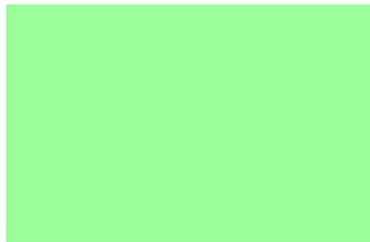


(b)(6)

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

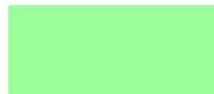


Date:

MAY 21 2013

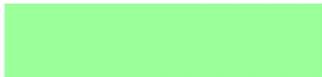
Office: ATHENS

FILE:



IN RE:

Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Athens, Greece, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Syria who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a violation of law relating to a controlled substance. Further, the applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or willful misrepresentation of a material fact. Additionally, the applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (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 and seeking admission within 10 years of his last departure. The applicant is the husband of a U.S. citizen. On June 28, 2011, he filed an Application for Waiver of Ground of Inadmissibility (Form I-601). The applicant seeks waivers of inadmissibility pursuant to sections 212(h),(i), and (a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h),(i), and (a)(9)(B)(v), in order to reside in the United States with his U.S. citizen spouse and children.

In a decision dated December 1, 2011, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen wife would experience extreme hardship as a consequence of his inadmissibility. Though the field office director acknowledged that denial of admission would have an adverse effect on the applicant's family, he concluded that the evidence presented showed this effect to be no greater than one would expect from the prolonged absence of a family member due to inadmissibility. The field office director further denied the waiver application as a matter of law after finding that no waiver was available for the applicant's inadmissibility under section 212(a)(2)(a)(I)(ii) of the Act.

On appeal, the applicant asserts that the field office director erred in finding that the record evidence did not establish that his admission would result in extreme hardship to his U.S. wife. The applicant contends that the evidence outlining medical, emotional, and financial difficulties to the applicant's U.S. citizen wife demonstrate extreme hardship to his qualifying relative.

The record contains, but is not limited to: the applicant's statement on appeal; the applicant's spouse's hardship statement; copies of prescription medications and explanation of benefits; documentation concerning the applicant's wife's substitute teacher positions; a copy of a 2004 newspaper article concerning the applicant's spouse's struggles after the apprehension and deportation of her husband; family photos; a marriage license; birth certificates; character reference letters; documentation concerning the applicant's removal proceeding, detention, and reentry after removal criminal proceeding; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-*

Alvarez, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record reflects that on or about June 8, 1998, the applicant was convicted in the Circuit Court in and for Sarasota County, Florida of aggravated assault in violation of section 784.021 of the Florida Statutes. The applicant was sentenced to 12 months of probation and court costs. The field office director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.

At the time of the applicant’s conviction, Florida Statute § 784.021 provided, in pertinent part, that:

- (1) An “aggravated assault” is an assault:
 - (a) with a deadly weapon without intent to kill; or
 - (b) with an intent to commit a felony.

. . .

- (2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The applicant states that his June 8, 1998 conviction for aggravated assault has been vacated due to procedural defect in the criminal proceeding. In support, the applicant submitted a copy of a Motion to Vacate or Set Aside Sentence. In the motion, the applicant, through counsel, requests the Sarasota County Circuit Court that his no contest plea be withdrawn and vacated pursuant to Florida Rules of Criminal Procedure 3.850 and 3.172(c)(8), which provide, in pertinent part, that:

3.850. Motion to Vacate, Set Aside or Correct Sentence

- (a) Grounds for Motion. The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida: (1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.

3.172. Acceptance of Guilty or Nolo Contendere Plea

(c) Determination of Voluntariness. Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands: (8) that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

The record also includes an order dated November 8, 2002 by Judge Davis of the Florida District Court of Appeal for the Second District in which it is concluded that the applicant established a rule 3.172(c)(8) violation. The Second District Appeals Court found that the applicant was prejudiced by the trial court's failure to advise him of the possibility that his no contest plea could result in his deportation. The record evidence reflects that the applicant's no contest plea was withdrawn, and that the judgment and sentence were vacated. On February 24, 2003, the aggravated assault charge was dismissed in open court. Based upon this evidence, the AAO concludes that the applicant's June 8, 1998 conviction was vacated due to a violation of Florida Rules of Criminal Procedure 3.172(c)(8).

The Board has held that vacation of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or because of immigration hardship. *See, e.g. Matter of Adamiak*, 23 I. & N. Dec. 878, 879 (BIA 2006) (where the criminal court failed to advise the defendant of the immigration consequences of his plea pursuant to section 2943.031 of the Ohio Revised Code, the subsequent vacatur is not a conviction for immigration purposes because the guilty plea has been vacated as a result of a "defect in the underlying criminal proceedings" and not for a rehabilitative or immigration hardship purpose); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a "'conviction" at section 101(a)(48) of the Act, "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships"); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute); *See also, Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

Here, the record shows that the applicant's conviction was vacated due to a defect in the underlying criminal proceedings and not pursuant to a state rehabilitative statute or because of immigration hardship. The record evidence establishes that the trial court failed to advise the applicant of the immigration consequences of his guilty plea, as required by Florida Rules of Criminal Procedure

3.172(c)(8), a provision that was adopted by the Florida Supreme Court in 1968. Therefore, based on the precedential decisions noted above, the AAO finds that the applicant's June 8, 1988 conviction is no longer a conviction for immigration purposes.

The field office director also found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime relating to a controlled substance. Section 212(a)(2)(A)(i)(II) of the Act provides, in pertinent part, that:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

The record reflects that on or about February 29, 2000, the applicant was convicted in the County Court in and for Montgomery County, New York of criminal possession of a controlled substance in the third degree in violation of section 220.16(01) of the New York Penal Code. The applicant was sentenced to time served and was placed on probation for a period of five years. At the time of the applicant's conviction, New York Penal Code § 220.16(01) provided, in pertinent part, that: "A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses a narcotic drug with intent to sell it." The Montgomery County Court Statement of Conviction shows that the controlled substance the applicant possessed at the time of his arrest was cocaine.

Throughout his waiver application proceedings, the applicant has asserted that his February 29, 2000 conviction for criminal possession of a controlled substance was vacated due to procedural defect in the criminal proceeding. In support of this assertion, the applicant submitted a certified copy of a Decision and Order dated March 5, 2001 by the Montgomery County Court. In his decision, County Court Judge [REDACTED] found that the record revealed that the plea agreement calling for five years of probation was unlawful under sections 60.05(1),(3), 65.00(1)(b), and 70.06(5) of the New York Penal Code. Based upon this finding, the county court concluded that the sentence entered against the applicant was illegal. Since the sentence was the product of an invalid plea agreement, the county court "exercise[d] its discretion and vacate[d] the [applicant's] guilty plea." The record evidence shows that this charge was dismissed pursuant to an agreement with the Montgomery County District Attorney's Office. Based upon this evidence, the AAO concludes that the applicant's February 29, 2000 conviction was vacated due to a violation of sections 60.05(1),(3), 65.00(1)(b), and 70.06(5) of the New York Penal Code, and is thus no longer a conviction for immigration purposes.

The field office director noted in his decision that the vacatur notwithstanding, the applicant remained inadmissible because he admitted to an immigration judge the commission of a crime relating to a controlled substance upon conceding removability as charged in a Notice to Appear. However, the AAO notes that for an admission to be valid under the second and third clauses of

section 212(a)(2)(A)(i) of the Act, the Board has required that the following three conditions be met: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to making the admission; and 3) the admission must have been voluntary. *Matter of K-*, 7 I&N Dec. 594, 597-98 (BIA 1957). Here, the record does not support a finding that *Matter of K-*'s three requirements governing admissions were met by the applicant in conceding removability before an immigration judge. Accordingly, we cannot find that the applicant has not made an admission valid under the second or third clauses of section 212(a)(2)(A)(i) of the Act.

Beyond the decision of the field office director, the AAO notes that the record shows that on or about December 6, 2001, the applicant was convicted in the County Court in and for Montgomery County, New York, of assault in the third degree in violation of section 120.00 of the New York Penal Law. The applicant was ordered to pay a \$10,000 fine and paid restitution in the amount of \$14,000. The Board held in *Matter of Solon*, 24 I&N Dec. 239, 245 (BIA 2007), that a conviction for assault in the third degree in violation of New York Penal Law § 1020.00(1) is a crime involving moral turpitude. The Board noted that in New York, every assault offense requires a battery that results in actual physical injury. *Id.* at 244 (citing *People ex rel. Clifford v. Krueger*, 297 N.Y.S.2d 990, 993-94 (N.Y. Sup. Ct. 1969)). Therefore, the AAO finds that the applicant's December 6, 2001 conviction for assault in the third degree under the New York Penal Law § 120.00 is a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

A discretionary waiver of this criminal ground of inadmissibility is available under section 212(h) of the Act, 8 U.S.C. § 1182(h) if:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

...

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

However, the applicant is inadmissible to the United States on other grounds. The field office director found the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or willful misrepresentation of a material fact. 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.

The record shows that on or about January 8, 1989, the applicant entered the United States under the assumed identity of [REDACTED] as an F-1 nonimmigrant student to attend [REDACTED] in Kansas. The record shows that the applicant never went to Kansas. Instead, the applicant traveled to New York and married his first U.S. citizen spouse on October 1, 1989. The applicant's first spouse filed a Petition for Immediate Relative (Form I-130) on behalf of the applicant. However, the petition was deemed abandoned after the applicant departed the United States. The applicant re-entered the United States on December 23, 1993 as the spouse of a U.S. citizen after a second Form I-130 filed by his first spouse was approved on August 12, 1993.

The record further shows that the applicant again departed the United States in 1994 to avoid prosecution on a controlled substance charge filed in New York. While in his home country of Syria, the applicant entered into another marriage on April 30, 1995 with his second U.S. citizen spouse under the name [REDACTED]. The applicant's second U.S. citizen spouse filed a Form I-130 on the applicant's behalf using fraudulent documents and failing to disclose the applicant's previous marriage, his prior entries into the United States, and the applicant's pending criminal case in New York. On July 23, 1995, the applicant was admitted into the United States at Detroit, Michigan as the spouse of a U.S. citizen.

Subsequently, the applicant was convicted in the United States of aggravated assault and criminal possession of controlled substances. On May 24, 2000, removal proceedings commenced against the applicant by personal service of a Notice to Appear. On August 14, 2000, an immigration judge denied the applicant's petition for voluntary departure and ordered the applicant removed to Syria. On October 16, 2000, the applicant was removed from the United States to Syria. However, on December 3, 2000, the applicant re-entered the United States by presenting a lawful permanent resident card he had obtained from his marriage to [REDACTED]. The applicant failed to disclose to the immigration officer at the port-of-entry his criminal convictions, his second marriage, and his October 16, 2000 removal.

In considering whether the misrepresentations on the applicant's nonimmigrant and immigrant visa applications bars his admission to the United States pursuant to section 212(a)(6)(C)(i) of the Act, the AAO will first determine whether it is a material misrepresentation for immigration purposes. The Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988), found that the test of whether concealments or misrepresentations were "material" was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, United States Citizenship and Immigration Services (USCIS) decisions. In addition, in *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961), the Board found that a

misrepresentation made in connection with an application for visa or other documents is material if either: (a) the alien is excludable on the true facts, or (b) 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 (AG 1961). Willfulness is established if the alien had knowledge of the falsity of his statement when made. *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979). Proof of intent to deceive is not necessary, and knowledge of the falsity of the misrepresentation is sufficient. *See Forbes v. INS*, 48 F.3d 439 (9th Cir. 1995).

Here, the applicant's misrepresentation of his identity on his nonimmigrant and immigrant visa applications, his failure to disclose to immigration officers his arrest in New York when he was admitted in 1995, his failure to disclose his bigamous marriage, and his failure to disclose to an immigration inspector in December 2000 that he had been removed from the United States on October 16, 2000 all constitute material misrepresentations under the Act. By stating that he was [REDACTED] in his immigrant visa application and at the Detroit, Michigan port-of-entry, the applicant cut off a line of inquiry that was relevant to his request for an immigrant visa. The applicant misrepresented his identity to a consular officer and immigration officials in order to procure the benefit of admission to the United States. In such an instance, the inspecting officer must make material inquiries such as whether the applicant possesses valid entry documents that were lawfully issued to him, and whether any United States government agencies possess information that has a bearing on the applicant's admissibility, such as records of criminal activity or prior immigration violations. Additionally, by presenting a lawful permanent resident card to an immigration inspector in December of 2000 and failing to disclose his prior removal, the applicant misrepresented a material fact that had a direct bearing on his admissibility to the United States. The record clearly reflects that the applicant made the misrepresentations with knowledge of their falsity. Consequently, the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, and needs to apply for a discretionary waiver of the ground of inadmissibility pursuant to section 212(i) of the Act. The applicant does not dispute his inadmissibility on appeal.

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

Furthermore, the field office director found the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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 and seeking admission within 10 years of his last departure. Section 212(a)(9)(B) 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-

....

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

The record shows that on December 3, 2000, one month and a half after the applicant was removed from the United States, he re-entered the United States and resided without lawful status until he was removed from the United States a second time on May 25, 2004. Though the record reflects that the applicant arrived at a port of entry and obtained authorization from an immigration officer to enter the United States, such permission was obtained by making a knowingly false claim to be a lawful permanent resident. Consequently, the applicant was present in the United States from 2001 to 2004 without having been inspected and admitted. *Cf. Matter of S-*, 9 I&N Dec. 599 (BIA 1962) (noting that an alien who arrived at a port of entry and obtained permission to come into the United States by making a knowingly false claim to be a citizen is present in the United States without having been inspected and admitted); *see* Section 101(a)(13)(A) of the Act (admission is the *lawful* entry of the alien into the United States after inspection and admission) (emphasis added). Further, the record evidence reflects that the applicant did not apply for permission to reapply for admission after his October 16, 2000 removal, as required by section 212(a)(9)(A)(iii) of the Act, and that USCIS never consented to the applicant's reapplying for admission. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of his 2004 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

Section 212(a)(9)(B)(v) of the Act provides that:

Waiver.-The Attorney General [Secretary of Homeland Security] 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 Attorney General [Secretary of Homeland Security] 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. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary of Homeland Security] regarding a waiver under this clause.

The AAO firstly notes that a waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative U.S. citizen or lawful permanent resident spouse, son, daughter, or parent of the applicant. However, 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, his children, or other family members can be considered only insofar as it results in hardship to a qualifying relative. 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 record reflects that the applicant is the spouse of a U.S. citizen. The applicant's U.S. citizen wife therefore meets the definition of a 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 the 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 is 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 issue of whether the applicant has established that his qualifying relative wife would experience extreme hardship as a result of his inadmissibility.

With regards to extreme hardship upon separation from the applicant, the applicant's wife asserts that she would experience emotional and financial hardship in the United States if the applicant remains in Syria. The applicant's wife submitted a declaration received by the U.S. Embassy on December 30, 2011 in which she states that she is unable to reside in Syria with the applicant and her children because of her bipolar disorder. She states that after moving to Syria with her children in 2004, she began experiencing problems with the applicant's family members. As a result, she returned to the United States while the applicant and their children remained in Syria. Here, though the AAO recognizes the significance of family separation as a hardship factor, we conclude that the emotional difficulties described by the applicant's wife in her declaration, and as demonstrated by the evidence in the record, are the common results of removal or inadmissibility and do not rise to the level of extreme hardship. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In *Hassan v. INS*, *supra*, it was held that the uprooting of family does not necessarily amount to extreme hardship but rather represents the type of hardship experienced by the families of most aliens who are removed. The AAO notes that the applicant's wife assertions reflect the family's current living arrangement as well as her desire for the applicant and their children to join her in the United States. However, the application does not include independent objective evidence demonstrating that separation is so severe that it would constitute extreme hardship.

With regards to financial hardship upon separation, the applicant's wife asserts that her sole means of income is her Social Security Disability Insurance (SSDI) and eight or nine thousand dollars a year, presumably from the practice of her profession of substitute teacher. She indicates on appeal that this amount is "going to dwindle every year," but she fails to explain why. Though the record includes several letters from two substitute teaching services in Johnstown New York indicating that her services as a school teacher will no longer be needed, the letters do not detail the reasons why she will no longer be employed by the agencies. As such, the AAO is unable to reach a conclusion regarding the applicant's wife's asserted hardships as it concerns her employment prospects.

Further, the AAO notes that although the applicant's wife asserts financial difficulties upon separation, the record does not contain sufficient objective evidence demonstrating that denial of admission would result in extreme financial hardship. That is, the record evidence does not demonstrate that the applicant's wife is presently unemployed or that she now depends entirely upon the applicant or other family members for financial support. The submitted income tax returns in the record are outdated in that they date back to 1995 and 1997 and are insufficient to demonstrate financial difficulties as a result of separation. The record does not contain utility bills, lease agreements, mortgage statements, income and liability documentation, or other financial documentation which would lead the AAO to determine that the applicant's wife's current income is insufficient to support her household and cover her monthly obligations. Similarly, the AAO notes there is insufficient evidence in the record to show that without the applicant's financial support, the applicant's wife would experience financial hardship. 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)).

Based on the foregoing, the AAO finds that the evidence in the record, when considered in the aggregate, fails to establish that the applicant's qualifying relative would experience hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the United States and she remained in the United States.

With regards to hardship upon the applicant's spouse's relocation to Syria, the applicant's wife states that she fears for her safety, as well as the safety of her children and spouse in that country. Here, the AAO recognizes that the applicant's wife would experience hardship should she relocate to Syria. The U.S. Department of State issued a Travel Warning for U.S. citizens traveling to Syria on March 1, 2013, in which it "strongly recommend[ed] that U.S. citizens remaining in Syria depart immediately." The warning adds that "that the security situation remains volatile [in Syria] and unpredictable as an armed conflict between government and anti-government armed groups continues throughout the country, with an increased risk of kidnappings, bombings, murder, and terrorism." The warning states that "[t]he Department of State has received reports that U.S. citizens are experiencing difficulty and facing dangers traveling within the country and when trying to leave Syria via land borders, given the diminishing availability of commercial air travel out of Syria...." It is therefore evident that current unrest in Syria poses a threat to the applicant's wife's security should she reside there. Further, the record demonstrates that the applicant's wife is experiencing emotional difficulties as a result of her concern over the safety of the applicant and their sons. Considering these elements in the aggregate, the record evidence supports a finding that the applicant has shown that relocation to Syria would result in extreme hardship for his wife.

However, the AAO notes that it 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 relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the

applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to his qualifying relative spouse in this case

Even were the AAO to determine that the applicant has demonstrated extreme hardship to a qualifying family member, we would not find that the applicant warrants a favorable exercise of discretion. In discretionary matters, the applicant 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, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 adverse factors in the present case are the applicant's unlawful presence for which he now seeks a waiver; his multiple willful misrepresentations of material facts in connection with his various entries into the United States; his bigamous marriage and his failure to disclose this fact to immigration authorities on several occasions; his fleeing the jurisdiction of the United States to escape prosecution for criminal possession of a controlled substance in New York; his gaining admission into the United States by knowingly presenting false information and an alias; the applicant's December 6, 2001 criminal conviction for assault in the third degree; his failure to comply with the terms of the nonimmigrant visa on which he initially entered the United States in 1989; his failure to comply with his first removal from the United States on October 16, 2000; and his illegal re-entry after removal in 2001. The favorable factors include his long period of employment; his marriage to a U.S. citizen; hardship to his spouse, and his long history of employment in the United States.

Here, the applicant's extensive history of U.S. immigration law violations constitutes a significant negative factor which denotes a disregard for the laws of the United States. The applicant initially entered the United States in 1989 and failed to abide by the terms of his nonimmigrant F1 student visa. The applicant did not pursue collegial studies, choosing instead to marry and settle in New York State. While in New York, the applicant was arrested and charged with criminal possession of a controlled substance. Instead of facing the authorities and the charges against him, the applicant fled the United States and returned to Syria, where he entered into a bigamous marriage. He then applied for admission into the United States under an alias, so as not to disclose information to immigration officials which would have raised questions regarding his admissibility and the pending criminal charges against him in New York.

Since his 1993 departure from the United States, the applicant continued to violate U.S. immigration law, returning as a lawful permanent resident as a result of his marriage to his second U.S. citizen wife while misrepresenting his purpose in entering the United States to immigrant inspectors at the port of entry. Not only has the applicant willfully misrepresented facts in order to gain admission to the United States multiple times, but he also entered the United States unlawfully in 2001 after his October 16, 2000 removal. The applicant failed to abide by the statutory procedures governing permission to reapply for admission. Instead, the applicant presented a lawful permanent resident card obtained through one of his bigamous relationships and failed to disclose that he had been removed from the United States following an administrative removal proceeding against him.

Taken together, these negative factors reflect a long-term and continuing disregard for the laws of the United States. The record does not show that the applicant has been rehabilitated. The applicant's repeated immigration violations and criminal conviction are significant negative factors demonstrating the applicant's undesirability as a permanent resident. While the AAO regrets the general hardship that the applicant's wife will face as a result of a denial of the applicant's waiver request, it does not find that the favorable factors in the present matter can outweigh the negative.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval 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 appeal will be dismissed.

The AAO further notes that in *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964), it was held that an application for permission to reapply for admission will be denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act. Thus, no purpose would be served in further review of the applicant's Form I-212 application. Consequently, the appeal of the field office director's denial of the Form I-212 is dismissed as a matter of discretion.

ORDER: The appeal is dismissed.