

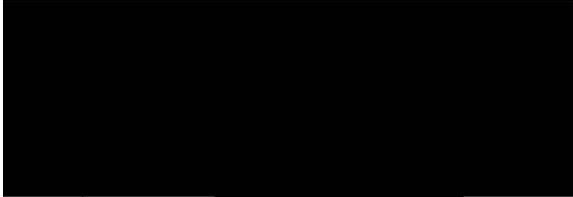
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FILE:

Office: CHICAGO, IL

Date: OCT 03 2006

IN RE:

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

ON BEHALF OF PETITIONER:



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, Chicago, IL and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Pakistan who was found to be inadmissible to the United States 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 a crime involving moral turpitude. The applicant is the spouse of a U.S. citizen, the father of a U.S. citizen and the son of a lawful permanent resident. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his wife and family.

The district director found after considering all the presented evidence that the applicant had not established extreme hardship to his U.S. citizen spouse and denied the application accordingly. *Decision of the District Director*, dated December 20, 2004.

On appeal, counsel contends that although the director's decision quoted the case of *Matter of Cervantes-Gonzales* as the standard in defining extreme hardship, the decision ignored these standards despite the fact that the factual situation presented in the applicant's case met all the requirements. Counsel asserts that there is no reasoning behind the Services recitation of its alleged analysis of the facts; the decision was "conclusory"; and was an abuse of discretion. Counsel also states that undue weight was given to convictions more than fifteen years old and it was unclear what standard was applied to these convictions. *Form I-290B*, dated January 18, 2005.

The record reflects that the applicant was convicted of Battery on March 15, 1989; Unlawful Use of Weapons on August 24, 1990; Theft on July 30, 1991; and Possession of Cannabis in the amount of 2.5 grams or less on January 10, 2001. The AAO notes that the applicant's convictions for Battery and Unlawful Use of Weapons occurred when he was a minor and will not be considered in reviewing his waiver application.

Section 212(a)(2)(A) of the Act states in pertinent part:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
 - (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

- (h) The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 . . .

The AAO notes that the applicant's conviction for Theft will be reviewed under section 212(h)(1)(A). The applicant's conviction for Possession of Cannabis will be reviewed under section 212(h)(1)(B).

The applicant's conviction for Theft occurred on July 30, 1991 and the applicant is still seeking admission as of today. An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's I-485 application, so the applicant, as of today, is still seeking admission by virtue of adjustment based on a relative petition. Thus, the activities leading up to the applicant's conviction took place more than 15 years ago. In addition, the record indicates that the applicant paid fines, completed probation and community service for all of his crimes. He pays child support for his son, is employed and owns a home. The AAO also notes that the applicant's conviction for Theft took place only 20 days after the applicant turned 18 years old. Thus, the AAO finds that the applicant's admission to the United States would not be contrary to the national welfare, safety or security of the United States and the applicant has been rehabilitated.

Although the applicant has established that he qualifies for a waiver under section 212(h)(1)(A) for his Theft conviction, he must also establish that he qualifies for a waiver under section 212(h)(1)(B) for his Possession of Cannabis conviction. A section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Hardship the alien himself experiences due to separation is irrelevant to section 212(h) waiver proceedings unless it causes hardship to the applicant's spouse, child and/or father. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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).

The AAO notes that extreme hardship to the applicant's qualifying family members must be established in the event that they reside in Pakistan or in the event that they reside in the United States, as they are not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The applicant's spouse states that she will suffer extreme hardship if she relocates to Pakistan. *Spouse's Declaration*, dated August 11, 2004. The applicant's spouse was born in the United States and her entire family lives in the United States. She states that she does not know the Urdu language and is a Christian. In addition, the applicant does not have any family in Pakistan as he was brought to the United States when he was only 6 years old. The applicant and his spouse own a home and a car in the United States. The applicant's spouse states that she suffers from a herniated disk and receives physical therapy and nerve blocks on a regular basis and could not receive this treatment in Pakistan. Furthermore, the applicant's spouse states that she would not be safe as a Christian American woman living in Pakistan. To support these assertions the applicant submitted a travel warning issued by the State Department for Pakistan, which warns of possible terrorist activity against U.S. citizens. The AAO finds that the applicant's spouse through her substantial family ties to the United States, financial ties to the United States, medical problems, language barrier and safety issues has established that she would suffer extreme hardship as a result of relocating to Pakistan.

The applicant also asserts that his spouse will suffer if he is removed from the United States. The applicant submitted financial and medical documents showing that the applicant would suffer extreme hardship as a result of his removal from the United States. The applicant submitted the deed to the couple's home showing the mortgage they currently have together. The applicant's spouse states that she would not be able to keep her home if the applicant was removed. In addition, the applicant submitted a letter from his spouse's doctor, Dr. [REDACTED], dated June 19, 2004. In this letter Dr. [REDACTED] states that the applicant's spouse suffers from a herniated disc after being in two car accidents in 2000. He states that the applicant's spouse has been his patient since 2001 and that her herniated disc causes her to suffer from intercostal neuralgias, which is defined as severe pain in the chest wall. Dr. [REDACTED] states that her condition is chronic and intermittently flares up interfering with her life and causing her to miss work. The doctor concludes that he feels the

applicant's presence is necessary for maintaining the spouse's wellbeing. The AAO finds that because of the applicant's spouse's chronic medical problem and the debilitating effects of this problem, she would suffer extreme hardship as a result of the applicant's removal from the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's four criminal conviction and his unlawful status in the United States. However, two of the applicant's criminal convictions took place when he was a minor and the third only 20 days after he turned 18 years old. For his last criminal conviction he completed 30 hours of community service. In addition, the applicant's unlawful status in the United States will be given diminished weight because his parents brought him to the United States at 6 years old.

The favorable factors in the present case are the extreme hardship to the applicant's spouse and the presence in the United States of a U.S. citizen child and a lawful permanent resident father.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.