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

U.S. Citizenship and Immigration Services

(b)(6)

Date: FEB 1 1 2014 Office: VIENNA, AUSTRIA

IN RE:

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Vienna, Austria, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted and the waiver application approved.

The applicant is a native and citizen of Romania who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act and section 212(i) of the Act in order to reside with his wife and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. The AAO dismissed the appeal, also finding that the applicant failed to establish extreme hardship to a qualifying relative. Counsel now files a motion to reopen and reconsider. Counsel submits new evidence in support of the applicant's waiver application.

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 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 Service policy. A motion to reconsider a decision on an application or petition 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 that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, counsel has submitted a brief and new documentary evidence to support the applicant's waiver application. The applicant's submission meets the requirements of a motion to reopen. Accordingly, the motion is granted.

In addition to the evidence specified in the AAO's previous decision, the record now also contains an updated letter from the applicant, a copy of the birth certificate of the couple's newborn child, and copies of money transfers. The entire record was reviewed and considered in rendering this decision.

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 -
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> . . . .

> (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.
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> . . . .
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> (v) *Waiver*. – The Attorney General [now the Secretary of Homeland Security (Secretary)] 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] 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.

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

> 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 Act is inadmissible.

Section 212(i) provides, in pertinent part:

> (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 permanent resident spouse or parent of such an alien . . . .

Regarding inadmissibility under section 212(a)(6)(C)(i), the field office director stated in her decision that the applicant's "visa application indicated that he was a student of Theology and faculty member at He also indicated he graduated from the in September 2000, and presented a letter stating he was ordained as a monk." The field office director also stated that the Petition for Nonimmigrant Worker (Form I-129) filed on the applicant's behalf by a " was found to have been involved in fraud. The AAO subsequently found that although the applicant did not sign the Form I-129, the applicant made material misrepresentations regarding his educational background to procure his J-1 visa which he used to enter the United States. The AAO specifically stated in our

decision that although "counsel states that the applicant did not misrepresent his educational background, . . . no evidence was presented to support that assertion."

On motion, counsel contends the AAO's finding regarding material misrepresentations of the applicant's educational background to procure his J-1 visa is a "previously undisclosed basis" for the supposed fraud. According to counsel, despite the fact that the applicant was placed in removal proceedings, the Department of Homeland Security (DHS) did not charge the applicant with being inadmissible at the time of entry and did not reference section 212(a)(6)(C)(i) of the Act. Therefore, counsel contends that "the absence of such a charge verifies that DHS never found any substance to such an allegation." Counsel submits the Notice to Appear (Form I-862) and Record of Deportable/Inadmissible Alien (Form I-213) in support of his assertions.

The Act clearly places the burden of proving eligibility for entry or admission to the United States on the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361 ("Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document . . . ."). Furthermore, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, 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).

In this case, the record does not contain any evidence corroborating the applicant's educational background. Contrary to counsel's assertion that the applicant's "educational background . . . was never a topic at issue and . . . never raised," both the field office director and the AAO explicitly address the applicant's purported educational background in concluding the applicant misrepresented a material fact. The applicant claimed in his visa application that he was student of Theology at and that he attended from 1995 – 2000. Aside from the applicant's statement that he has done nothing wrong at any time, there is no evidence, such as a copy of a diploma, transcripts, or copies of tuition receipts, to corroborate the applicant's assertions about his educational background. Considering the Form I-129 filed on his behalf by a Monastery was found to be fraudulent, it is reasonable to require corroborating evidence about the applicant's educational background in Theology despite the fact that the applicant himself did not submit the Form I-129.

Counsel's reliance on Form I-862 and Form I-213 for the proposition that DHS never found any substance to an allegation of misrepresentation is incorrect. The DHS is not limited to the charges stated on these forms and frequently adds additional charges during removal proceedings. Regardless, the AAO conducts appellate review on a *de novo* basis. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center 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).

Therefore, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit. In addition, as counsel concedes, the applicant is also inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

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.

After a careful review of the entire record, including the additional evidence submitted on motion, the AAO finds that the applicant's wife, will suffer extreme hardship if the applicant's waiver application was denied. The record shows that relocated to Romania in December 2008 to be with her husband. A new birth certificate submitted with the motion shows that gave birth to the couple's second child in Romania on October 17, 2012. In addition, new documentation submitted with the motion shows that mother has regularly sent money to the applicant in Romania to support the applicant's family, often sending them a few hundred dollars three times each month. This evidence corroborates contention that she and her husband are having extreme financial problems in Romania as neither has been able to find work. The record also indicates that is living with the applicant's parents in a house that has no running water, no bathroom, and heat in only some rooms. Furthermore, the record contains articles addressing the prevalence of cash bribes in order to obtain medical care in Romania, corroborating contention that the health care system in Romania is unsafe. In addition, the record shows was born in the United States and has been separated from her entire immediate family, including her parents and her sister, who live in the United States. A letter from sister describes her visit to see in Romania and discusses depression and hopelessness at living there. Her sister's letter also describes how she took her own daughter to the hospital in Romania and was expected to pay a bribe just to be acknowledged, and corroborates the contentions that and her husband have no source of income and are living with the applicant's family in a house without indoor plumbing or heat. Considering all of these factors cumulatively, the record establishes that the hardship has been experiencing by relocating to Romania to be with her husband is extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion.

The record also establishes that if returns to live in the United States without her husband, she would suffer extreme hardship. As stated above, the record establishes that has been living in Romania with her husband since December 2008 to avoid the hardship of separation. According to after her husband departed the United States in June 2008, she fell into a deep depression. The record contains documentation showing she was prescribed anti-depressant

medications that her physician corroborated were having little effect on her extreme anxiety, despair, and depression. The record shows that has since had two children with the applicant. If returns to the United States without the applicant, she would be a single parent to the couple's children who are currently one and four years old. would need to readjust to living without the applicant, a difficult situation made more complicated considering she would be a single parent to two young children and her previous mental health issues that were unresponsive to medications. Considering these unique circumstances cumulatively, the record establishes that the hardship the applicant's wife would experience if she returns to the United States is extreme, going beyond those hardships ordinarily associated with inadmissibility. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that faces extreme hardship if the applicant is refused admission.

The applicant also merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include: the applicant's willful misrepresentation of a material fact in order to procure an immigration benefit, and periods of unauthorized presence and employment. The favorable and mitigating factors in the present case include: the applicant's ties to the United States, including his U.S. citizen wife; the extreme hardship to the applicant's entire family if he were refused admission; numerous letters of support, including from the couple's church; and the applicant's lack of any arrests or criminal convictions.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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.

ORDER: The motion is granted and the waiver application approved.