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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 15 2014 OFFICE: ATLANTA FILE: consolidated therein)

IN RE: Applicant: AKA:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Atlanta, Georgia and the matter is before the AAO on appeal. The appeal will be dismissed.

The applicant, a native and citizen of China, was found inadmissible 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 attempting to procure admission into the United States through fraud or misrepresentation. The applicant seeks a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his U.S. citizen spouse.

In a decision dated January 31, 2013, the Field Office Director concluded that the applicant did not demonstrate that his spouse would suffer extreme hardship and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, counsel for the applicant states that the Field Office Director failed to address the evidence establishing that the applicant's spouse would suffer extreme hardship if the applicant's waiver is denied. Counsel also states that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, as the immigration judge did not sustain that charge in the applicant's exclusion proceedings in 1995.

In support of the waiver application, the record includes, but is not limited to: briefs from counsel; an affidavit by the applicant's spouse; biographical information for the applicant, his spouse, and their three children; medical records for the applicant's spouse; financial documentation; a letter from the applicant's spouse's parents; documentation of home ownership and medical insurance coverage; country-conditions documentation concerning China and documentation of the applicant's immigration history. 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.

The Field Office Director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act as a result of his attempt to obtain admission to the United States on April 25, 1994, using a photo-switched Taiwanese passport bearing another individual's name and a counterfeit U.S. nonimmigrant visa. In a sworn statement dated April 25, 1994 and in sworn testimony before the immigration judge, the applicant admitted that he paid a smuggler for this document, which he used to attempt to gain admission to the United States. The record contains a transcript of the applicant's sworn testimony before the immigration judge on October 16, 1995, which states:

> Q. …is this the document that you used and obtained from the smuggler?
> A. Yes.

Q. And sir, is this a validly issued passport?
A. Uh, I don't know. He told me --- the smuggler told me this is – this one is good.
Q. Well, sir, is your name
A.
Q. Is that your name?
A. It's not my real name.
Q. Okay, sir, when were you born? What date?
A. January 13th, uh, 1974.
Q. And sir, if the passport said that you were born July 15th, 1969, would that be incorrect?
A. He said I uh, look uh, similar uh, to that one and it's similar age.
Q. Well, sir the picture that's contained on the passport, that's your picture, correct?
A. Yes.
Q. But, this isn't your passport, correct?
A. That's correct.
Q. And sir, how much did you pay for this passport?
A. Uh, uh, several thousand uh, somebody else uh, helped and I arranged the money – borrowed it.
Q. Okay, and sir, when you came to the United States, did you have this passport with you?
A. Yes.
Q. And sir, did you wait in a line to see an Immigration Official at the airport?
A. That's correct.
Q. And sir, were the people in front of you showing their passports to the Immigration Inspector?
A. Uh, that's correct.
Q. And, sir, and [sic] at some point came to be your turn to show your passport to the Immigration Inspector, correct?
A. That's correct.
Q. And did you show this passport hoping to gain entry into the United States?
A. That's correct.
Q. And sir, did you ever tell the Immigration Inspector what your real name was?
A. Uh, finally I told them. Uh, when I was caught.

The record indicates that the applicant presented the fraudulent documents to immigration officials at the Miami International Airport. The record also shows that the applicant was referred to secondary inspection where he provided a sworn statement and gave another false name. It is not clear from the record when the applicant ultimately provided his true identity to immigration officials, but the evidence shows that he attempted to enter the United States with a fraudulent passport and did not disclose his true identity until he was "caught."

After he admitted to using a forged passport, the applicant was paroled into the United States for exclusion proceedings, where he was charged with excludability under sections 212(a)(6)(C)(i) of

the Act, for seeking admission into the United States by fraud or wilful misrepresentation of a material fact, and 212(a)(7)(A), as an immigrant not in possession of a valid unexpired immigrant visa. The applicant conceded excludability under section 212(a)(7)(A) but contested it under 212(a)(6)(C)(i) and applied for asylum under section 208 of the Act, 8 U.S.C. § 1158. The immigration judge denied the application for asylum, finding the applicant excludable as charged under section 212(a)(7)(A) of the Act, but concluding that "the government did not sustain its burden" of showing that the applicant was also excludable under section 212(a)(6)(C)(i).[1] The Board affirmed the immigration judge's decision.

On appeal, the applicant claims he should not be found inadmissible under section 212(a)(6)(C)(i) of the Act, as the immigration judge found the U.S. government did not sustain the section 212(a)(6)(C)(i) charge. The applicant, however, does not offer any reasons or independent support for his argument.

The applicant lives in Georgia, which is within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit. 28 U.S.C. 41. The Eleventh Circuit, in *Dormescar v. Attorney General*, reviewed a claim that a decision in a removal proceeding should bar the Department of Homeland Security in a later proceeding. 690 F.3d 1258 (11th Cir. 2012). The court concluded it was not necessary to resolve the issue, as even were the doctrine of *res judicata* to apply in administrative proceedings, it would not apply in that particular case. *Id.* at 1268, n. 10 ("The Department might be right [that res judicata does not apply], but we need not reach the issue of whether *res judicata* always or never applies in agency proceedings involving aliens who have been convicted of aggravated felonies because, even assuming that the defense generally does apply with full force in immigration proceedings, under the specific facts of this case it is not a bar to the removal order . . .".) The court made clear that, in matters where a party asserts the doctrine of *res judicata*, it is that party's burden of proof to show that the following elements have been met: 1) the prior tribunal must have had jurisdiction of the issue; 2) the case must involve the same parties as the first case, or their privies; 3) each case must involve the same cause of action; and 4) there must have been a final judgment on the merits. *Id.* at 1268. Even if res judicata were appropriate in the context of administrative immigration benefit adjudications, the applicant has neither raised nor discussed any of these requisite elements, and as such cannot be said to have met his burden of proof under *Dormescar*.

An adjustment applicant must establish that the applicant is admissible as an immigrant. *See* section 245(a)(2) of the Act. Like an applicant for admission, an adjustment applicant must establish admissibility "clearly and beyond doubt." *See Kirong v. Mukasey,* 529 F.3d 800 (8th Cir.

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[1] The burden in exclusion proceedings is upon the applicant to establish that he is not inadmissible under any provision of the Act. Section 291 of the Act, 8 U.S.C. § 1361 (1994); *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994). The immigration judge accordingly erred in finding that the government had not met a requisite burden in the applicant's exclusion proceedings. The burden of coming forward with the evidence was with the government to sufficiently allege fraud in the manner of entry, and this was accomplished with, among other things, the false passport. We cannot discern what conclusions the immigration judge might have made had he reviewed the evidence of record properly in light of the question of whether *the applicant* had established that *he* was not inadmissible.

2008). The applicant's presentation of a forged passport, and his testimony during his exclusion hearing regarding his actions in attempting to enter the United States, do not establish the applicant's admissibility by this high standard; instead, they amply support a decision that he is inadmissible under section 212(a)(6)(C)(i).[2] In this respect, the applicant misrepresented his identity by providing fraudulent documents to the immigration inspector to procure admission to the United States, continued to misrepresent his identity in secondary questioning and only later revealed his true identity. The record does not show a timely retraction by the applicant, but rather indicates that he only revealed his true identity after not being allowed admission with the forged documentation. A finding of excludability under section 212(a)(6)(C) of the Act will be "closely scrutinized," because such a finding may bar an applicant from any future admission. *Matter of Y-G-*, 20 I&N Dec. 794 at 797. After such scrutiny, we can discern no error in the Field Office Director's finding of attempted fraud in the manner of entry. Under these circumstances, we will affirm his finding of the applicant's inadmissibility under section 212(a)(6)(C)(i).

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section, in pertinent part, states that:

> (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.

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 a U.S. lawful permanent resident or U.S. citizen spouse or parent of the applicant. The applicant submitted evidence concerning the hardship to his U.S. citizen spouse. Hardship to the applicant or his U.S. citizen children will not be separately considered, except as it may affect the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and we then would assess 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

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[2] The record also indicates that although the applicant disclosed his exclusion order on his I-485, Application to Register Permanent Residence or Adjust Status, he stated in response to Part 3 section A that he last entered the United States "without inspection." In fact the applicant was paroled into the United States after his attempt to procure admission using a false identity and documents. Moreover, his signed Form G-325A dated March 5, 2006 omits the false identities he used in his attempt to gain admission to the United States in 1994.

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).

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 1292, 1293 (9th Cir. 1993) (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.

Regarding the hardship the applicant's spouse would experience upon separation, counsel states that the applicant's spouse has become more financially and emotionally dependent on the applicant after the couple's third child was born in September 2012 and will suffer extreme hardship if separated from the applicant. The record indicates that the applicant and his spouse have three children, ages 9, 8, and 1. In her statement dated September 22, 2009, the applicant's spouse states that the applicant is the love of her life and she does not know how she will survive without him. She states that she will not be able to pay the mortgage, utilities and other home expenses without the applicant. She also states that she fears that she would not be able to afford daycare for their children and would be at risk of losing her job. The record indicates that the applicant's spouse has been employed by as an accounts payable specialist since March 25, 2002. On the Form I-864, Affidavit of Support, she filed on behalf of the applicant, she indicates that she earns $32,000 per year. The joint bank account statement she submitted indicates that she has $16,204.44 in her checking and savings accounts. She also reports having stocks and bonds in her retirement account amounting to $37,256.93, as well as $131,332.82 in real-estate holdings. The applicant and his spouse's 2012 federal income tax returns indicate an income of $22,352 for the applicant's spouse. No income was reported for the applicant; however, his Form G-325 signed on August 1, 2013 indicates he has been employed as a "restaurant owner" since April 2010. A federal income tax transcript from 2012 indicates ownership of but no profit or loss was reported from the restaurant. The 2012 tax returns for the couple also indicate rental income of $8,525.

The record does not indicate how the applicant's spouse relies on the applicant financially or what financial hardship she would suffer in his absence. The record does not show the applicant's financial contribution to the family or the cost of daycare for the applicant's children. Without this information it is not possible to determine the degree of financial hardship that the applicant's spouse would experience as a result of separation from the applicant. Although the applicant's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Concerning potential hardship related to the applicant's spouse's medical condition, in a letter dated February 21, 2013, her doctor states that he has seen the applicant's spouse since January 2013 and that she has a medical history significant for Type 2 diabetes mellitus, iron deficiency

anemia and uterine fibroids. Her doctor states that he is managing the applicant's spouse's diabetes and anemia and that she takes four medications. Her doctor did not provide other information concerning how often the applicant's spouse must be seen by a doctor, assistance that she may need from family members, or symptoms that she is experiencing. The record contains the letter mentioned above, as well as copies of medical records, including progress notes and lab results containing medical terminology and abbreviations that are not easily understood to those outside the medical profession. Counsel also provides general documentation regarding diabetes and cites some of the physical problems associated with diabetes; however, there is no indication in the record that the applicant's spouse is experiencing any of the mentioned conditions associated with diabetes, such as blindness, kidney failure, coronary heart disease, or nerve damage. The evidence submitted also does not address her particular risk of suffering from those conditions in the future. Moreover, the medical records submitted concern the applicant's spouse's condition at the time of childbirth in September 2012 and during her pregnancy prior to that time. To the extent that counsel argues that childbirth would be dangerous for the applicant's spouse in China and that the applicant's spouse's condition could not be safely managed there, that issue will be considered in regards to the hardship of relocation. The record, however, does not establish that the hardships the applicant's spouse faces as a result of separation from the applicant, considered in the aggregate, rise to the level of extreme.

Counsel states that the applicant's spouse would suffer hardship, were she to relocate to China, as a result of her lack of ties in that country, her diabetes, and the coercive population-control policies in China. The record indicates that the applicant's spouse left China when she was approximately seven years old[3] and that her parents reside with her and the applicant in Georgia. Moreover, the applicant's spouse asserts that she has no close family ties there and does not speak or understand the language. As mentioned above, the record indicates that the applicant suffers from diabetes mellitus, which appears to be controlled with medication. The record contains substantial documentation regarding possible difficulties in obtaining similar treatment in China for the applicant's spouse's condition. Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. Although treatment may eventually be available to the applicant's spouse in China, any disruption in care would likely cause hardship to the applicant's spouse.

Counsel also cites China's population-control policies as a source of hardship to the applicant's spouse in China. The court cases he submits are not directly applicable to the applicant's case, because they concern the Board's failure to consider evidence of changed conditions in an individual's specific home region with respect to enforcement of these policies. Though his spouse explains that she fears she would be persecuted for violating these policies, this conclusion is not supported by the record; however, the hardship on the applicant's spouse of moving to a

[3] Although counsel in his brief states that the applicant's spouse has resided in the United States since the age of seven, in her statement dated September 22, 2009, the applicant's spouse states that she left China when she was approximately seven years old and then resided in Colombia for a number of years before moving to the United States.

country where she has not resided since she was seven years old taking with her three young children is taken into consideration along with the other hardships of relocation. Additionally, the record documents the applicant's spouse's ties to the United States through her long-term employment, property ownership and her family ties, including her three U.S. citizen children. This evidence, considered in the aggregate, establishes that the applicant's spouse would suffer extreme hardship were she to relocate to China to reside with him.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation and the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id., also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

Although the applicant's spouse's concern over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act be above and beyond the normal, expected hardship involved in such cases.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether he merits a waiver as a matter of discretion.

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 not been met.

ORDER: The appeal is dismissed.