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

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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:

SELF-REPRESENTED

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 District Director, New York, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of China 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 procuring admission to the United States by fraud or willful misrepresentation of a material fact. The applicant's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to remain in the United States.

The District Director found that the applicant had failed to establish extreme hardship to a qualifying relative and the Form I-601, Applicant for Waiver of Grounds of Inadmissibility, was denied as a matter of law and as a matter of discretion. *Decision of the District Director*, dated July 24, 2013.

On appeal, the applicant[1] asserts that he did not willfully misrepresent material facts when he arrived in 1991. Additionally, former counsel asserts that the applicant's spouse would experience extreme hardship if the applicant's waiver application is denied. *Brief in Support of Appeal*, dated August 23, 2013.

The record includes, but is not limited to, statements from the applicant and his spouse, a psychological evaluation of the applicant's spouse, country-conditions information about China, medical records and financial records. The entire record was reviewed and considered in rendering 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.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now Secretary of the Department of Homeland Security (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

[1] The record includes a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by which states that she is eligible to practice law in New York, New Jersey and California. These states' attorney licensing databases do not reflect that she is eligible to practice law. The applicant is therefore considered to be self-represented.

immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that the applicant sought to procure admission to the United States with a fraudulent U.S. visa and Thai passport in the name of on or about March 16, 1991. He was ordered excluded *in absentia* on May 28, 1991. After applying for asylum and being placed in immigration proceedings again, he was granted voluntary departure on May 7, 1997, under his correct name but he failed to timely depart. The applicant then filed a motion to reopen his case and was ordered deported on June 15, 2000.

On appeal, the applicant asserts that he did not willfully misrepresent himself upon arrival because, although he traveled with fraudulent documents, he disclosed his identity when he arrived when questioned by U.S. immigration authorities. Moreover, the applicant claims that his use of fraudulent documents was "forgivable" because he feared persecution in China. The applicant cites to *Matter of Y-G-*, 20 I&N Dec. 794 BIA 1994), in which an individual attempted to enter the United States with fraudulent documents but did not lie when asked to state his real name and stated that the documents were not his own; in that case the applicant was not found inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant also asserts that his misrepresentations were not willful, by explaining that he only read Chinese at the time; he does not know if the name on his entry documents was his, as it was in another language; and he takes responsibility for the misrepresentation but asserts that it was not knowingly done. The record does not include evidence that the applicant provided his real name and informed U.S. immigration authorities that the documents were not his own, as the individual from the BIA case the applicant cites did.

The term "willful" should be interpreted as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *Matter of G-G-*, 7 I&N Dec. 161(BIA 1956). The AAO is unable to find that the applicant is inadmissible for making a willful misrepresentation of a material fact without "clear, unequivocal, and convincing evidence." *See Kungys v. United States*, 485 U.S. 759, 771-72 (1988). Although the applicant may not have been able to read English, he was aware that he did not apply for a U.S. visa. He knowingly and willfully presented a U.S. visa that he knew he did not apply for and obtain lawfully. He would also have been aware that the passport that he presented for admission was not a Chinese passport. He is therefore inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for procuring admission to the United States through willful misrepresentation of a material fact.

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 his children can be considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and U. S. Citizenship and Immigration Services 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 AAO will first address hardship to the applicant's spouse if she relocates to China. The applicant states that there is systematic discrimination against women in China; and China is culturally and politically different from the United States. He believes that his spouse would face sterilization or other punishment for having more than one child in violation of the birth control policy in China. The applicant's spouse states that she will not be able to receive comparable medical care or employment in China; she fears punishment for having more than one child; and there are no women's and human rights in China.

The applicant states that their children cannot read or write Chinese; they would fall behind in school in China; their friends are in the United States; and they are accustomed to American educational systems and freedom. His spouse states that she does not want to raise their children under a Communist regime. She believes that relocating as a family to China would be "devastating." The record includes the 2012 U.S. Department of State Human Rights Report on China, which reflects that "the Chinese Communist Party (CCP) constitutionally is the paramount authority." The report also reflects that a coercive birth-limitation policy exists and has resulted in forced abortions and forced sterilization, and there is discrimination against women.

The applicant's spouse's physician states that she has been under his care for three years and her condition has deteriorated; she suffers from depression, myalgia and myositis, insomnia, lumbago, sciatica, anemia, esophageal reflux, uterine leiomyoma, and she plans to have surgery to remove an ovarian cyst. Another physician states that the applicant's spouse was diagnosed with lower extremity pain in her legs and back, with numbness and weakness; and she received physical therapy twice a week.

The record reflects that the applicant's spouse, who was granted asylum status in 1996, has been in the United States for nearly 20 years. She has numerous serious physical and mental medical issues for which she is being treated that likely would be exacerbated upon relocation. She also would experience emotional hardship related to the hardship their 13 and 11 year-old children would experience upon relocation to China. In addition, country-conditions in China as discussed above, would adversely affect her, particularly given her asylee status. Moreover, taking into account her long absence from China, her claim related to difficulty finding employment has merit. Considering the hardship factors presented in the aggregate, and the normal hardship associated with relocation, the AAO finds that the applicant's spouse would experience extreme hardship if she relocated to China.

The AAO will now address hardship to the applicant's spouse if she remains in the United States without him. The applicant's spouse states that she has known the applicant since 1998. Given her "terrible health," she claims she cannot care for their children alone. She states that with the love and support of the applicant, their children are caring and have done well in school; and she visits a psychiatrist because of her mental and emotional difficulties. The applicant states that his spouse is mentally ill and has substantial health issues that would affect her ability to care for the children without him; her health will deteriorate without him to care for her; and their children's welfare will deteriorate without him.

The psychologist who evaluated the applicant's spouse diagnosed her with major depression, generalized anxiety disorder, somatization disorder and dependent personality disorder. The record includes medical documentation corroborating claims that the applicant's spouse is under the care of a psychiatrist and is being treated with medication and supportive psychotherapy.

The applicant's spouse also states that she and their children will experience financial hardship without the applicant. The record includes letters reflecting that the applicant and his spouse since October 2012 have been independent contractors with a real estate business. Their 2012 tax return reflects an income of $14,039. The applicant's 2012 Form W-2 reflects wages of $12,473and his spouse's reflects wages of $4,566. The record also includes copies of several bills for the applicant and his spouse.

The record reflects that the applicant's spouse has several serious physical medical issues. She also has mental-health issues. It is reasonable to conclude that she would experience difficulty caring for their children by herself. In addition, the applicant earns most of the family income; therefore his absence would result in financial hardship. Based on the totality of the hardship factors presented, the AAO finds that the applicant's spouse would experience extreme hardship if she remained in the United States without the applicant.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied.
Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). *Id.* at 301 (citation omitted).

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the applicant's U.S. citizen spouse and children, extreme hardship to his spouse, hardship to his children, ties to his extended family in the United States, the lack of a criminal record and the filing of tax returns.

The unfavorable factors include the applicant's periods of unauthorized stay and unauthorized employment, his misrepresentations, his exclusion order and his deportation order.

The AAO finds that the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. However, because the applicant was ordered excluded and deported, as referenced above, and he failed to remain outside of the United States for the requisite period of time, he is inadmissible under section 212(a)(9)(A) of the Act and is required to file Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

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 appeal is sustained.