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U.S. Citizenship  
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[REDACTED]

FILE:

[REDACTED]

Office: NEWARK, NEW JERSEY

Date:

SEP 07 2007

IN RE:

[REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) and section 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v) and 8 U.S.C. § 1182(i) respectively.

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Newark, New Jersey. The applicant filed a motion to reconsider the decision on June 24, 2005, which the director denied on November 2, 2005. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more, and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to obtain an immigration benefit by fraud or willful misrepresentation. He seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 8 U.S.C. § 1182(i) respectively, in order to remain in the United States with his U.S. citizen wife.

The record reflects that the applicant indicated that he first entered the United States without inspection on November 15, 1985. The applicant was granted temporary resident status on March 6, 1995 (under alien number A90 261 851) and permanent resident status on December 1, 1990 as a Special Agricultural Worker pursuant to section 210 of the Act. After an investigation revealed that the applicant had never been employed as an agricultural worker as claimed, his permanent resident status was rescinded on March 6, 1995 and the applicant was given 30 days to depart the United States.

The applicant and his wife, [REDACTED], were married in the United States on March 29, 1996 in the United States. The applicant's wife, a native of Cuba who became a naturalized U.S. citizen on January 27, 1999, filed a Petition for Alien Relative (I-130) on the applicant's behalf on May 12, 1999. The petition was approved on November 22, 2006. The applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) on May 12, 1999. The applicant departed from the United States and returned on February 22, 2000 pursuant to advance parole. The applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on August 4, 2000.

In a Notice of Intent to Deny (NOID) issued on January 13, 2005, the District Director stated that records from the U.S. Secret Service indicate that the applicant was convicted and sentenced to one year of imprisonment in 1993 for counterfeit related crimes, but the applicant failed to disclose any arrests and convictions in seeking to adjust status. *Notice of Intent to Deny of District Director* [REDACTED] dated January 13, 2005. The District Director found that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting a material fact in seeking to procure an immigration benefit. Noting that the applicant initially entered the United States without inspection in 1985, and was later admitted on February 22, 2000, the District Director also found the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for one year or more.

The District Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative. In a decision to deny the waiver application dated May 7, 2005, the District Director noted that the applicant had submitted no new evidence to overcome the grounds for denial stated in the NOID and denied the waiver application accordingly. *Notice of Decision to Deny of District Director* [REDACTED], dated March 07, 2005.

On appeal, counsel observes that the applicant has repeatedly maintained that he was never convicted of a crime in 1993, and asserts that the District Director has failed to provide the evidence upon which she relied in making such a determination. Counsel contends that because the applicant's failure to disclose this alleged, but non-existent, arrest and conviction is the only basis for the finding of inadmissibility, the applicant is not required to seek a waiver of inadmissibility. Nevertheless, counsel asserts that the applicant is the sole source of financial support for his family and there is ample evidence in the record showing that denial of the waiver of inadmissibility would cause extreme hardship to a qualifying relative.

The record includes a copy of [REDACTED] naturalization certificate; affidavits from the applicant and his spouse; financial, tax, and business records for the applicant and his spouse; and family and other photographs. The entire record was reviewed and considered in rendering this decision.

There is insufficient evidence in the record showing that the applicant has been convicted of a crime that renders him inadmissible, or that his failure to disclose all of his arrests constituted a material misrepresentation that renders him inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. On his adjustment application, the applicant disclosed that he had been arrested for bank fraud in Virginia, but indicated that the charges were dismissed. Court documents in the record do show that the applicant was arrested and charged with Forgery, Uttering and False Pretense in Fairfax, Virginia in 1998 and that these charges were dismissed.

There are no court documents in the record that support the district director's assertion that the applicant was convicted of counterfeiting related charges in New York in 1993. The record does reflect that the applicant was arrested in New York on July 31, 1992 on charges of First Degree Possession of a Forged Instrument, Fourth Degree Criminal Possession of a Weapon and Menacing. On August 1, 1992, the applicant was arraigned on the latter two charges as well as an additional charge of Second Degree Reckless Endangerment. The record shows that the applicant was never arraigned on the forgery charge, and the other charges were dismissed on November 4, 1992. The record also reflects that the applicant was arrested on December 16, 1989 in New York and charged with Assault with Intent to Cause Physical Injury, but the charge was dismissed on May 3, 1991. Finally, the record shows that the applicant was arrested on August 13, 2003 in New Jersey on two counts of "Unregistered Vehicle Dismantler," but these charges were later dismissed as well.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. See *Kungys v. United States*, 485 U.S. 759 (1988); see also *Matter of Tijam*, 22 I. & N. Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I. & N. Dec. 436 (BIA 1950; AG 1961). The additional arrests did not result in convictions and the applicant never made any admissions as to the elements of the crimes. Had the applicant disclosed these arrests, they would not have resulted in his inadmissibility. Therefore, these arrests are not material and the applicant's omission is not a material misrepresentation. Accordingly, the district director's determination that the applicant was inadmissible for failing to disclose a 1993 conviction must be withdrawn.

Likewise, the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresenting his employment in applying for Status as a Temporary Resident and Permanent Resident under the Special Agricultural Worker provisions of section 210 of the Act.

Section 210(b)(6) of the Act, 8 U.S.C. § 1160(b)(6) – Special agricultural workers, provides in pertinent part, that:

6) Confidentiality of information.—

(A) In general.— Except as provided in this paragraph, neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may—

(i) use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application, including a determination under subsection (a)(3)(B) of this section, or for enforcement of paragraph (7);

(ii) make any publication whereby the information furnished by any particular individual can be identified; or

(iii) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications.

(B) Required disclosures.—The Attorney General shall provide information furnished under this section, and any other information derived from such furnished information, to a duly recognized law enforcement entity in connection with a criminal investigation or prosecution, when such information is requested in writing by such entity, or to an official coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

(C) Construction.—

(i) In general.—Nothing in this paragraph shall be construed to limit the use, or release, for immigration enforcement purposes or law enforcement purposes of information contained in files or records of the Service pertaining to an application filed under this section, other than information furnished by an applicant pursuant to the application, or any other information derived from the application, that is not available from any other source.

(ii) Criminal convictions.—Information concerning whether the applicant has at any time been convicted of a crime may be used or released for immigration enforcement or law enforcement purposes.

(D) Crime.—Whoever knowingly uses, publishes, or permits information to be examined in violation of this paragraph shall be fined not more than \$10,000.

(7) Penalties for false statements in applications.—

(A) Criminal penalty.—Whoever—

(i) files an application for adjustment of status under this section and knowingly and willfully falsifies, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, or,

(ii) creates or supplies a false writing or document for use in making such an application, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(B) Exclusion.—An alien who is convicted of a crime under subparagraph (A) shall be considered to be inadmissible to the United States on the ground described in section 212(a)(6)(C)(i).

In the present case, the record does not show that the applicant defrauded or made a willful misrepresentation in connection with any application other than his application for special agricultural worker status. In addition, the applicant has not been convicted for false statements in that or any other application. The AAO thus finds that the acting district director erred in concluding that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

The record does reflect that the applicant is inadmissible pursuant to 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for one year or more.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure of removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by J. [REDACTED], Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The record reflects that applicant's permanent resident status was rescinded on March 6, 1995 and the applicant was given 30 days to depart the United States. There is no indication that the applicant departed as required. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until May 12, 1999, the date of his proper filing of the Form I-485, a period in excess of one year. The applicant subsequently departed from the United States and returned and was admitted pursuant to advance parole on February 22, 2000. In applying to adjust his status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of his last departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure,

and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

*Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if he is refused admission.

In his affidavit, the applicant indicates that he is self-employed and the sole provider for his family. He states that he cannot relocate his family to Pakistan without severe hardship to his children and wife. In her affidavit, [REDACTED] states that she assists her husband in his business and depends on his financial support. She claims that she will not be able to support herself if he is forced to leave the United States. She also maintains that she will suffer extreme hardship if she relocates to Pakistan because she does not speak any dialect of a Pakistani language. Although these assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *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)). The applicant has not submitted specific evidence showing that his wife will be unable to support herself financially in his absence, or that he will be unable to support his family in Pakistan. Likewise, the record lacks detailed evidence showing the psychological impact separation, or relocation by the applicant's wife to Pakistan, will have on the applicant's wife.

The applicant has not submitted sufficient evidence to show that his and his wife's situation is atypical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.