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

U.S. Citizenship and Immigration Services

(b)(6)

Date: DEC 04 2014 Office: ST. PAUL FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i)

ON BEHALF OF APPLICANT:

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, St. Paul, Minnesota. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native of Mexico and citizen of Mexico and Italy who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant was also 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 misrepresentation. The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his U.S. citizen wife and children.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director,* dated March 10, 2014.

The record indicates that the applicant initially filed Form I-601 on January 23, 2007. The Field Office Director denied this application on March 26, 2007, and a subsequent appeal to the AAO was dismissed on October 28, 2011. The applicant refiled Form I-601 on July 19, 2012, which is the basis for the matter now before the AAO.

On appeal, counsel contends that the applicant's qualifying relative will experience extreme hardship if she were to relocate to Mexico to be with the applicant and submits additional evidence in support of this contention. In addition, counsel contests the finding that the applicant is inadmissible under section 212(i) of the Act.

The record includes, but is not limited to, the following documentation: briefs filed by counsel in support of Form I-290B and Form I-601, statements by the applicant and the applicant's spouse, psychological documentation for the applicant's spouse, financial documentation, country-conditions information about Mexico, and letters of reference. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides, in pertinent part, that:

> (B) Aliens Unlawfully Present.-
>
> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year,

> voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

At his adjustment of status interview, conducted on October 3, 2006 by an officer of USCIS, the applicant admitted that he had entered the United States without inspection in or around March 2002 and remained until his departure in December 2002 or January 2003. The applicant's presence from in or around March 2002 through either December 2002 or January 2003 was unlawful and over 180 days.

He further admitted that he had entered the United States on March 22, 2004 and remained until October 12, 2004. A stamp in the applicant's passport confirms that he was admitted to the United States on March 22, 2004 with permission to remain for 90 days, or until June 20, 2004. That applicant's presence from June 21, 2004 through October 12, 2004 was therefore unlawful. That period of unlawful presence was less than 180 days.

The applicant admitted that he returned to the United States on October 13, 2004, the day following his previous departure, and that he has since remained in the United States. A Form I-94W Nonimmigrant Visa Waiver Arrival/Departure Record confirms that the applicant entered the United States on October 13, 2004 with permission to remain in the United States until January 11, 2005, after which his presence became unlawful.

As noted above, the record reflects that the applicant entered the United States without inspection in or around March 2002 and departed the United States in December 2002 or January 2003. The applicant accrued unlawful presence during this entire period of time. The applicant subsequently departed the United States voluntarily during one of those months. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than 1 year more and seeking readmission within three years of his departure from the United States. The applicant does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

In addition, the Field Office Director found the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission to the United States through fraud or misrepresentation.

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 the applicant entered the United States on October 13, 2004 pursuant to the Visa Waiver Program (VWP), as a citizen of Italy. The applicant was not authorized to work in the United States pursuant to that classification. A Form G-325A, which the applicant signed on June 29, 2006, indicates that the applicant began working at , Minnesota, during April of 2004 and was working there as of the date he signed the Form G-325A. At his October 3, 2006 interview, the applicant confirmed that employment history. That the applicant had a pre-existing relationship with a United States citizen and resident, that he had children living in the United States, and that he engaged in employment upon entering the United States all suggest that he intended to live and work in the United States when he entered on October 13, 2004, and that he misrepresented his immigrant intent in obtaining permission to enter, and entering, as a nonimmigrant pursuant to the VWP.

On appeal, counsel contends that in order to be inadmissible under section 212(a)(6)(C)(i) of the Act, an affirmative action must be taken by the alien that constituted a material and willful misrepresentation, and that silence or a failure to volunteer information does not count as misrepresentation. Counsel further contends that there is no evidence to show that the applicant misrepresented himself either at the border or in his visa application. However, the Form I-94W, which the applicant submitted at the time of his entry to the United States on October 13, 2004, specifically includes the question: "Are you seeking to work in the U.S.?" Had the applicant answered this question affirmatively, he would not have been permitted to enter the United States under the VWP. As we stated above, the applicant indicated that he began working in the United States at Minnesota in April 2004 on his 2006 Form G-325A, and affirmed his employment history during an interview on October 3, 2006. Thus, the record shows that the applicant was employed in the United States in April 2004, six months prior to his entry on October 13, 2004.

The elements of a material misrepresentation are as follows:

> A misrepresentation made in connection with an application for visa or other documents, or with 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 resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-49 (AG 1960). For a misrepresentation to be considered

willful, there must be evidence that the applicant intended to present false information or fraudulent documentation to an authorized official of the U.S. government. *Matter of Y-G-*, 20 I&N Dec. 794, 796-96 (BIA 1994); *see also Matter of D-L & A-M*, 20 I&N Dec. 409 (BIA 1991).

We find that the applicant is inadmissible under section 212(a)(6)(C) of the Act for having willfully misrepresented to U.S. officials a material fact by stating that he was not seeking to work the United States when he intended to resume his employment in the United States.

Counsel states that the applicant received notice that the Form I-129F, Petition for Alien Fiancé(e) filed on his behalf was approved on September 14, 2004, and that this would require him to leave the United States in order to allow for consular processing of his visa. Counsel states that the purpose of his entry was solely to bring his daughter to her mother in Minnesota and visit with his family while he awaited direction from his former attorney. Counsel states that the applicant's intention was to depart when necessary to process his fiancé visa, and his intent was only altered after advice from his former attorney to get married and apply for adjustment of status in the United States. Counsel then contends that the fact that he began work shortly after arrival in the United States does not indicate that he did not intend to leave the country, and that he began working because he needed to support his fiancée and their daughter. However, as indicated above, the applicant testified that he had already begun to work in the United States in April 2004, six months prior to his entry on October 13, 2004.

Counsel further contends that finding the applicant inadmissible under section 212(a)(6)(C) of the Act without providing him with an opportunity to respond is a violation of due process. The record indicates that the applicant was informed of his inadmissibility under section 212(a)(6)(C) of the Act in our decision to dismiss the applicant's initial appeal. *See Decision of the AAO*, dated October 28, 2011. Thus, at the time the applicant filed his current Form I-601, he was aware of this admissibility finding and had ample opportunity to respond.

Section 291 of the Act, 8 U.S.C. § 1361, states that whenever any person makes an application for admission, the burden of proof shall be upon such person to establish that he is not inadmissible under any provision of this Act. The burden never shifts to the government to prove admissibility during the adjudication of a benefit application, including an application for a waiver. INA § 291; *Matter of Arthur*, 16 I&N Dec. 558 (BIA 1976). The applicant has not met his burden.

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

> 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.

Section 212(a)(9) of the Act provides, in pertinent part:

> (v) Waiver.-The Attorney General [now Secretary of the Department of Homeland Security (Secretary)]has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) 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. The applicant's lawful permanent resident 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 U.S. Citizenship and Immigration Services (USCIS) 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 of Immigration Appeals (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)); *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 Field Office Director stated that USCIS previously determined that the applicant's spouse would experience extreme hardship if she remained in the United States without the applicant. In our previous decision, we found that the record reflects that the applicant's spouse is experiencing mental health issues. She would have to raise her children without the assistance of the applicant, and given that the applicant has been the primary caregiver for the children, the children may experience difficulty without the applicant. In addition, the record reflects that the applicant's spouse is likely to have difficulty paying her mortgage and other living expenses based on her salary. When considering these factors, in addition to the normal results of separation from a spouse, we found that the applicant's spouse would experience extreme hardship if she were separated from the applicant.

With respect to relocation to Mexico, counsel asserts that the applicant's spouse would experience extreme hardship if she relocates to Mexico to be with the applicant. The record reflects that the applicant's spouse was born in the United States and has always resided in the United States. The record also shows that the applicant's spouse has strong family ties in the United States, including her children, her mother, and all her siblings.

Counsel contends that the applicant's spouse has established relationships with her doctors, psychiatrists, and therapists in the United States that she would lose upon relocation, which would likely cause a relapse of her depression.

Counsel further asserts that it is not safe for the applicant's spouse to relocate to Mexico. The record indicates that the applicant's home is in the state of Morelos. Counsel submits a copy of the U.S. Department of State Travel Warning for Mexico, dated January 9, 2014 (which was updated on October 10, 2014), which states that crime and violence are serious problems and can occur anywhere. With respect to the state of Morelos, the Travel Warning states:

> Morelos: Cuernavaca is a major city/travel destination in Morelos - Exercise caution in the state of Morelos due to the unpredictable nature of organized crime violence. You should also defer non-essential travel on any roads between Huitzilac in the northwest corner of the state and Santa Marta in the state of Mexico, including the Lagunas de Zempoala National Park and surrounding areas. On August 24, 2012, two U.S. government employees were injured after being fired upon by Federal Police officers on a non-toll road north of Tres Marias, Morelos. Numerous incidents of organized crime-related violence have also occurred in the city of Cuernavaca.

See Travel Warning-Mexico, U.S. Department of State, dated October 10, 2014.

Counsel also asserts that the applicant's spouse would have a difficult time finding employment in Mexico to help support her family, as she has been working in a restaurant in the United States and lacks advanced job skills required to get a stable and decent-paying job in Mexico.

Thus, due to her length of residence and extensive family ties in the United States and her concerns about poverty, prospective employment and her safety in the state of Morelos, it has been established that the applicant's spouse would suffer hardship beyond the common results of removal if she were to relocate to Mexico to reside with him.

With respect to relocation to Italy, counsel states that neither the applicant nor his spouse have any ties to Italy. Neither the applicant nor his spouse speak any Italian, thus they would have difficulty acquiring jobs, and it would be difficult for their children to attend and succeed in Italian-speaking schools. The record establishes that the applicant's spouse would suffer hardship beyond the common results of removal if she were to relocate to Italy.

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.

We note 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:

> 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 to his U.S. citizen spouse and children if the applicant's waiver is not approved; the applicant's spouse's strong family ties in the United States; the fact that the applicant resided in the United States approximately 10 years, with an

apparent lack of any criminal record; and letters of reference on behalf of the applicant. The unfavorable factors in this matter are the applicant's unlawful presence in the United States and his misrepresentation when entering the United States in October 2004.

Although the applicant's immigration violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and 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 appeal is sustained.