U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 24 2013 Office: MIAMI 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 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 its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, 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 any 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,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba. The record indicates that on September 28, 2002, the applicant arrived at the Miami International Airport from Brazil as a passenger under the Transit Without Visa (TWOV) program en route to the Bahamas. The applicant was intercepted by the TDF team at Concourse E, Miami International Airport. The applicant claimed to be Cuban and was referred to secondary inspection. During secondary inspection the applicant admitted under oath that the Paraguayan passport he had utilized to board the plane in Brazil was in fact fraudulent. He further stated that the purpose of his trip was to join his family and work in the United States. It was determined that the applicant was inadmissible 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 having attempted to procure entry into the United States by fraud or willful misrepresentation. 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 with his lawful permanent resident spouse.

The field office director concluded that extreme hardship to a qualifying relative had not been established and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director,* dated September 29, 2011.

In support of the appeal, counsel submits a brief. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (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 Attorney General [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 Attorney General [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.

On appeal, counsel first contends that the applicant's presentation of the fraudulent passport to airport officials was solely for the purpose of boarding the plane and at no time did the applicant

present fraudulent documents to an officer of the United States government. Further, counsel maintains that the applicant was intending to remain in the United States to apply for adjustment of status and his intention was never to utilize they TWOV program. Counsel refers to the Board of Immigration Appeals (Board) decisions *Matter of D-L- & A-M-, 20 I&N Dec. 409 (BIA 1991)* and *Matter of Shirdel, 19 I&N Dec. 33 (BIA 1984),* to support the above assertions. The AAO finds that the Board decisions referred to by the applicant fail to establish that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

It is noted that the TWOV program was designed to facilitate international travel, and permitted:

> [A]liens traveling from one foreign country to another, which route entails a stopover in the United States, to proceed "in immediate and continuous transit" through this country without a passport or visa. 8 U.S.C. § 1182(d)(4)(C) (1970). An individual desiring to use the transit without visa privilege must establish, inter alia, that 1) he is admissible under the immigration laws, 2) he has confirmed means of transportation to at least the next country, and 3) he will accomplish his departure within eight hours after his arrival or on the next available transport. 8 C.F.R. § 214.2(c) (1980)[1]

The Board case cited by counsel, *Matter of D-L- & A-M-* held that a section 212(a)(6)(C)(i) of the Act, (formerly section 212(a)(19) of the Act of 1952) charge of inadmissibility cannot be upheld unless the fraud or material misrepresentation was practiced upon an authorized U.S. Government official.

Matter of D-L- &A-M- states at 412 that:

> [W]e hold that, outside of the TRWOV [TWOV] context addressed in *Shirdel*, an alien is not excludable under section 212(a)(19) of the Act [now section 212(a)(6)(C)(i) of the amended Act] for seeking entry by fraud or willful misrepresentation of a material fact where there is no evidence that the alien presented or intended to present fraudulent documents or documents containing material misrepresentations to an authorized official of the United States Government in an attempt to enter on those documents.

The Board emphasized that its holding applied only outside of the TWOV context, and the Board specifically distinguished its holding from a decision made in the TWOV-related case, *Matter of Shirdel, supra.*

Matter of Shirdel held that two Afghani citizens who posed as Turkish nationals were excludable under the second clause of section 212(a)(19) of the former Act, for seeking to enter the United States by fraud or a material misrepresentation. The decision specifically states that, "[t]he fraud

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[1] The TWOV program was suspended on August 2, 2003.

was their flying to the United States posing as TRWOV aliens in order to submit applications for asylum." *Matter of Shirdel, supra* at 36.

The AAO notes that the First Circuit Court of Appeals held in *Ymeri v. Ashcroft,* 387 F.3d 12, FN 4 (1st Cir. 2004) that:

> The transit without visa privilege is a benefit provided under the Immigration laws. An alien who transits through this country as a transit without visa participant has attained one of the benefits listed in section 1182 [212] (a)(6)(C)(i) [of the Act], regardless of whether the alien effects an "entry."

U.S. v. Kavazanjian, 623 F.2d 730, 732 (1st Cir. 1980) held that:

> [T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country's border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.
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> . . . .
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> [W]e think an alien's assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United States before again departing. *See Reyes v. Neely,* 228 F.2d 609, 611 (5th Cir. 1956), ("A misrepresentation may be made as effectively by conduct as by words") . . . . *Id.* at FN15.

In the present matter, the record clearly reflects that the applicant traveled to the United States posing as a TWOV alien under the TWOV program. The record establishes that the applicant completed a Form I-94T, TWOV arrival and departure record when he traveled from Brazil to the United States. In addition, the record contains a September 28, 2002, Record of Sworn Statement in Administrative Proceeding, signed by the applicant, as well as a September 28, 2002 INS memorandum. Both reflect that the applicant presented himself to [redacted] agents in Brazil as a Paraguayan national, using false identification documents. The documents reflect further that the applicant did not intend to travel to the Bahamas and that his plan was to live and work in the United States.

The applicant in the present case clearly intended to enter the United States in order to apply for adjustment of status and he had no intention of continuing his trip to the Bahamas. He was precluded from obtaining TWOV status as a Cuban national and he obtained a Paraguayan passport in order to obtain TWOV status, travel to the United States, and apply for adjustment of status. Based on the above the applicant is clearly inadmissible under section 212(a)(6)(C) of the Act, for attempting to procure admission into the United States by fraud or willful misrepresentation of a material fact.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. The applicant's lawful permanent resident spouse is the only qualifying relative in this case. Hardship to the applicant 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).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g.*, *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel contends that the applicant's lawful permanent resident spouse will suffer hardship if she remains in the United States while the applicant relocates abroad due to his inadmissibility. On appeal, counsel maintains that the applicant's spouse is now enrolled in school and must lower or eliminate the number of hours she can work and thus, she needs the applicant to remain in the United States to assist her financially. *Brief in Support of Appeal,* dated December 8, 2011.

To begin, the record contains no statement from the applicant's spouse, the qualifying relative in this case, outlining the hardships she would experience were her husband to relocate abroad. As for counsel's assertions that the applicant's spouse needs her husband's financial support so that she may pursue her studies, no documentation has been provided on appeal establishing the applicant's spouse's current overall financial situation to establish that without the applicant's physical presence in the United States, the applicant's spouse will experience financial and/or academic hardship. The AAO notes that in the most recent tax return provided, from 2010, the applicant's spouse was the sole financial provider for the family. Nor has it been established that the applicant's spouse is unable to pursue her studies while continuing her employment. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner'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). The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, her situation, if she remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record.

In regards to establishing extreme hardship in the event the qualifying relative relocates abroad based on the denial of the applicant's waiver request, the AAO notes that this criterion has not been addressed. As such, it has not been established that the applicant's spouse would experience extreme hardship were she to relocate abroad as a result of the applicant's inadmissibility.

The record, reviewed in its entirety, does not support a finding that the applicant's lawful permanent resident spouse will face extreme hardship if the applicant is unable to reside in the United States. Rather, the record demonstrates that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States or is refused admission. There is no documentation establishing that the applicant's spouse's hardships are any different from other families separated as a result of immigration violations. Although the AAO is not insensitive to the applicant's spouse's situation, the record does not establish that the hardships she would face rise to the level of "extreme" as contemplated by statute and case law.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.