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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: OCT 2 2 2014 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Applicant: [redacted]

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:

[redacted]

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 Director, Nebraska Service Center, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i). He is the spouse of a U.S. citizen. The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States.

The director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 24, 2014.

On appeal, counsel for the applicant asserts that the director's decision was in error and that the record establishes the applicant's spouse will experience extreme hardship.

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 sought admission in 2008, but withdrew his application after a Customs and Border Protection (CBP) officer determined that he had misrepresented material facts in order to obtain entry into the United States. He was allowed to withdraw his application for admission and return to Nigeria.

The applicant states that he did not misrepresent any facts during his interview and that the CBP officers simply did not believe that he was coming to the United States for business purposes.

The record includes, but is not limited to, the following documentation: a brief from counsel for the applicant; statements from the applicant and his spouse; statements from the applicant's children; photographs of the applicant's spouse and children; business records pertaining to the applicant's automotive business in Nigeria; copies of receipts for travel to Nigeria; copies of the applicant's spouse's tax returns for the years 2010 and 2011; copies of paystubs for the applicant; copies of rent receipts, wire transfer receipts, and other financial obligations of the applicant's spouse; educational records pertaining to the applicant's spouse's daughter; an unemployment report for Nigeria; a psychological report pertaining to the applicant's spouse; and copies of medication labels pertaining to the applicant's spouse.

The Director found the applicant inadmissible due to misrepresentation based on the fact that he intended to enter the United States as an immigrant in 2008, rather than for a temporary purpose allowed under his B1/B2 visa. He refers to the applicant's withdrawal of admission in 2008 after CBP officers had determined that the applicant had previously entered the United States indicating he

would only stay four weeks but stayed four months; that the applicant had been residing with his girlfriend during his stays in the United States; and that it was not clear he was coming to the United States to purchase equipment for his business in Nigeria.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or

2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

With regard to the applicant's entry and presence prior to his April 2008 interview, the director's inference is that he misrepresented to CBP Officers the length of time he intended to stay in the United States. His stay of four months did not render him inadmissible or violate the conditions of his B1/B2 visa. The record does not demonstrate that the applicant would have been inadmissible based on the true facts, if for instance, he had stated that he needed to stay for a period of four months, it does not establish that the inspecting officer would have denied his admission.

The record contains a copy of the interview transcript showing the questions that the applicant was asked and what answers he provided during his inspection in 2008. When asked about companies that he had previously done business with the applicant provided the names of two companies. When asked about why his girlfriend said he had sat around reading magazines on his last visit the applicant stated that he was confused and could not explain her answer. The applicant stated that he did not have access to all of his business records at that moment, and indicated that he could provide clearer answers after consulting his business records. The applicant was found to be inadmissible as an intending immigrant and was allowed to withdraw his application for admission. When applying for his waiver the applicant submitted documentary evidence with regard to the conduct of his business in Nigeria. Included in this documentation were copies of invoices from the companies he had mentioned to the CBP officers, pictures of equipment he had purchased, work orders for his business and other documents produced in the conduct of business. This evidence establishes that the applicant was entering the United States in order to conduct business on behalf of his business in Nigeria.

In addition, the fact that the applicant was residing with a girlfriend in the United States was not material because any such fact would not be material to the applicant's conduct of business with a

B1/B2 visa. Notes from the applicant's inspection interview that day state that he "freely" discussed his girlfriend and staying with her. The applicant had never overstayed on any of his previous visits and he had a return ticket with him at the time of his inspection. Based on these facts the record does not establish that the applicant was attempting to enter the United States as an intending immigrant. This finding of misrepresentation is not supported by the record.

However, the applicant remains inadmissible under section 212(a)(6)(C)(i) of the Act. The record indicates that the applicant, when submitting documentation in support of the Form I-130 filed on his behalf by his wife, presented a false divorce decree for his prior marriage. The applicant attended a visa interview on February , and admitted that he initially submitted a fake document, then went back and obtained a valid divorce decree which his lawyer presented. Based on the fact that the applicant initially submitted a false document, he is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for misrepresentation.

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

> (1) The Attorney General may, in the discretion of the Attorney General, 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 Attorney General 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 a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (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.

The entire record was reviewed and considered in rendering a decision on the appeal.

On appeal, counsel for the applicant asserts the applicant's spouse will experience physical, financial and emotional hardship rising to the level of extreme hardship due to separation from the applicant.

Counsel explains that the applicant's spouse has to raise and support her two children as a single parent without the assistance of the applicant. The applicant's spouse has submitted a statement explaining that her daughter suffers from a learning disability and needs the specialized care and educational resources provided in the United States, and that she currently has to provide all the care for her children, including the special needs of her daughter, by herself. Counsel further explains that the applicant's spouse sends money to Nigeria to support the applicant and has to bear the financial burden of travel back and forth to Nigeria to visit him.

The record contains copies of educational records pertaining to the applicant's daughter. The documentation submitted clearly demonstrates that she is cognitively impaired and has had special educational needs to accommodate her cognitive deficiency. Based on her school records the applicant's spouse's daughter will be in high school through 2015 and may require specialized support and assistance beyond that date.

The record contains copies of tax returns for the applicant's spouse. The most recent tax return, for the year 2012, establishes that the applicant's spouse is supporting two dependent children and earned an income of $27,191.

The record contains copies of travel itineraries and receipts for travel back and forth to Nigeria. Counsel notes that the applicant's inadmissibility would be permanent, and that if he is denied admission his spouse and children would have to continue bearing the financial burden of overseas travel if she remained in the United States. The record contains evidence of the applicant's spouse's rent obligations and other bills related to living expenses. Although the record does not indicate the applicant's spouse will be unable to meet her financial obligations, it does demonstrate that she is bearing an increased financial burden due to separation from the applicant.

The record contains a Psychological assessment of the applicant's spouse from the The report discusses the emotional stress on the applicant's spouse related to the immigration problems with the applicant, her daughter's educational struggles and a prior abusive relationship. The report diagnoses her with hypertension and prescribes hypertension medication for a period of five years. The record also contains a copy of her prescription and medication labels for Atenolol.

The record is well documented. While no individual hardship factor in this case rises to the level of extreme hardship, when the hardship factors are considered in the aggregate the record establishes that the applicant's spouse will experience extreme hardship due to separation.

With regard hardship upon relocation, counsel for the applicant asserts the applicant's spouse would experience physical, emotional and financial hardship. Counsel asserts that the applicant's spouse's daughter has special educational needs which would not be met if they relocated to Nigeria. Counsel also explains that the applicant's spouse's children were each born to different fathers, and that relocating the children to Nigeria would present custody issues with their biological fathers.

The applicant's spouse has also submitted a statement pointing out that both of her children were born in the United States and that relocating them to a country they did not know would pose physical and emotional hardships on her as their parent. She explains that her daughter was

diagnosed with cognitive delay and learning disability when she was in Kindergarten, and that, despite her age, she is unable to take care of herself. She further notes that she has not resided in Nigeria for 17 years and that having to relocate while caring for her two children would pose physical hardships for her. As discussed above the record contains substantial evidence documenting the special educational needs of the applicant's daughter.

The applicant has submitted a statement in which he explains that the economic conditions in Nigeria are very tough, and that if his spouse and children relocated to Nigeria they would likely experience financial hardship due to the inability to find employment. The record contains three periodicals submitted into the record discussing the high unemployment in Nigeria, including its origins and current impacts, and attempts to address the situation under President Goodluck Jonathan.

When these hardship factors are considered in the aggregate the record establishes that the applicant's spouse would experience extreme hardship due to relocation.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied and we may now consider whether the applicant warrants a waiver as a matter of discretion.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

Matter of Marin, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the presence of the applicant's spouse and children in the United States, the hardship the applicant's spouse would experience due to his inadmissibility and the lack of any criminal record for the applicant. The unfavorable factor is the submission of a false divorce decree by the applicant.

Although the applicant's immigration violation is serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted. The burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.