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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 15 2014 OFFICE: WASHINGTON, DC FILE:

IN RE:

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

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Indonesia who is 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 seeking to procure an immigration benefit under the Act by fraud or by making a material misrepresentation. The applicant also was found inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for possession of marijuana. The applicant requests a waiver of inadmissibility pursuant to sections 212(i) and 212(h) of the Act, 8 U.S.C. §§ 1182(i) and 1182(h), in order to remain in the United States with his legal permanent resident spouse and U.S. citizen children.

The Field Office Director concluded that the applicant was ineligible for a waiver, as he failed to demonstrate that he possessed less than 30 grams of marijuana when he was arrested. The Field Office Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision of the Field Office Director*, dated February 8, 2013.

On appeal, counsel asserts that the decision of U.S. Citizenship and Immigration Services (USCIS) was arbitrary because it did not address the evidence of hardship to the applicant's spouse. Counsel also provides an addendum to the appeal, including proof from the Commonwealth of Virginia's Department of Forensic Science that the applicant possessed 1.05 grams of plant material when he was arrested for marijuana possession in 1998.

In support of the waiver application, the record includes, but is not limited to: a Form I-290B, Notice of Appeal or Motion; briefs written on behalf of the applicant; affidavits from the applicant and qualifying spouse; letters from the qualifying spouse's therapist and parishioners from the applicant's churches; documentation regarding the applicant's criminal history; documentation regarding the applicant's son's developmental issues; medical documentation for both of the applicant's children; identification documentation for the applicant; financial documentation; two Forms I-485, Applications to Register Permanent Residence or Adjust Status; and Form I-589, Application for Asylum and for Withholding of Removal, with supporting documents. The entire record was reviewed and considered in rendering a decision on the appeal.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

Section 212(i) of the Act provides:

> The Attorney General [now the Secretary 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 immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of an alien granted classification under clause (iii) or (iv) of section 204 (a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

The record reflects that in 2003 the applicant submitted an asylum application and did not disclose that a preparer, who subsequently was convicted of immigration fraud in 2005, had assisted him in filling it out. According to the Field Office Director's decision, the preparer stated that the applicant's asylum claim "was completely fabricated." In addition, the applicant responded "no" to the question on Form I-485, signed on August 16, 2004, concerning whether he had ever been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any laws or ordinances.

On appeal, counsel asserts that letters and the applicant's affidavit demonstrate that the applicant is a and establish that the applicant has a fear of persecution in Indonesia; therefore his asylum application was legitimate, even if the preparer used an incorrect address. With respect to his failure to disclose that he was assisted in filling out his asylum application, counsel states that the applicant did not intentionally omit this information. Regarding his failure to disclose his arrests and conviction in his adjustment application, the applicant states that he had forgotten about his criminal arrests and conviction and he attempted to correct his error during his adjustment interview. Counsel contests the finding of inadmissibility under section 212(a)(6)(C) of the Act by asserting the applicant did not willfully fail to disclose his prior criminal arrests.

"It is not necessary that an 'intent to deceive' be established by proof, or that the officer believes and acts upon the false representation," but the principal elements of the willfulness and materiality of the stated misrepresentations must be established. 9 FAM 40.63 N3 (citing *Matter of S and B-C*, 9 I&N Dec. 436, 448-449 (A.G. 1961) and *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975)).

Concerning the willfulness of the applicant's misrepresentations, 9 FAM 40.63 N5, in pertinent part, states that:

> The term "willfully" as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or

> in an honest belief that the facts are otherwise. 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 made an untrue statement.

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).

Pursuant to section 291 of the Act, the applicant bears the burden of demonstrating by a preponderance of the evidence that he is not inadmissible. *See also Matter of Arthur*, 16 I&N Dec. 558, 560 (BIA 1978). Where the evidence for and against admissibility "is of equal probative weight," the applicant cannot meet his burden of proof. *Matter of Rivero-Diaz*, 12 I&N Dec. 475, 476 (BIA 1967) (citing *Matter of M--*, 3 I&N Dec. 777, 781 (BIA 1949)).

The applicant states that he filled out his Form I-485 in 2004 and, because he was a changed person, he had forgotten about his past criminal background. The applicant does not assert that a medical or physical impairment caused him to forget his arrest in 1998 for possession of marijuana or his conviction for petty theft in 1991, for which he was briefly detained.

Although the applicant's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan,* 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). 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)). The record indicates that the applicant affirmatively failed to disclose his prior arrests and conviction in response to a specific question in his adjustment application. As such, it is not necessary to address the issues of misrepresentation related to the applicant's asylum application. The record establishes that the applicant is inadmissible under Section 212(a)(6)(C) of the Act.

The record also indicates that on or around August 11, 1998, the applicant was arrested for possessing marijuana. The record reflects that the charges against him were dismissed. At the time of the Field Office Director's decision on February 8, 2013, the applicant had not established that he possessed 30 grams or less of marijuana and therefore was found ineligible for the waiver. However, on appeal the applicant has established that he possessed 1.05 grams at the time of his 1998 arrest. The applicant does not require a waiver for this arrest, however, because the record reflects no conviction ensued.

With regard to the applicant's conviction for petty theft on September 17, 1991 in California, counsel concedes that the applicant's offense is a crime of moral

turpitude. However, he indicates that the applicant is eligible for the petty-offense exception since he was sentenced to a period less than the six-month maximum sentence for the offense.

Section 212(a)(2)(A)(i)(I) of the Act states in pertinent part:

> (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 . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

> The [Secretary] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that –
>
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
>
> (ii) the admission to the United States of such alien would not be contrary to the national

welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 [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 . . .; and

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The record reflects that, on September 20, 1991, the applicant was convicted in the Municipal Court of the County of California of Petty Theft in violation of California (Cal.) Penal Code § 488 and was sentenced to one day in jail.[1]

At the time of the applicant's conviction, Cal. Penal Code § 488 provided that, "Theft in other cases is petty theft" (distinguishing petty theft from grand theft as defined in Cal. Penal Code § 487). According to the version of Cal. Penal Code § 490 in effect at the time, "Petty theft is punishable by fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or both."

The applicant's conviction qualifies for the petty-offense exception, as the maximum penalty possible for his conviction was six months in prison and he was imprisoned for one day. Thus, the applicant is not inadmissible under section 212(a)(2)(A)(i) of the Act.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent. Hardship to the applicant or his children is not considered in section 212(i) waiver proceedings unless it causes 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 USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

[1] The record reflects that the applicant received credit for one day served, but it is unclear whether he was sentenced to more than one day, owing to a handwritten "3" annotating his disposition docket document's section addressing the days he would serve in detention. This difference in days, however, would not affect the outcome in this case.

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 deportation, 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, 885 (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

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 qualifying spouse indicates that she would experience emotional, physical and financial hardships if she were to be separated from the applicant. She states that she has been with the applicant for over ten years, he is a great emotional support to her, and the emotional loss that she would endure upon separation would be "incomprehensible." She also states that their separation would cause her "an incredible amount of heartache and distress" and that she would be very depressed and anxious without the applicant. In addition, she asserts that she would experience physical anguish. A therapist summarizes the qualifying spouse's statements and indicates that the qualifying spouse will have to deal with "tremendous ramifications" and that "it will be traumatic for those left behind" if the applicant's waiver is denied. However, the therapist does not indicate that the applicant's wife has specific psychological concerns, and this evidence fails to specifically address how the qualifying spouse's emotional hardships rise beyond the ordinary hardships associated with separation. Absent an explanation in plain language from the treating physician or therapist of the exact nature and severity of any mental or psychological condition and a description of any treatment or family assistance needed, we are not in the position to reach conclusions concerning the severity of the applicant's spouse's psychological condition or the treatment she needs. Further, while it is understandable that the applicant's spouse would experience some emotional difficulties if she remains in the United States without the applicant, the record provides little detail regarding the specific emotional hardships that she would experience upon separation.

Concerning the applicant's spouse's financial hardship upon separation, she states that she does not work so she could provide child care to their children, and the applicant currently pays for all their living expenses. Further, she indicates that without the applicant, she would bear the additional expense of child care because she would need to obtain employment. However, the record has not established that she would require child care assistance, given the ages of their children, and the record is silent regarding whether her family members in the United States could assist her with child care. She also indicates that their son has developmental and medical issues and requires constant attention. However, while it appears that their son faced developmental issues in the past, the most recent academic report concerning his condition, dated January 30, 2012, indicates that he "is performing in the average range in all developmental areas" and that his "cognitive skills are within the average range." Further, the report concludes that their son "no longer meets the criteria as a student with a disability" and recommends "dismissal from special education." Moreover, the applicant provides no evidence showing that his wife, who earned her undergraduate degree in business, would be unable to find suitable employment if it were necessary. As such, the applicant failed to provide sufficient evidence to establish that the qualifying spouse would suffer emotional, physical and financial hardships as a result of her separation from the applicant that, considered in the aggregate, are extreme.

Addressing the hardship that the applicant's qualifying spouse, a native of Indonesia, would experience if she were to relocate there, she states that she has no close ties to Indonesia and that she is close to her family in the United States, including her U.S. citizen sister and legal permanent resident parents who live nearby. However, the applicant provides no evidence to corroborate his spouse's claims about her relationship with her family in the United States. The record also lacks evidence regarding whether the applicant has family in Indonesia who could support the applicant's spouse and their family upon relocation. The applicant's spouse also indicates that she has community ties to her church in the United States and that she fears being a Christian in a Muslim country. However, the record lacks country-conditions documentation indicating that she would be at risk due to her religion in Indonesia. Further, it appears that the applicant's spouse lived most of her life in Indonesia, and she does not claim to have experienced problems before she left. The record lacks evidence demonstrating how the applicant's spouse would be affected specifically by any adverse conditions there. The assertions made by the applicant's spouse are evidence and have been considered. However, they cannot be given great weight absent supporting evidence corroborating her claims.

Concerning hardships related to her psychological health upon relocation, the applicant's qualifying spouse indicates that she will suffer emotionally watching their U.S. citizen children being raised in Indonesia without the educational opportunities that they have in the United States. Further, she states that their son will not have the ability to get the help that he needs and that they will not have health insurance for him and the rest of their family. Though Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship under section 212(i) of the Act, and the applicant's spouse is the only qualifying relative for the waiver, hardship to their children will be considered as it may affect the applicant's spouse. Although the qualifying spouse states that she will suffer emotionally due to their children being afforded fewer opportunities in Indonesia, the record fails to provide specific detail as to the impact of their children's hardships on her. Further, as stated above, it is unclear from the record that their son continues to experience developmental or medical issues.

The applicant's spouse also states that because it would be difficult for her and the applicant, who only has a high-school education, to obtain employment, they would suffer financially in Indonesia. However, the record does not contain documentation to support these assertions. The qualifying spouse also indicates that their family currently has health care benefits, which they would lose if they returned to Indonesia, as stated above. Assertions are evidence and will be considered. However, going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)). The record does not establish that the applicant's spouse would experience extreme hardship upon relocating to Indonesia.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The applicant has not established extreme hardship to his legal permanent resident spouse as required under section 212(i) of the Act. As

the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

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 not been met.

ORDER: The appeal is dismissed.