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: JUL 15 2013 Office: FRESNO, CA FILE:

IN RE: Applicant:

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

Ron Rosenberg,
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director ("Field Office Director"), Fresno, California. The Administrative Appeals Office (AAO) dismissed an appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted, the prior decision of the AAO will be affirmed, and the application will remain denied.

The applicant is a native and citizen of India. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having been unlawfully present in the United States for one year or more and seeking admission within 10 years of her last departure, and misrepresenting her intent to reside in the United States. She is married to a Lawful Permanent Resident (LPR). She seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), (i).

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her LPR spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 6, 2012. The applicant subsequently appealed. The AAO found that the applicant had misrepresented her intent to take up residence in the United States and that the applicant had failed to establish a qualifying relative would experience extreme hardship. *AAO Decision*, dated February 25, 2013.

On motion, counsel for the applicant contests the AAO's conclusions and asserts that the evidence and testimony were not properly examined. *Form I-290B*, received March 25, 2013.

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). A motion to reconsider must: (1) 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; and (2) 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).

On motion, counsel for the applicant contests the AAO's finding in its February 25, 2013, decision and states that proper interpretation of the relevant statutes and regulations would have resulted in a determination that the applicant's spouse is experiencing extreme hardship. The AAO finds that the applicant's I-290B meets the requirements of a motion to reconsider.

The record includes previous documentation filed by the applicant. On motion, counsel submits the following documentation: a brief from counsel; documents relating to the applicant's spouse's daughter's VAWA application; an additional statement by , Ph.D., dated March 20, 2013; and another statement by the applicant. The entire record was reviewed and all relevant evidence considered in rendering this decision.

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

(i) In general. 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 chapter is inadmissible.

The record indicates that the applicant entered the United States in September 2010 as a visitor for pleasure, and remained beyond the expiration of her authorized period of stay. The Field Office Director concluded that the applicant had failed to reveal that she was married to a U.S. citizen in applying for entry, misrepresenting her intent to take up residence in the United States for an indefinite period.

The applicant has not offered any evidence to support her assertion that she was not intending to take up residence in the United States. The applicant herself has submitted a sworn statement admitting that she was entering the United States to reside with her husband. *Memorandum Record of Interview made in Examinations Section*, Department of Justice, dated April 22, 2011. Although the applicant refers to a statement submitted into the record by a witness, this witness does not corroborate the applicant's testimony that she was waived through at the border, but that questions were asked and answered, either by herself or the witness. *Statement of* , dated November 29, 2010. An answer that was given, according to the witness, was that the applicant was going to be dropped off at the mall, not that she was going to see her daughter or was entering the United States for any other reason than as a temporary visitor for pleasure. *Id.* Based on the inconsistencies in the applicant's testimony, the AAO finds the sworn statement taken at the time of entry to be the most credible evidence of the applicant's misrepresentation.

On Motion, counsel cites to the USCIS Adjudicator's Field Manual (AFM) to support the assertion that silence or failure to volunteer information does not constitute misrepresentation. 9 FAM 40.63 N4.2. What the FAM actually says is that silence or failure to volunteer information does not "in itself" constitute misrepresentation. Thus, when coupled with certain conduct, it is appropriate and necessary to consider the silence or failure to volunteer information when determining whether an applicant has misrepresented herself. In this case, the applicant entered the United States on a temporary B visa and then filed a Form I-485 adjustment of status application 19 days later.

Filing for adjustment of status is considered one of the "other benefits" referred to in section 212(a)(6)(C)(i) of the Act. 9 FAM 40.63 N9.2.

Counsel cites to *Matter of Areguillen*, 17 I&N Dec. 308 (BIA 1980), and *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2013), to support his assertion that the applicant did not misrepresent herself when entering the United States. *Matter of Areguillen* relied on a now revoked interpretation of "inspected and admitted." *Tamayo-Tamayo v. Holder*, 709 F.3d 795 (9th Cir. 2013). The question in *Matter of Quilantan* was whether the applicant had been "inspected and admitted" as it related to adjustment of status under section 245(a) of the Act. The present case deals with the applicant's false representation that she was entering the United States for a temporary purpose on a B

nonimmigrant visa when she was actually planning to reside in the United States for an indefinite period as an immigrant.

Counsel continues to assert that the applicant's statement at her adjustment interview was misconstrued, and that she did not intend to apply for adjustment of status when she entered the United States. As previously discussed, the applicant's subsequent statements have been examined and the AAO does not find counsel's after-the-fact interpretation of interview questions to be persuasive. The applicant failed to reveal she intended to reside in the United States indefinitely and apply for adjustment of status when entering on a temporary visa, the applicant filed an adjustment of status application within two weeks and the applicant admitted in a hand-written statement that she misrepresented her intent to the inspection agent and intended to take up residence in the United States. In light of these facts, the applicant's recent statements, which change her story about inspection upon entry, are not supported by any evidence, and are outweighed by the existing evidence in the record.

As such, the AAO affirms its determination that the applicant is inadmissible for misrepresenting her intent to reside in the United States indefinitely, pursuant to 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 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.

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

> (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.
>
> . . . .

The record indicates that the applicant entered the United States without inspection in October 1999 and filed a Form I-589, Application for Asylum, on December 7, 1999. Counsel states on motion that the applicant filed for asylum after her 1999 entry, and that an appeal of her denied asylum application was pending until the time she left the United States in 2003. Counsel asserts that, since she had a pending asylum application until she left the United States, she did not accrue any unlawful presence.

The AAO agrees. An applicant does not accrue unlawful presence from the date she files a bona fide application for asylum. In this case, the applicant filed her application within three months of her entry, and as such, failed to accrue any unlawful presence prior to her application. The applicant's case was pending an appeal of the Immigration Judge's denial when she departed the United States in October 2003. In 2004 she instructed USCIS to withdraw her application.

The applicant next entered the United States pursuant to a B nonimmigrant visa, misrepresenting her intent to reside in the United States indefinitely, on September 7, 2010. As such, the applicant has not accrued unlawful presence, and the AAO therefore finds that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(I)(ii) of the Act.

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. Hardship to the applicant or any children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and 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.

On motion counsel repeats the assertion that the applicant's spouse will experience emotional hardship without due to separation, citing to a psychological exam in the record and the applicant's spouse's statement submitted on motion. *Brief in Support of Motion*, received March 25, 2013. The applicant's spouse has also submitted another statement repeating previous assertions of hardship related to separation from the applicant.

The Chief previously reviewed the assertions of emotional and physical hardship to the applicant's spouse due to separation and did not find sufficient evidence to establish that the hardships in this case rise to the level of extreme hardship. On motion, the applicant submits an additional statement from Ph.D., describing the mental health of her spouse as depressive and anxious. Evidence on this issue was previously submitted, reviewed and considered in determining whether

the applicant's spouse is experiencing extreme hardship. The statement from on Motion repeats her previous determinations, and her new report fails to provide any additional evidence that would alter the prior determination.

The applicant's spouse has also submitted additional documentation related to his daughter's marital hardships. In a statement dated March 13, 2013, explains that the applicant's spouse's daughter is receiving child support and spousal support from her former spouse.

The AAO has previously examined evidence pertaining to the emotional, financial and physical hardships on the applicant's spouse related to separation. In this case, the AAO has recognized that the applicant's spouse's daughter filed a VAWA application. However, the record does not establish that the applicant's spouse's daughter is incapable of seeking employment to sustain herself or that she requires any physical assistance on a daily basis that other family members are unable to provide. The evidence submitted on motion does not substantially alter the AAO's previous determination.

An examination of the evidence submitted on motion does not change the AAO's determination that the applicant has failed to establish that a qualifying relative would experience extreme hardship, either upon relocation or upon separation.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if she is refused admission. The AAO recognizes that the applicant's husband may suffer emotionally as a result of separation from his wife. These assertions, however, represent common hardships associated with removal and separation, and do not rise to the level of "extreme" as informed by relevant precedent. 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 addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The motion is granted but the underlying application remains denied.