

(b)(6)



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: SEP 05 2014 OFFICE: NEW YORK (LONG ISLAND) [REDACTED]

IN RE: [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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, denied the waiver application. The applicant, through counsel, appealed the District Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion is granted, the prior AAO decision is withdrawn, and the underlying appeal is sustained.

The applicant is a native and citizen of El Salvador 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), for seeking to procure a benefit under the Act through willful misrepresentation. The District Director concluded the applicant failed to establish extreme hardship would be imposed upon a qualifying relative and denied his Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. We dismissed the applicant's appeal and affirmed the District Director's decision.

On motion, counsel asserts the applicant's rights to counsel and due process will be severely prejudiced if his motion were not granted; the applicant was the victim of a scam, and he did not intend to commit fraud; the evidence should satisfy the requirements of extreme hardship to the applicant's family; the applicant and his family are unable to relocate to El Salvador due to the current conditions there; and the applicant has demonstrated that he is a person of good moral character. *See Brief Submitted in Support of Motion*, dated January 31, 2014.

A motion to reopen must state the new facts to be proved 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). In the matter before us, counsel does not support with precedent decisions his assertion that the applicant's rights to counsel and due process will be severely prejudiced, and those are issues over which we have no jurisdiction. However, as the applicant has submitted new documentary evidence to support his claim, the motion to reopen will be granted.

The record includes, but is not limited to: briefs; correspondence; affidavits by the applicant, his spouse, their sons and minor children; letters of support; documents establishing identity and relationships; academic, employment, financial, and medical documents; Internet articles regarding adenomyosis; the applicant's conviction records; and documents about conditions in El Salvador and Latin America. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(C) Misrepresentation.-

(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 Act is inadmissible.

...

(iii) Waiver authorized.- For provision authorizing waiver of clause (i), see subsection (i).

On appeal, we concluded the evidence submitted by the applicant in support of his appeal was insufficient to find that he did not willfully misrepresent a material fact to procure a benefit under the Act and therefore the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. On motion, the applicant, through counsel, contests this finding.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term “willfully” means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

The record reflects that a Petition for Alien Relative (Form I-130), identifying the applicant as the spouse of a U.S. citizen, and a concurrently filed Application to Register Permanent Residence or Adjust Status (Form I-485) were denied in 1996. Documentation submitted in support of these forms include a marriage certificate indicating the applicant married the U.S. citizen petitioner in the ██████ New York on June 17, 1993. The applicant subsequently stated that he has been married only once to his lawful permanent resident spouse and never met or married the U.S. citizen named in the marriage certificate and on the Form I-130.

In support of the motion, counsel contends the applicant was unaware of his purported marriage to a U.S. citizen until he obtained information from a Freedom of Information Act (FOIA) request, and the applicant has always included his lawful permanent resident spouse on his “paperwork” and tax documents. Counsel also contends the applicant met his burden in establishing that he was a victim of fraud at his hearing before the immigration judge, and accordingly, the immigration judge terminated removal proceedings so the applicant could seek relief from U.S. Citizenship and Immigration Services instead.

To support counsel’s contentions, the applicant further states in his waiver application that an individual in Brooklyn prepared Forms I-130 and I-485, and with these forms submitted unbeknownst to him a marriage certificate and an I-94 card indicating his entry into the United States on November 24, 1990. The applicant further states he would not have agreed to deceive the U.S. government by submitting a “funny” marriage certificate, and he would not divorce his wife of many years for an immigration benefit, as he would not wish his children to see that they could obtain benefits by lying. His spouse also states the applicant trusted the person who submitted these applications, not realizing that he was being “scammed.”

The evidence demonstrates the applicant signed Form I-485, and in so doing, certified under penalty of perjury that the application and the evidence submitted with it are true and correct. Moreover, the applicant has not submitted evidence demonstrating his legal incapacity or inability to understand the documents he signed. We therefore find that the applicant's misrepresentation of his marital status to a U.S. citizen in connection with his request for adjustment of status was willful as opposed to accidental, inadvertent, or in an honest belief that the facts were otherwise. Moreover, the immigration judge's order does not refer to the underlying facts considered before terminating the applicant's removal proceedings, other than the conclusory statement the applicant "is eligible for adjustment of status before the Director, due to his arriving [sic] status." The Act makes clear that a foreign national must establish admissibility "clearly and beyond doubt." See section 235(b)(2)(A) of the Act. See also 240(c)(2)(A) of the Act. The same is true for admissibility in the context of an application for adjustment of status. See *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008). See *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008); see also *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). Based on the foregoing, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, and he requires a waiver under section 212(i) of the Act.

Section 212(i) of the Act provides, in relevant 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.

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. Hardship to the applicant, his sons, and other children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's lawful permanent resident spouse is the only qualifying relative in this case. 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-Morales*, 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 of Immigration Appeals (BIA) 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 BIA 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 BIA 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 Id.* at 568; *In re 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 BIA 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., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *In Re 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 v. INS*, 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.

In support of the waiver application, the applicant's spouse indicates she would suffer physical, financial, and emotional hardship in the applicant's absence as: she had an abnormality in her pancreas in 2012 and continues to have pain in her stomach; she has not worked since the birth of their first child; she would be unable to afford their expenses without the applicant's financial support; life without the applicant, who she met when they were about 16 years old, would be

unbearable, because they rely on each other for support and he has been her best friend, companion, and the love of her life; and he is a great husband and father and the foundation of their home.

To corroborate his spouse's claim of physical hardship, the applicant earlier submitted a physician's letter, dated January 28, 2013, in which the physician indicates the spouse, who experienced dysfunctional uterine bleeding and pain, has an "anteverted uterus with an appearance suggestive of adenomyosis," with no noted abnormalities. The record also includes Internet articles about adenomyosis, describing its causes, symptoms, and treatment. The record is sufficient to establish that the applicant's spouse was diagnosed with adenomyosis, which can be a painful condition.

To corroborate her claims of financial hardship, the applicant's spouse outlines their monthly household bills, including their mortgage, utilities, cable and Internet, and automobile-insurance payments, which total about \$3,169. She also discusses the school tuition payments for their daughter and sons, totaling about \$2,385. Moreover, the applicant's eldest son indicates his family would not know how to survive without the applicant as he has been the sole provider, and his family would be forced to sell their home. In support of these claims of financial hardship to his family, the applicant submitted billing statements; earnings statements; tax returns; and an editorial from the Internet that discusses age discrimination in the Latin American job market. The article does not specifically address labor or market conditions in El Salvador to support assertions that the applicant could not financially assist his spouse with income he may earn there. However, the record is sufficient to establish the applicant's spouse serves as the family's sole breadwinner, earning an income of \$108,500 in the construction industry, and that his spouse has not worked outside their home since the birth of their eldest son.

To corroborate claims of emotional hardship to the applicant's family members, the applicant's eldest son indicates his younger siblings need a strong male role model, and he and his siblings would be devastated if the applicant were removed. The applicant's two adult sons and two minor children are not qualifying relatives under the waiver provision of 212(i) of the Act, and the evidence does not reflect the effect that hardship to them would have on the applicant's only qualifying relative, his lawful permanent resident spouse. Nevertheless, the record establishes that the applicant and his spouse have been married and resided together in the United States for over 25 years.

When evidence of hardship is considered in the aggregate, the record establishes the applicant's spouse would suffer extreme hardship as a result of separation from the applicant due to the cumulative effect of her medical history; the emotional hardship she would endure, having been married to the applicant for almost 25 years; and the financial hardship she would experience, considering that she has not worked outside the home for approximately 20 years.

Addressing the hardship the applicant's spouse would experience if they were to relocate to El Salvador, counsel asserts: the applicant and his family do not have any ties to El Salvador; the conditions in El Salvador are "very serious" as demonstrated by the recent travel warning issued by the U.S. Department of State, in which it discusses crime and the extortion of foreigners; and the applicant's children "run a great risk of being harm[ed], especially since [they] hardly speak proper and correct Spanish, they can neither write nor read it." As mentioned previously, the applicant's

children are not qualifying relatives under the waiver provision of 212(i) of the Act, and the record does not sufficiently evidence the effect that hardship to them would have on his qualifying relative. Nevertheless, the record demonstrates the applicant's spouse has resided in the United States for over 30 years, where she maintains close family and community ties. Moreover, in its latest travel warning for El Salvador, the U.S. Department of State indicates:

[T]he homicide rate has been rising steadily since August 2013. . . . [C]rime and violence are serious problems throughout the country. . . . Extortion is a particularly serious and very common crime in El Salvador. . . . U.S. citizens who are visiting El Salvador for extended periods are at higher risk for extortion demands. Hitting its peak a few years ago, extortion rates have dropped in the last two years. However, recent reports show an increase in the level of violence associated with extortion cases. Many extortions are not reported by victims for fear of reprisal and lack of faith in the ability of the government to protect the victims.

Travel Warning, El Salvador, last updated April 25, 2014.

The record reflects that the cumulative effect of the hardship the applicant's spouse would experience as a result of the applicant's inadmissibility rises to the level of extreme. We thus conclude that were the applicant's spouse to relocate to El Salvador to be with the applicant due to his inadmissibility, she would suffer extreme hardship given her length of residence in, and strong family and community ties to, the United States; the social and political conditions in El Salvador; and the normal hardships associated with relocation.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, *supra* at 301. 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.

In *Matter of Mendez-Morales*, 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 stated 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.*

The favorable factors in this case include extreme hardship to the applicant's lawful permanent resident spouse; hardship to his adult U.S. citizen sons and younger U.S. citizen children, his good moral character as described in letters of support, the filing of income taxes, his steady employment, and evidence of his rehabilitation. The unfavorable factors include the applicant's misrepresentation, periods of unlawful status, and his conviction for a work-related state administrative-code violation in 1998.

Although the applicant's immigration violations and conviction are serious, the record establishes that the positive factors in this case outweigh the negative factors and 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. The prior decision of the AAO is withdrawn, and the underlying appeal is sustained.