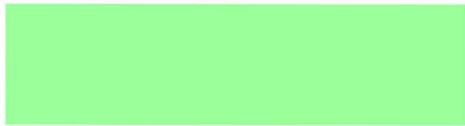


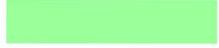


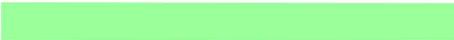
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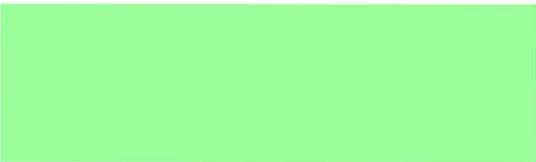
Date: **AUG 01 2013** Office: NEWARK, NEW JERSEY

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



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,

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, Newark, New Jersey. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reconsider. The motion will be granted and the prior AAO decision will be affirmed.

The applicant is a native and citizen of Senegal who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by willful misrepresentation. He is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated August 8, 2011.

On appeal, the AAO concluded that the evidence in the record is insufficient to establish that extreme hardship would be imposed on a qualifying relative, and dismissed the appeal accordingly. *See Decision of the AA O*, dated December 19, 2012.

In response, counsel for the applicant filed *Form I-290B*, Notice of Appeal or Motion (Form I-290B), indicating that she was filing a motion to reconsider by marking box E in Part 2. *See Form I-290B*, received January 19, 2013.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Counsel contends that the AAO erred in finding that the applicant failed to demonstrate that, in the aggregate, his qualifying relative wife would suffer extreme hardship if a waiver is not granted. *See Brief in Support of Motion*, received January 19, 2013. Counsel cites to a number of extreme hardship-related cases including *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998), *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979), and *Matter of O-J-O*, 21 I&N Dec. 381 (BIA 1996). Despite the requirement of 8 C.F.R. § 103.5(a)(3) that a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision, counsel has supplemented the record on motion with 17 exhibits. Supplemental evidence submitted that was not of the record at the time of the initial decision, includes but is not limited to: a new hardship affidavit from the applicant's spouse; a new affidavit from the applicant; Senegal country conditions reports for

2011; a 2012 paystub and 2011 tax return; a 2013 bank statement; a marriage certificate and family photographs. The AAO recognizes that the applicant is represented on motion by new counsel, and finds that while counsel did not file a motion to reopen under 8 C.F.R. § 103.5(a)(2) in order to submit new evidence for consideration, the applicant has met the requirements of 8 C.F.R. § 103.5(a)(3), and we will treat the motion before us as a motion to reopen and reconsider. The motion will be granted and the application reopened and reconsidered.

In addition to the supplemental evidence described above, the record contains but is not limited to: Forms I-290B; various immigration applications and petitions; earlier hardship affidavits from the applicant and his spouse; a birth certificate and school records for the applicant's spouse's daughter; employment, tax and financial records; and country conditions information for Senegal. The entire record was reviewed and considered in rendering this decision on motion.

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 reflects that the applicant entered the United States on September 5, 2001 by presenting the French passport of another individual, and thus entered the United States by materially misrepresenting his identity. Based upon the foregoing, the applicant was found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 USC § 1182(a)(6)(C)(i). The record supports this finding, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(6)(C) of the Act.

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

- (1) 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.

The discussion contained in the AAO's earlier decision on appeal with regard to establishing "extreme hardship" for a waiver of inadmissibility under section 212(i) of the Act and the related case law cited therein remains applicable in this decision on motion and is incorporated herein by reference.

The record reflects that the applicant's spouse is a 42-year-old native of Senegal and citizen of the United States who has been married to the applicant since August 2007. She has been a U.S.

citizen since August 1995, and has a 13-year-old U.S. citizen daughter from a previous relationship whom the applicant is raising as his own. The applicant's spouse states that she has enjoyed employment with the same company, [REDACTED] for more than ten years, has worked her way up to supervisor, and that relocation would result in the loss of both her long-time employment and employer-provided benefits, including health insurance, which she relied upon when she was out on disability in 2011. She indicates that over the course of many years she has built an excellent credit history, always pays her credit card bills and loans on time, and would be unable to pay her debts and meet her financial obligations were she to relocate to Senegal where securing viable employment would be highly unlikely. The applicant's spouse fears that readjusting to life in a third world country in which she has not resided in approximately 18 years will be traumatic and will negatively affect her mental health. She fears also for her safety in Senegal as a woman, and for the safety, health and education of her 13-year-old daughter who has resided her entire life in the United States and would be faced with adjusting to an unfamiliar country and culture dramatically different from her own.

The AAO made a number of findings on appeal concerning evidentiary deficiencies in the record which have been addressed on motion. With regard to relocation-related hardship, the AAO found that the evidence submitted did not support the contentions that living conditions in Senegal are much worse than in the United States; that neither the applicant nor his spouse would be able to secure viable employment therein; that the applicant's spouse would have trouble readjusting to life in Senegal beyond that typically experienced by individuals who have lived for a period in the United States; or that she would not have the same freedoms and rights as a Muslim woman in Senegal that she has in the United States. On motion, the applicant's spouse explains that her daughter, [REDACTED], was born in 2001 in the United States where she has resided her entire life, is excelling in school and is a proud honor roll student. She states that [REDACTED] is at the age where in Senegal she would be at great risk of being subjected to the common cultural practice of forced female genital mutilation (FGM). The applicant's spouse indicates that all of her sisters relocated from Senegal to France in order to protect their daughters from this fate. The U.S. Department of State's 2011 Country Report on Human Rights Practices-Senegal, submitted for the record, confirms that "sealing" is one of the most extreme and dangerous forms of FGM and is practiced particularly in rural and some urban areas of Senegal. The report notes that while the practice of FGM decreased slightly from 2005 to 2011 it remains at 26 percent. The report further indicates, however, that the prevalence of this practice in children over 10 years of age is reported to be less than 6 percent. Nevertheless, the AAO recognizes that the fear and risk of such harm to her daughter constitutes hardship to the applicant's spouse herself and is a factor to be considered in the aggregate. As noted by counsel, the U.S. State Department reports that rape, violence against women, sexual harassment, and discrimination against women are widespread in Senegal and prosecutions for rape other crimes against women remain minimal. As noted by counsel, the CIA World Factbook submitted for the record and last updated January 7, 2013, demonstrates that while Senegal has the 68th largest labor force in the world (of 231 countries), its unemployment rate is 48%, ranking Senegal 193rd of 201 listed countries. Counsel further notes that of those employed, 75.5% work in agriculture and only 22.5% in industry in services, and that the minimum wage ranges from 37 to 42 cents. The AAO finds that these statistics are sufficiently probative to demonstrate that the applicant or his spouse, both currently enjoying careers in high-

end fashion retail, are unlikely to secure employment in Senegal sufficient to support themselves and their daughter.

The AAO found inconsistent on appeal former counsel's assertion that the applicant's spouse has no ties to Senegal, as the latter indicated on a biographical questionnaire that her parents still reside there. Current counsel responds on motion that the applicant's spouse was referring to having no family in Senegal who could assist or support her upon relocation. The record contains no such assertion by the applicant's spouse. Counsel adds that the applicant's spouse's father is in his 80s, her mother is in her 70s, neither parent works, and both are sustained by money sent to them by applicant's spouse. Again the record contains no such assertions by the applicant's spouse. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Nevertheless, the applicant's spouse has stated that she has no "strong" family ties to Senegal and that most of her family and friends reside in the United States. She adds on motion that all of her sisters live in France. The AAO thus accepts as accurate the assertion that the applicant's spouse has only minimal family ties remaining in Senegal.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse, including readjustment to a country in which she has not resided since 1995; her lengthy residence of nearly 18 years in the United States; her close family, work, and community ties in the United States; her long-time steady employment in the United States of more than 10 years with the same employer and her related employer-provided benefits including health insurance; her stated mental, emotional, physical, economic, employment, and safety concerns about relocating to Senegal; and her concerns for her daughter's safety, health, well-being, and education. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Senegal to be with the applicant.

The AAO noted in our earlier decision on appeal that the only assertion of separation-related hardship in the record was that the applicant's spouse and her daughter rely on the applicant financially and would suffer a financial impact in the event of his removal. The AAO found that the income tax returns and the applicant's spouse's employment records were not sufficiently probative to demonstrate that she would be unable to meet her financial obligations without the applicant's assistance or that the applicant contributed financially to his household in the past or would do so in the future if he remains in the United States. On motion, counsel submits the couple's joint tax return for 2011 showing that they earned a total of \$70,123 (\$36,364 by the applicant and \$33,759 by the applicant's spouse). Also submitted on motion is the applicant's year-end paystub for 2012 showing that he alone earned \$63,057.72. [REDACTED] of [REDACTED] writes in a letter dated March 28, 2013 that the applicant is the Assistant Store Manager of the company's [REDACTED], has been employed there since September 17, 2011, and that his current annual salary is \$90,000. This letter was submitted by counsel on April 13, 2013 in support of the applicant's request to travel for business purposes to Nice, France in June 2013. The evidence submitted on motion and thereafter demonstrates that the applicant's

current income, and thus his presumed financial contribution to his household, is significant. The record contains no evidence, however, demonstrating that the applicant was ever employed prior to September 17, 2011 or that he ever contributed financially to the household. Joint tax returns submitted for tax years 2007, 2008, 2009 and 2010 list only the applicant's spouse's income as demonstrated by related Form W-2, Wage and Earnings Statements for those years. Thus it appears that the applicant's spouse's household remained financially solvent on her income alone at least until the filing of the I-601 appeal. The recent [REDACTED] employment letter indicates that the applicant has been employed by the company since September 17, 2011, just weeks after the I-601 appeal was filed. There is no record of any previous employment or income by the applicant and no explanation on motion as to the dramatic surge in his annual income from [REDACTED] from \$33,759 in 2011, to \$63,057.72 in 2012, to \$90,000 in 2013. There is additionally no budget submission or other documentary evidence in the record delineating the applicant's spouse's current expenses from which an accurate determination might be made as to whether she would suffer economic hardship in the applicant's absence. Moreover, the initial separation-related hardship deficiency addressed by the AAO on appeal remains unanswered. No new or additional assertions have been made on motion that the applicant's spouse would suffer hardship due to separation from the applicant. As economic hardship resulting from the applicant's removal is the only assertion related to separation, and as the record as currently constituted does not demonstrate that the applicant's spouse would be unable to support herself and her daughter without the applicant's financial contribution, extreme separation-related hardship has not been established.

The AAO has considered cumulatively, both on appeal and motion, all assertions of separation-related hardship to the applicant's spouse. This includes the only such assertion made, that in the applicant's spouse's June 2011 affidavit, where she writes: "My husband helps me and my daughter with financial support and I would have a difficult time supporting my daughter and myself without his help. Additionally, he helps watch and care for my daughter, when I am unable to." Considered in the aggregate, the AAO finds the evidence insufficient to demonstrate that the challenges encountered by the applicant's qualifying relative, when considered cumulatively, meet the extreme hardship standard.

Although the applicant has demonstrated that his qualifying relative spouse would experience extreme hardship if she were to relocate to Senegal to join him, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has shown extreme hardship to a qualifying relative in the scenario of relocation *and* the scenario of separation. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as 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 a qualifying relative in this case. Accordingly, the applicant has not established that he is statutorily eligible for a waiver under section 212(i) of the Act.

(b)(6)

NON-PRECEDENT DECISION

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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. Therefore, the motion is granted but the prior AAO decision is affirmed.

ORDER: The prior AAO decision is affirmed.