a qualifying relative.

As the AAO previously determined that the applicant's wife would suffer extreme hardship by relocating abroad to reside with the applicant due to his inadmissibility, the issue of relocation will not be revisited on motion. In both its prior decisions, however, the AAO concluded the applicant had failed to establish that his spouse would experience extreme hardship should she remain in the United States while the applicant resides abroad.

The AAO determined that the record did not contain documentation to establish the nature and severity of emotional hardship to the qualifying relative or to demonstrate how separation would affect her ability to meet her daily responsibilities. The AAO further concluded that documentation failed to demonstrate that the applicant's wife would experience financial hardship upon separation from the applicant.

Regarding the claim of physical and emotional hardship due to separation from the applicant, counsel provides new evidence that the applicant's wife has ongoing health problems that are worsened by the fear of separation from the applicant. The record shows that the applicant and his wife knew each other while growing up in Yugoslavia, the applicant moved to the former Yugoslav province of Slovenia for work in 1985 and became a citizen of that newly formed country, and his wife fled the war in Bosnia and came to the United States as a refugee. A report

by the therapist who has been treating the qualifying relative since December 2012 supports the applicant's claim that his wife is suffering severe emotional distress that will worsen with her husband's departure. Based on twice monthly therapy sessions for over three months, the therapist diagnoses the applicant's wife with major depressive disorder affecting her daily functioning and making her unable to work, observes that the stress of worry about her husband's immigration situation is increasing her symptoms, and notes an additional diagnosis of post-traumatic stress disorder (PTSD) arising from her first husband being killed in 1993. *See Psychological Evaluation,* April 12, 2013. The therapist states that the patient is potentially suicidal, will not be able to survive another loss, and recommends she undergo a psychiatric evaluation to determine whether medication is indicated. The record reflects that the qualifying relative sustained injuries to her pelvis in a 2001 automobile accident followed by a 2006 trauma to her left foot leaving her with a painful "big" toe, and an internist who examined her during the same time frame as the therapist confirms the applicant's claims that his wife is suffering ongoing pain and mobility issues stemming from the 2006 injury. *See Medical Report,* April 15, 2013. This doctor prescribed an antidepressant medication, stated the need for a psychiatric consult due to the patient's depression and severe PTSD, and noted she trusted no one except her husband, was afraid to leave the house, and could become suicidal.

Regarding the financial component of separation hardship, counsel asserts the qualifying relative will be severely impacted by the loss of the applicant's income. Several 2013 credit card statements reflect that the she is carrying balances totaling between $8,000 and $13,000 on which only slightly more than the minimum amount due is being paid, and there is evidence the qualifying relative's inability to work due to her health conditions has made her dependent on the applicant. Tax returns on record indicate that, even based on their incomes when both were working, the qualifying relative's current level of debt represents a burden on her resources. Documentation shows that the applicant contributed most of the couple's approximately $1,200 monthly income in 2010, they had verifiable 2011 living expenses (excluding food costs) approaching $1,000 per month, and their apartment is leased in the applicant's name. Counsel claims that their living expenses are nearly $2,000 per month and that financial assistance from the applicant's brother, documented at over $10,000 this year, will cease upon the applicant's departure. Evidence indicates that the applicant's wife lacks the financial resources to visit her husband overseas to ease the pain of separation.

The record indicates that the applicant's spouse will experience physical and emotional hardship as a result of the applicant's absence. The evidence of pain and mobility issues coupled with documented risks of severe psychological consequences support the claim that the qualifying relative's daily functioning will be further impaired by her husband's absence. For all these reasons, the cumulative effect of the physical, emotional, and financial hardships the applicant's wife is experiencing or is likely to experience due to his inadmissibility rises to the level of extreme. The AAO concludes based on the evidence provided that, were his wife to remain in the United States without the applicant due to his inadmissibility, she would suffer extreme hardship beyond those problems normally associated with family separation.

The documentation on record, when considered in its totality, reflects the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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 . . . 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 favorable factors in this matter are the extreme hardships the applicant's wife will face if the applicant returns to Slovenia, regardless of whether she joins the applicant there or remains here; supportive statements; the applicant's 12-year residence in the United States; lack of any criminal record; history of gainful employment; and statements regarding good character. The unfavorable factors in this matter concern the applicant's misrepresentation and misuse of the Visa Waiver Program to enter and remain in the United States.

Although the applicant's violations of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Given the equities involved, including the passage of time since the applicant's violations of immigration law, the AAO finds 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. Accordingly, the motion to reopen is granted and the prior decision of the AAO is withdrawn. The appeal is sustained.

ORDER: The motion is granted, the prior AAO decision is withdrawn, and the underlying appeal is sustained.