IN RE: Applicant:

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:

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, Columbus, Ohio, and the Administrative Appeals Office (AAO) dismissed the appeal of the denial. The matter is again before us on a motion to reopen and reconsider. The motion will be granted and our prior decision to dismiss the appeal will be affirmed.

The applicant is a native and citizen of Somalia 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 attempting to procure admission to the United States through fraud or misrepresentation. The applicant is the beneficiary of an approved Petition for Alien Relative and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. Decision of the Field Office Director, dated January 25, 2011.

Reviewing the applicant’s Form I-601 on appeal, we found that although the applicant established that his qualifying relative would experience extreme hardship if she were to relocate to Somalia to reside with him, he failed to establish that his qualifying relative would experience extreme hardship were she to remain in the United States. We dismissed the appeal accordingly. Decision of the AAO, dated January 6, 2012. We granted two subsequent motions to reopen and reconsider, and affirmed our decision to dismiss the appeal. Decisions of the AAO, dated February 20, 2014 and September 5, 2014.

The applicant files Form I-290B, Notice of Appeal or Motion (Form I-290B) requesting we reopen and reconsider the decision. According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The current motion does not state new facts to be proved and does not include any additional evidence, therefore the motion to reopen is denied.

According to 8 C.F.R. § 103.5(a)(3), 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. On the current motion, the applicant contests that he is inadmissible under section 212(a)(6)(C)(i), claiming that he made a timely retraction to his misrepresentation, and cites precedent decisions, including a recent decision from the U.S. Court of Appeals for the Sixth Circuit. In addition, the applicant contends that our decision failed to consider all relevant factors to be weighed considering the totality of the circumstances, and cites precedent decisions. As the applicant has stated reasons for reconsideration supported by precedent decisions, the motion to reconsider will be granted.

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 record indicates that the applicant attempted to enter the United States on June 20, 1999, by presenting a fraudulent Dutch passport to an immigration officer at [redacted] International Airport. The applicant told the immigration officer that he was a student in the Netherlands and that he was coming to the United States for vacation. The immigration officer asked the applicant several questions which the applicant could not answer, such as where and what he studied, arousing suspicion that he was not being truthful, and referred the applicant to secondary inspection. It was only during secondary inspection that the applicant revealed he was not the person listed on the Dutch passport. The applicant was charged with willful misrepresentation of a material fact and placed in removal proceedings, and the applicant requested asylum in the United States. It is noted that during proceedings before the immigration judge, the applicant testified that he had paid a smuggler $3,500 to come to the United States with fraudulent documents, and conceded that he was inadmissible under section 212(a)(6)(C)(i). The immigration judge found the applicant not credible about several material facts, including his identity, denied his asylum claim and ordered him removed. Oral Decision of the Immigration Judge, December 18, 2000. The Board of Immigration Appeals (BIA) dismissed the applicant’s appeal in April 2003 and also dismissed two motions, the most recent one in 2007.

On the current motion, the applicant contends that he made a timely recantation of his misrepresentation at the airport.

We noted in our previous decision that a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. 9 FAM 40.63 N4.6. Whether a retraction is timely depends on the circumstances of the particular case. Id. In general, it should be made at the first opportunity. Id. If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. Id.

The doctrine of timely recantation is of long standing and ameliorates what would otherwise be an unduly harsh result for some individuals, who, despite a momentary lapse, simply have humanity’s usual failings, but are being truthful for all practical purposes. See Llanos-Senarillos v. United States, 177 F.2d 164, 165-66 (9th Cir. 1949). The BIA has recognized the virtue of applying that principle when an alien “voluntarily and prior to any exposure of the attempted fraud corrected his testimony that he was an alien lawfully residing in the United States.” Matter of M—, 9 I. & N. Dec. 118, 119 (BIA 1960); see also Matter of R— R—, 3 I. & N. Dec. 823, 827 (BIA 1949). In addition, the BIA has found “recantation must be voluntary and without delay.” Matter of Namio, 14 I. & N. Dec. 412, 414 (BIA 1973). And, when the so-called retraction “was not made until it appeared that the disclosure of the falsity of the statements was imminent [, it is evident that the recantation was neither voluntary nor timely.” Id. The record indicates that the applicant presented a Dutch passport to an immigration officer in an attempt to procure admission to the United States and only revealed his misrepresentation after he was detained for further questioning.

The applicant, citing a recent decision by the U.S. Court of Appeals for the Sixth Circuit, states that that Court held that timeliness of the retraction is not measured in the actual amount of time that has transpired from the misrepresentation to the recantation, but rather, a recantation is timely made if the misrepresentation is retracted before it had been or was about to be exposed. Ruiz Del-Cid v. Holder,
765 F.3d 635 (6th Cir. 2014). In *Ruiz Del-Cid*, the petitioner made untrue statements on his application for asylum, his asylum case was referred to an immigration judge, and he voluntarily recanted the untrue statements at the hearing before the immigration judge. The Court found that the petitioner chose, to his own detriment, to retract his statement at the first opportunity he had to testify after his interview and where there was no evidence that his lie would ever have been exposed. 765 F.3d at 641. The Court noted that no government action preceded the retraction. 765 F.3d at 638. We note that the Court, in several instances, refers to the doctrine of retraction as requiring that the false statement be retracted before its falsity has been or is about to be exposed. 765 F.3d at 639, 640, and 641.

In this particular case, the record shows that the applicant claimed he was a student in the Netherlands and was questioned about where and what he studied, and only after he was unable to satisfactorily answer these questions, he was referred to secondary inspection and retracted his claims to be a citizen of the Netherlands. The record clearly indicates that government action preceded the retraction, and the falsity of his statements were about to be exposed. We conclude that the applicant did not make a timely retraction, and therefore is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

The applicant further states that it has been well-established that the use of a false passport and misrepresentations to border officials to get into the United States by a person fleeing persecution are consistent with an asylum claim. To the extent that the applicant contends that he only used the fake passport because he was fleeing Somalia to apply for asylum in the United States, the record indicates that he attempted to use the false Dutch passport to enter the United States, and only applied for asylum after being questioned about his identity and being referred to secondary inspection. This case is therefore distinguished from cases in which aliens used fraudulent documents only *en route* and did not present them to U.S. government officials for admission, but, rather, immediately requested asylum. See, e.g., *Matter of D-L- &A-M-*, 20 I&N Dec. 409 (BIA 1991); cf. *Matter of Shirdel*, 18 I&N Dec. 33 (BIA 1984).

In this case, as noted above, the applicant presented a false Dutch passport to an immigration officer in an attempt to procure admission to the United States and only revealed his misrepresentation after he was detained for further questioning. The applicant is therefore inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides that:

> 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 the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only
insofar as it results in hardship to a qualifying relative. The applicant’s U.S. citizen spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996).

We previously determined that the applicant has established that his spouse, a native of Somalia and a U.S. citizen who was resettled in the United States as a refugee, would suffer extreme hardship if she were to relocate to Somalia to be with the applicant. However, we dismissed the appeal because the applicant failed to establish that his spouse would experience extreme hardship were she to remain in the United States.

On the current motion, the applicant states that relevant factors to show hardship to a qualifying relative must be considered in the aggregate in determining whether extreme hardship exists, citing Matter of O-J-O, 21 I&N Dec. 281, 283 (BIA 1996). The applicant claims that his spouse would suffer financial hardship if she was separated from him. As noted in previous decisions, the applicant’s spouse filed federal income tax returns listing herself as the head of household, and having income in the range of $11,989 to $24,843, and therefore the evidence in the record is insufficient to establish that the applicant’s spouse would experience financial hardship in the applicant’s absence. The applicant further claims that his spouse would suffer medical hardship; however, there is no evidence in the record to establish that the medical conditions of the applicant’s spouse require support or assistance from the applicant. The applicant also claims that his spouse would suffer psychological hardship. In our previous decision, we noted that the record does not show that psychological hardship to the applicant’s spouse and the symptoms she has experienced are extreme, atypical, or unique compared to others separated from a spouse. The record lacks sufficient evidence demonstrating that the financial, medical, or other impacts of separation on the applicant’s spouse are in the aggregate above and beyond the hardships normally experienced, such that the applicant’s wife would experience extreme hardship if the waiver application is denied and she is separated from the applicant.

On motion, the applicant did not show that his spouse would suffer extreme hardship if she was separated from the applicant. As we previously stated, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has shown extreme hardship to a qualifying relative in the scenario of relocation and separation, as 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.

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 motion to reconsider is granted and the prior AAO decision to dismiss the appeal is affirmed.