Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

H5

[redacted]

FILE: [redacted] Office: BANGKOK, THAILAND Date: MAR 08 2011

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h) of the Immigration and Nationality Act; section 212(i), 8 U.S.C. § 1182(i) of the Immigration and Nationality Act

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Bangkok, Thailand, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen or reconsider. The previous decision will be affirmed and the application denied.

The applicant is a native and citizen of Australia who is inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude; and under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for having seeking admission into the United States by fraud or willful misrepresentation.

On motion to reopen and reconsider counsel contends that inadmissibility under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for seeking admission into the United States by fraud or willful misrepresentation, is not conclusively established. Counsel contends that the AAO omits discussion of relevant U.S. Department of State Foreign Affairs Manual (FAM) provisions. He avers that 9 FAM 40.63 N4.2, provides that "silence or a failure to volunteer information does not . . . constitute a misrepresentation" under section 212(a)(6)(C)(i) of the Act. Further, counsel cites 9 FAM 40.63 N4.7(d), and states that there is no evidence in the record that enables the AAO to conclusively establish that the applicant affirmatively communicated a willful misrepresentation of a material fact to an immigration officer at a port of entry.

Counsel maintains that the applicant states in the letter dated November 30, 2010 that he did not make any misrepresentations or fail to respond truthfully to any questions posed by the U.S. immigration officer at the port of entry in regard to his intention in coming to the United States on his B-1/B-2 visa. Counsel points to letters by [redacted] and [redacted] to show that the applicant maintained legitimate nonimmigrant intent. Counsel asserts that the AAO's finding of misrepresentation must be rejected because it is based on nothing more than "mere suspicion."

Moreover, counsel avers that the AAO mistakenly assumes that investing or managing a surf-school constitutes a violation of immigration status. He indicates that *Bhakta v. INS*, 667 F.2d 771 (9th Cir. 1982), *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990), and *Matter of Lett*, 17 I&N Dec. 312 (BIA 1980), show that self-employment does not constitute unauthorized employment. Counsel maintains that the Ninth Circuit Court of Appeals is the jurisdiction wherein the instant case resides because it is the jurisdiction where the surf school was operated. Lastly, counsel states that there is no evidence that the applicant received "wages or other remuneration" or provided "labor" within the meaning of 8 C.F.R. § 274a.1(f), (g), and (h); or had an "employer-employee relationship." Counsel avers that according to USCIS policy, an employer-employee relationship cannot be established where the asserted "employee" is a principal owner of an enterprise. *See* Memorandum to Service Center Directors, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements, Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)," HQ 70/6.2.8.

Counsel contends that in its extreme hardship determination, the AAO understated the threat to the applicant's wife's mental health if she remains in Australia, and erroneously concluded that relocation to a larger Australian city would alleviate her extreme hardship. He states that the record

shows that the applicant's wife "lacks liquid funds to relocate away from Mallacotta, having expended them by investing with her husband in an expansion of the family abalone business."

Counsel maintains that the AAO ignores the applicant's wife's worsening manifestation of major depression, anxiety, and risk of self-harm or suicide. In addition, counsel declares that the AAO did not take into consideration the psychological hardship associated with the birth of a child and the risk of post-natal depression and postpartum psychosis, and the associated physical and psychological harm to the applicant's wife and child. He contends that [redacted] states in her evaluation that relocation within Australia would exacerbate, not mitigate, extreme hardship to the applicant's wife. Counsel states that in *Watkins v. INS*, 63 F.3d 844, 849-50 (9th Cir. 1995), the Court found the Board of Immigration Appeals (Board) abused its discretion because of inadequately explaining the psychologist's testimony about the petitioner's son not being able to learn another country's language. Counsel maintains that the AAO disregarded the psychological effects of separation on [redacted] presented in [redacted] psychological evaluation and in the letters from [redacted], her mother, father, brother and friends.

Counsel avers that the applicant and his wife cannot relocate to a large Australian metropolitan area without giving up their investment in the abalone business. Counsel avers that the AAO should have acknowledged that accompanying the applicant to Australia or remaining in the United States without him is not a "personal choice" and must be considered in the hardship evaluation. Counsel states that the new facts warranting reopening are the expected birth of a child in April 2011, and the applicant's wife's concern that her child will be endangered by her major depression and anxiety, caused by separation from her family and support structure in the United States. Counsel submits a psychological evaluation dated November 26, 2101 by [redacted] a letter by the applicant; a letter by the applicant's wife; a letter by [redacted] literature about postpartum depression; a letter by [redacted] a real estate agent; and a lease agreement.

Counsel's motion to reopen and reconsider is granted, but we affirm our prior decision for the reasons stated below.

Section 212(a)(6)(C)(i) of the Act renders inadmissible to the United States:

> 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.

Counsel states that there is no evidence in the record which establishes that the applicant affirmatively communicated a willful misrepresentation of a material fact to an immigration officer at a port of entry. He declares that the applicant states in the letter dated November 30, 2010 that he did not make any misrepresentations or fail to respond truthfully to any questions of the U.S. immigration officer at the port of entry with regard to his intention in coming to the United States on his B-1/B-2 visa. To show the applicant maintained his legitimate nonimmigrant intent counsel furnishes letters by [redacted] and [redacted]. Counsel contends that the AAO's finding of misrepresentation should be rejected since it is based on "mere suspicion."

The AAO finds that there is sufficient evidence in the record to establish that the applicant did not have valid nonimmigrant intent, but actually intended to violate his status by establishing and operating a permanent business, and that the applicant obtained a B1/B2 visa for the purpose of immigrating to the United States.

Section 1101(a)(15) of the Act states that:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--
>
> . . .
>
> (B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure . . .

The regulations define "pleasure," for purposes of B-2 classification as "legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature." 22 CFR § 41.31(b)(2). 8 CFR § 214.1(e) states that "a nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure . . . may not engage in any employment."

It is apparent from the explicit language of section 101(a)(15)(B) of the Act, as supplemented by the foregoing regulations, that the B-2, or visitor for pleasure, nonimmigrant category is not intended to be a "catch-all" classification available to all aliens who wish to come to the United States temporarily for whatever purpose. Instead, section 101(a)(15)(B) was designed to encompass a specific, defined class of aliens.

The B-1 classification allows an alien to engage in activities considered legitimate for a business visitor. The FAM and the legacy INS Operations Instructions both describe legitimate B-1 activities. *See* 9 FAM 41.31, notes 5–8; O.I. 214.2(b). 9 FAM 41.31 N8, provides that:

> Aliens should be classified B-1 visitors for business, if otherwise eligible, if they are traveling to the United States to:
>
> (1) Engage in commercial transactions, which do not involve gainful employment in the United States (such as a merchant who takes orders for goods manufactured abroad);
> (2) Negotiate contracts;
> (3) Consult with business associates;
> (4) Litigate;
> (5) Participate in scientific, educational, professional, or business conventions, conferences, or seminars; or
> (6) Undertake independent research.

In regard to an investor seeking and investment in United States, 9 FAM 41.31 N9.7, states:

> An alien seeking investment in the United States, including an investment that would qualify him or her for status as an E-2 investor. Such an alien is precluded from performing productive labor or from actively participating in the management of the business prior to being granted E-2 status.

The regulation at 22 CFR § 41.31(b)(1) defines business:

> The term 'business,' as used in INA 101(a)(15)(B), refers to conventions, conferences, consultations, and other legitimate activities of a commercial or professional nature. It does not include local employment or labor for hire... An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of § 41.53 [pertaining to temporary workers in the H nonimmigrant category].

The applicant asserts in the November 30 letter that:

> I never misrepresented, [sic] my intentions each time I entered the U.S. and never intended to remain permanently in the U.S. when I entered as a visitor. My conduct in managing my investment with a partner in a San Diego surfing school and always returning to Australia confirms my temporary intent in seeking a visa and coming to the United States.

The letter by [redacted] states that he has known the applicant and [redacted] through the University of California in Santa Barbara. He conveys that the applicant was a frequent visitor at his house in downtown Santa Barbara and that the applicant lived with [redacted] in her apartment near the university campus. He states that the applicant was not present in San Diego, where the surf school in which the applicant invested is located and operated by his business partner. He states that the applicant timed his visits with [redacted] breaks in the winter and summer. The residential lease agreement reflects that [redacted] entered into a lease from September 1, 2004 to August 31, 2005 for premises situated in Goleta, which is located in Santa Barbara, California.

[redacted] avers in the letter dated November 24, 2010 that he was an independent contractor with The Next Wave USA from 2007 to 2008, and coached advanced surf lessons. He indicates that the applicant "was not around very often and [redacted] was in charge of the day to day and year round operations of the surf school as well as coaching a few of the athletes himself."

The letter by [redacted] and [redacted] indicate that they are a close friend of the applicant and his wife. They state that the applicant's travel to the United States was predominately due to [redacted] presence. [redacted] and [redacted] aver that the applicant and [redacted] lived together in San Diego and that they saw them socially. They further state that with regard to The Next Wave USA, the applicant "helped establish how the company should be run, hired the employees, trained them and made contacts with other surf companies to help support the athletes among his other creative pursuits such as the branding and corporate identity for the school." They

state that the applicant "also spent a significant amount of time with [redacted] while she gained her MFA in Santa Barbara."

We take note that the record contains information from the website, nextwaveusa.com, which explicitly lists [redacted] (the applicant), [redacted] and [redacted] as coaches at The New Wave-USA, located at [redacted], which is the applicant's spouse's residence. The website states: "For the past ten years, [redacted] has been teaching beginners and advanced surfers, owing and operating a successful surf school in San Diego." In addition, we observe that [redacted] states the following in the psychological assessment of the applicant dated September 21, 2007:

> [The applicant] then began a surf school in San Diego. At that time it was a summer school only and he would return to Mallacoota to dive during the Australian summer. He continued that for four or five years before selling that school to concentrate on training elite surfers. Thus, in the first quarter of 2006 he opened a surf school in San Diego that specialises [sic] in training elite surfers. This is a year round business. He has a business partner. He reported that he still returns to Mallacotta for a few months every year to supplement his income by diving for abalone.
>
> At the time of my interview with him he had just returned from California and was going to Mallacoota in a few days.

In regard to misrepresentations, 9 FAM 40.63 N4.7 provides:

> [I]n determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application or to immigration *officers* when applying for admission. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants . . . Fail to maintain their nonimmigrant status (for example, by engaging in employment without authorization by DHS)."
>
> . . .
>
> [T]he fact that an alien's subsequent actions are other than as stated at the time of visa application or entry does not necessarily prove that the alien's intentions were misrepresented at the time of application or entry. . . . The existence of a misrepresentation must therefore be clearly and factually established by direct or circumstantial evidence sufficient to meet the "reason to believe" standard. . . . a "reason to believe" standard requires that a probability exists, supported by evidence which goes beyond mere suspicion.

The 30/60-day rule, as articulated in 9 FAM 40.63 N4.7-1, applies when

> an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry (POE), that the purpose of his or her visit is tourism, or to

> visit relatives, etc., and then violates such status by: . . . Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

Under this rule, "when violative conduct occurs more than 60 days after entry into the United States, the Department does not consider such conduct to constitute a basis for an INA 212(a)(6)(C)(i) ineligibility." *Id.* at § 40.63 N4.7-4.

Although the AAO is not bound by the Foreign Affairs Manual, we have consistently applied the 30/60 day rule. In the present case, the applicant indicates in his immigrant visa application that he was in the United States in B-1/B-2 nonimmigrant status from June 2003 to September 2003; March 2004 to March 2004; June 2004 to September 2004; December 2004 to January 2005; June 2005 to September 2005; December 2006 to March 2006; June 2006 to September 2006; January 2007 to March 2007; June 2007 to September 2007; and December 2007 to March 2008. We take note of the applicant's assertion in the November 30, 2010 letter regarding his intention in coming to the United States as a visitor, and the letters provided to demonstrate that he maintained his legitimate nonimmigrant intent.

However, the AAO finds that the evidence of The New Wave-USA website, the statements made by [redacted], and also made by [redacted] and [redacted] provide a clear and factual basis for a "reason to believe" that the applicant violated his B1/B2 nonimmigrant visa status by operating, managing, and coaching [redacted] which is violative conduct under the 30/60 day rule. *See* 9 FAM 40.63 N4.7-1 and 9 FAM 41.31 N9.7. The applicant obtained a B-1/B-2 nonimmigrant visa and was granted admission to the United States on that visa. We find that he is inadmissible for misrepresentation because there is sufficient evidence in the record for a "reason to believe" that he did not have valid nonimmigrant intent, but actually intended to violate his status by establishing and operating a permanent business, and consequently, obtained a B1/B2 visa for the purpose of immigrating to the United States.

Counsel states that self-employment does not constitute unauthorized employment in view of *Bhakta v. INS*, 667 F.2d 771 (9th Cir. 1982), *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990), and *Matter of Lett*, 17 I&N Dec. 312 (BIA 1980). In *Bhakta* and *Lauvik* the Ninth Circuit found that an alien may perform menial tasks without negating treaty investor status if the alien primarily acts to direct, manage, and protect his investment. 667 F.2d at 772-73; 17 I&N Dec. at 313. In *Matter of Lett*, the Board found that if an applicant is deemed a qualified nonpreference investor of an enterprise with capital exceeding $40,000 and with qualified employees, his management work does not constitute employment within section 212(a)(14) of the Act. 17 I&N Dec. at 313. We find that these cases are distinguishable from the present case and therefore not persuasive. The applicant's operation, management, and coaching at The New Wave-USA occurred while he was a B-1/B-2 nonimmigrant, whereas the employment at issue in *Bhakta*, *Lauvik*, and *Matter of Lett* occurred while the aliens held status as a treaty investor or qualified nonpreference investor.

Lastly, counsel states that there is no evidence that the applicant received "wages or other remuneration" or provided "labor" within the meaning of 8 C.F.R. § 274a.1(f), (g), and (h); or had an employer-employee relationship. As previously discussed, we have found that the applicant's operation, management, and coaching at his company, The New Wave-USA, was a violation of his

B-1/B-2 nonimmigrant status indicative of immigrant intent at the time of entry. Consequently, we need not address evidence of the applicant's receipt of "wages or other remuneration," provision of "labor" within the meaning of 8 C.F.R. § 274a.1(f), (g), and (h); or the existence of an "employer-employee relationship."

Counsel contends that the record does not contain evidence that would enable the AAO to definitively establish that the applicant affirmatively communicated a willful misrepresentation of a material fact to an immigration officer at a port of entry. Counsel further declares that "silence or a failure to volunteer information does not . . . constitute a misrepresentation." *See* 9 FAM 40.63 N4.2. We find counsel's contention unconvincing. However, in order to gain admission to the United States on a B-1/B-2 nonimmigrant visa, a person must physically present himself for inspection at a port of entry, and present his B-1/B-2 nonimmigrant visa. Such actions inform the immigration officer at the port of entry of the purpose of the visit, and for a B-1/B-2 nonimmigrant visa, the valid purposes are tourism and/or legitimate B-1 activities. Immigration inspectors routinely ask visitors the purpose of their visit, and it is thus reasonable to conclude that the applicant would have had to communicate to the inspecting officer his purpose in coming to the United States on a B-1/B-2 nonimmigrant visa at the time of each entry, and that admission would have occurred only had he communicated activities encompassed within the legitimate parameters of the visa category. As discussed, the evidence in the record establishes a clear and factual basis for a "reason to believe" that the applicant did not have nonimmigrant intent. His true intention was to establish and operate a permanent business in the United States, and in other respects reside in the United States, thereby violating his visitor status and manifesting immigrant intent. Thus, we find that the applicant obtained a B1/B2 visa and procured admission on multiple occasions to the United States using that visa for the purpose of immigrating to the United States. In sum, we find the applicant is inadmissible under section 212(a)(6)(C) of the Act for willfully misrepresenting a material fact and seeking admission into the United States by material misrepresentations.

The applicant is also inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude. A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . .
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

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

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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 sections 212(i) and 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative. Under section 212(h), qualifying relatives include U.S. citizen or lawful permanent resident spouses, parents, sons and daughters. Under section 212(i), the only qualifying relatives are U.S. citizen or lawful permanent resident spouses and parents. The applicant must demonstrate extreme hardship to his U.S. citizen spouse. Hardship to the applicant and is considered only to the extent it results in hardship to the qualifying relative. If extreme hardship to a qualifying relative is established, USCIS then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

The AAO determined in the decision dated October 8, 2010 that the applicant's wife would not experience extreme hardship if she joined her husband to live in Australia. With regard to that determination counsel contends that the AAO understated and mischaracterized the threat to the applicant's wife's mental health if she remains in Australia, and erroneously concluded that relocation to a larger Australian city would alleviate her extreme hardship. Counsel maintains that the AAO ignored the applicant's wife's worsening manifestations of major depression, anxiety, and risk of self-harm or suicide. In addition, counsel declares that the AAO did not consider the psychological hardship associated with the birth of a child and the risks of post-natal depression and postpartum psychosis, and physical and psychological harm to the applicant's wife and child. Counsel maintains that the AAO disregarded the psychological effects of separation on [redacted] as presented in [redacted] psychological evaluation and the letters from [redacted], her mother, father, brother and friends. Counsel avers that the AAO should have acknowledged that accompanying the applicant to Australia or remaining in the United States without him is not a "personal choice" and must be weighed in the hardship evaluation. Moreover, counsel states that the record shows that the applicant's wife does not have liquid funds to relocate away from Mallacotta, having expended her funds in the expansion of the abalone business. Counsel avers that the applicant and his wife cannot relocate to a large Australian metropolitan area without giving up their investment in the family's abalone business. Counsel states that the applicant's wife is pregnant and is concerned that her mental health will impact her unborn child and her ability to take care of her child, and is worried about developing post partum depression. Counsel submits letters by the applicant, his spouse, his father, a real estate agent; [redacted], [redacted] friends of the applicant and his wife; by [redacted] documentation about postpartum depression, and other evidence.

As previously stated in the October 8, 2010 decision, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of

separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. *See Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994); *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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 *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).

The applicant's wife states in the letter dated November 25, 2010 that the AAO failed to fully analyze the impact of her family history on her psychological condition, and the extreme emotional pain that she suffers from separation from her family members. She avers that her parents bought a house in Santa Barbara, California, and now spend most of their time there; and that she is selling her house in San Diego and is searching for a house near them. She asserts that in view of her major depression, anxiety, and despair she is "just as emotionally dependent on my own immediate family as would be a person under 21 years of age."

The applicant's wife avers that she cannot cope with living year round in Mallacoota, and that her husband's seasonal involvement with his father's abalone business would allow them to spend a significant portion of each year in the United States. She describes having to raise her unborn child in Mallacotta without her mother's guidance. The applicant's wife contends that the AAO failed to recognize that moving to a larger city in Australia would not remedy the emotional hardship of family separation. She declares that they cannot move from Mallacoota to another location in Australia because of cost and because they would have to abandon the abalone business since Australian law requires them to legally run it from Mallacotta. Lastly, the applicant's wife asserts that the AAO failed to consider [redacted] and [redacted] concern about her deteriorating condition, her extensive family history of mental illness and suicide, and her being significantly at higher risk of suicide.

The applicant conveys in the undated letter his anxiety about his wife's physical and mental health, and about the safety of their unborn son. The applicant's father states in his undated letter that the applicant started an independent harvesting company in Mallacoota. He asserts that his daughter-in-law is suffering greatly and has severe psychological problems because of her forced absence from her life with her family, and her art and wedding photography business in California.

[redacted] a business associate of the applicant in the abalone industry, states in the letter dated November 17, 2010 that the abalone harvesting season begins in April of each year and that the applicant "could not viably operate an abalone harvesting business residing in a metropolitan area far away from the zone associated with the authorized access license." He states that the applicant "is required to remain present in Mallacotta for a portion of the year (between 6-9 months, depending on diving conditions) in order to continue his livelihood and maintain his business."

[redacted] states in the psychological evaluation dated November 26, 2010, that she had a telephonic interview with the applicant and his wife on November 26, 2010. She avers that the applicant's wife is pregnant and therefore discontinued using antidepressants. She states that the applicant's wife is concerned about her emotional state on her fetus, and how her depression and anxiety will interfere with her care of her baby. [redacted] conveys that the applicant's wife's "emotional health is marred by a proclivity for clinical depression, and a history of family suicide." She indicates that relocation in Australia would "add to her feelings of loss (the loss of her husband's business and livelihood) . . . and of despair (because she has no close relationships in any large Australian city and fears further isolation in a large city)." [redacted] states that "a move to a larger Australian municipality would likely exacerbate rather than diminish the distinct and extreme psychological hardship that now afflicts her." She reports that it is her understanding from the applicant and his wife "that a move to a larger metropolitan area is not feasible because of

governmentally-imposed geographic restrictions on pursuing the abalone fishing business and other commitments that require [redacted] and [redacted] to remain in Mallacoota."

[redacted] conveys that the applicant's wife feels that reunification with her parents is even more urgently needed now that she is facing motherhood, and that the applicant's wife emotionally struggles being caught between her family and life in the United States and her marriage to the applicant. [redacted] emphasizes that the applicant's wife is at greater risk of suicide than the average person. She maintains that it is her judgment that the applicant's wife "is a serious risk of committing suicide or harming herself or possibly her newborn child *in utero*, and who has a family history of suicide, a move of this nature would not likely reduce her already extreme psychological hardship."

[redacted] conveys that the applicant's spouse is at risk of worsening depression and anxiety during the post natal period. She maintains that moving to a larger metropolitan center in Australia is unlikely to resolve or ameliorate her psychological condition or the potential risks to her child. The editorial by [redacted] and [redacted] *Postpartum Depression and Child Development*, Vol. 27, *Psychological Medicine* (1997) indicates that it is "likely that postpartum depression . . . will disrupt normal infant engagements with the mother and, as a consequence, impair infant developmental progress." The applicant submitted an abstract of a review of postpartum psychosis by [redacted] *A Review of Postpartum Psychosis*, Vol. 15, *Journal of Women's Health* 352 (2006).

As stated in our October 8, 2010 decision, family separation has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

Regardless of the type of familial relationship involved, the hardship resulting from family separation is based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247.

With regard to evidence in the record, we note that [redacted] indicates in the first psychological evaluation dated January 6, 2010 that the applicant's wife lived in Australia following

her marriage to the applicant in September 2007, and then later decided to relocate to the United States. She reports that the applicant's 28-year-old wife had "multiple symptoms of depression and anxiety and was in a Major Depressive Episodee [sic]" following the denial of her husband's application to come to the United States. [redacted] reported:

> It is likely that most women of this age and education would find it extremely difficult to be faced with conflict between fulfilling the role of full-time wife and trying to meet personal and professional needs. Many young women are able to have both marital and professional fulfillment because they live in an urban area where they can accomplish both goals. Many young married women find it extremely difficult to live in such a small town with so few opportunities for friendship or fulfillment. It is not unusual that [redacted] would look at a marital life of living in Mallacoota and raising children there with alarm. [redacted] stress is likely amplified by her own family history. It is clearly in the forefront of her awareness that her mother became profoundly depressed while living in a situation of similar social isolation, ultimately developing alcoholism. [redacted] is also acutely aware that she has a family history of clinical depression and that she would be at risk of developing serious depression or the serious consequences of depression.

In the psychological evaluation dated July 28, 2010, [redacted] states that she conducted a telephonic interview of the applicant's wife and her parents and that the applicant's in-laws visited their daughter in Mallacoota and describe the place "as in stark contrast with California[,] which was their daughter's home for many years." They describe the town as "extremely small with virtually no opportunities to make friends," and their daughter as living "in a house which is only partially heated. [redacted] said she can't imagine raising children in the house, nor in the town." [redacted] reports:

> [redacted] parents explained that when their daughter married [redacted], they innocently believed they would be able to live in Mallacoota during the fishing season, and live in California the rest of the year—a plan which would permit their daughter to pursue her career, and also permit them to see her regularly, and form a relationship with their grandchildren . . . Now faced with living in Mallacoota year-round, they have seen their daughter's mood deteriorate precipitously. [redacted] said, "She feels dead in the water as far as a career. She sees what her friends from school have accomplished. She feels defeated. Her belief that she could have [a] successful career is not [sic] fantasy."

[redacted] conveys that [redacted] parents specifically fear that their daughter is experiencing perceptions of failure to fulfill her potential that is highly similar to their deceased loved ones. This is a reasonable fear, in my opinion."

We note that in the letter dated January 8, 2010 the applicant's wife describes with specificity how her photography business and art career have suffered because she lives in the small village of Mallacotta, and she states that "I have always had a strong desire to succeed in my career as one of my life's main pursuits." She describes art and photography as her "lifelong passion and they form a huge part of my identity." The applicant's wife does convey her fear of abandoning her mother, who

is a recovering alcoholic, by living so far away. Lastly, we observe that the applicant's wife explains in detail the "many ways Mallacoota feels like a prison."

The hardship factors asserted in the instant case are the emotional impact to the applicant's wife as a result of separation from her parents in the United States, having to live in Mallacoota, and the loss of her cultural, social, and professional life in California. In the hardship analysis we have taken into consideration the evidence of emotional hardship that the applicant's spouse will experience due to separation from her family members, particular her mother, who is a recovering alcoholic and who has recently bought a house in Santa Barbara. In addition, we have weighed that hardship in the context of the applicant's wife's pregnancy. However, though the applicant's 30-year-old wife describes herself as "just as emotionally dependent on my own immediate family as would be a person under 21 years of age," the record reflects otherwise. The record shows the applicant's wife has lived a full life apart from her parents for large portions of her life. While her parents lived in Idaho, the applicant's wife attended undergraduate and graduate universities in California. The applicant's wife bought a house and started businesses in art and photography in San Diego after completion of her master's degree. The applicant's wife states in the letter dated January 8, 2010 that while living in San Diego, over a two-year period, she was filming and editing a documentary about surfing and environmental concerns with the applicant and the Surfrider Foundation. The applicant and his wife had made plans to live in Mallacoota during the fishing season. We take note that [redacted] describes in detail in her first two psychological evaluations the professional, cultural, and social hardships that the applicant's wife will endure living in the small town of Mallacotta; however, we notice that she does not place the same emphasis on the emotional hardship that the applicant's wife will experience due to separation from her parents.

Furthermore, in the January 8, 2010 letter the applicant's wife discusses in detail the professional, social, and cultural hardships associated with living in a small fishing village, but does not describe with as much specificity the hardships of separation from family members in the United States, even though she treats family separation as the most significant hardship on motion. In addition, we observe that [redacted] indicates in the first psychological evaluation that even though the applicant's wife was devastated by the charge of statutory rape against the applicant, she had the emotional maturity that is needed to make her own determination about marrying the applicant. [redacted] states that after "much soul-searching, which included a review of the forensic psychological report on Brett and many conversations with Brett, she felt convinced that this was a situational mistake rather than a reflection of ongoing pathology . . . With all of this knowledge, [redacted] married [redacted] on September 8, 2007 and moved to Australia to begin their married life." Moreover, we take note that [redacted] knowledge about conditions in Mallacotta is not based on her expert knowledge of Mallacotta, but is from the statements made by the applicant and his wife, and the applicant's in-laws. Thus, in weighing all of the evidence in the record, the AAO finds that even though the record establishes that the applicant's wife will endure emotional hardship as a result of separation of her parents, the evidence in the record demonstrates that the applicant's wife has led a full, vital life separate from her parents, which shows that her emotional dependence upon her parents is not the same as that of a minor child.

The applicant's wife describes the hardships associated in living in Mallacotta, and declares that they cannot move elsewhere in Australia due to cost and because they would have to abandon their abalone business since Australian law requires its operation from Mallacotta. However, the

applicant has not cited any legal provision in support of the assertion that Australian law requires that he live year-round in Mallacotta in order to operate his abalone business. Moreover, had the applicant's waiver been granted, he and his wife would have left Mallacotta and their abalone business to live in California. In addition, we note that the applicant only recently become more involved in his father's abalone business, and prior to his involvement in the abalone business the applicant focused his entrepreneurial and management skills in the operation of surf schools, which is a business that he could operate elsewhere in Australia. Moreover, we note the record demonstrates that the applicant and his wife are a married couple that are prosperous, college-educated, resourceful, and entrepreneurial, and in light of these attributes, we find it dubious that they will be dependent on the abalone business for their livelihood, but are likely to adapt well to life in an advanced country such as Australia, whether or not they choose to reside in Mallacotta. Further, we observe that the applicant's spouse is affluent, as the record reflects that she had financial resources of $2 million in income in 2007 and $1 million in assets, which should enable her and her husband and child to live comfortably in Australia. No documentation has been provided in support of counsel's claim that the applicant's wife had significant financial losses due to the economic downturn. Finally, we note that even though the evaluations of [redacted] have been taken into consideration in the hardship determination, their weight is diminished by the incongruities and inconsistencies we have pointed out. When all of the alleged hardship factors are considered in the aggregate, we find that they fail to establish that the hardship endured by the applicant's wife as a result of joining the applicant to live in Australia meets the standard of "extreme hardship."

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(i) and 212(h) of the Act.

Furthermore, even had we found extreme hardship, we would deny the waiver application in the exercise of discretion based on the adverse factors in the case, which are the applicant's serious criminal behavior and the applicant's significant violations of United States' immigration laws. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The applicant was convicted of the offenses of sexual penetration of child under the age of 16, and indecent act with a child under the age of 16. The applicant was 31 years old when he committed these crimes against a 14-year-old child. Such crimes against children have been singled out by the Attorney General as being particularly egregious and repugnant. In *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705 (A.G. 2008), the Attorney General stated that "*any* intentional sexual contact by an adult with a child is . . . "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." The Attorney General further stated that:

> [S]exual abuse of children destroys, in a way that cannot be described as anything other than "base" and "vile," the trust and innocence of society's most vulnerable members. *See, e.g.*, Eze v. Senkowski, 321 F.3d 110, 112 (2d Cir. 2003) ("The sexual abuse of children is heinous beyond words. It is intolerable ... reprehensible ... [and] destructive of young lives."); Nicanor-Romero, 523 F.3d at 1013 (Bybee, J., dissenting) ("Children in particular—because of their naiveté, their dependence on adults, and their inability to understand, flee, or resist such advances—are vulnerable to adults who seek to take advantage of them sexually. Thus, we find such conduct especially repulsive and worthy of the severest moral opprobrium."); *cf.* New York v.

> *Ferber*, 458 U.S. 747, 756-57, 763 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'"); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (concluding that child pornography, unlike adult pornography, does not merit First Amendment protection).

24 I&N Dec. 687 at 705-706. The AAO finds that the conduct of which the applicant was convicted, the sexual abuse of a 14-year-old child, has been consistently viewed as being "heinous beyond words," "especially repulsive and worthy of the severest moral opprobrium," and "inherently base, vile, or depraved."

Moreover, we take notice that the applicant has significant violations of the United States' immigration laws. The applicant gained admission to the United States on a tourist visa on many occasions over the course of many years, each constituting a misrepresentation of the applicant's intention in coming to the United States. The applicant has manifested a regular and consistent pattern of abusing the privilege afforded by a tourist visa.

Thus, when we consider and balance the adverse factors in this case, the applicant's crimes of sexual abuse of a child and his significant violations of immigration laws, with the favorable factors such as any hardship to his wife, his expected child, and his employment history, we find that the adverse factors clearly outweigh the favorable factors. Therefore, we find that the grant of relief in the exercise of discretion would not be warranted in this case.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the prior decision by the AAO will be affirmed and the appeal will be dismissed.

ORDER: The prior decision of the AAO is affirmed. The appeal is dismissed and the application is denied.