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



**U.S. Citizenship
and Immigration
Services**

H₂

Date: OCT 03 2011

Office: NEWARK

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

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 APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, 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 pursuant to 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. He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident wife and U.S. citizen children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated February 18, 2009.

On appeal, counsel for the applicant asserts that the applicant's wife and children will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated April 14, 2009.

The record contains, but is not limited to: a brief from counsel; psychological evaluations of the applicant's family members; reports on conditions in Pakistan; copies of medical documents for the applicant and his wife; documentation in connection with the applicant's, his wife's, and his older son's employment, taxes, and expenses; documentation in connection with the applicant's children's academic activities; copies of birth records for the applicant's family members; statements from the applicant's wife and children; and documentation regarding the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

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

(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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record shows that on September 14, 2000 the applicant pled guilty to Offering a False Instrument for Filing in the First Degree pursuant to New York Penal Law § 175.35, for which he was sentenced to five years of probation and \$9,110 restitution. At the time of the applicant's conviction, New York Penal Law § 175.35 stated:

A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state, he offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation.

Offering a false instrument for filing in the first degree is a class E felony.

The present case falls within the jurisdiction of the Third Circuit. To determine whether a crime constitutes a crime involving moral turpitude, we engage in a categorical inquiry that consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute." *Jean-Louis v. Holder*, 582 F.3d

462, 465-66, 2009 WL 3172753 (3rd Cir. October 6, 2009). The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The AAO is not aware of any published Federal court or administrative decisions addressing whether an offense under New York Penal Law § 175.35 constitutes a crime involving moral turpitude. In analyzing the language of the statute, it is observed that it an offender must act “with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state.” The Board of Immigration Appeals (BIA) has confirmed that “crimes that have a specific intent to defraud as an element have always been found to involve moral turpitude . . .” *In Re Kochlani*, 24 I&N Dec. 128, 130 (BIA 2007). Thus, all offenses under New York Penal Law § 175.35 may be categorically deemed crimes involving moral turpitude, and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Therefore, he requires a waiver of his inadmissibility pursuant to section 212(h) of the Act.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of 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

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

A waiver of inadmissibility under section 212(h) 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, parent, son, or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and children are the qualifying relatives 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-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of 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).

In a letter dated July 29, 2008, the applicant’s wife stated that she is a native of Pakistan, and that she and the applicant had been married for 24 years as of the date of the letter. She indicated that she and the applicant have three children who were born in the United States. She asserted that she and their children will suffer extreme hardship if the applicant is compelled to depart the United States and they become separated. She stated that they are dependent on the applicant for financial and emotional support, and that the applicant is the sole supporter for them.

The applicant’s wife cited poor conditions in Pakistan, including political and economic problems. She indicated that the country is chaotic and dangerous due to the power held by Islamic militants. She stated that she and their children would be deprived of many benefits they realize and enjoy in the United States should they relocate to Pakistan with the applicant.

The applicant’s wife asserted that she is presently unable to work due to serious health problems, including ovarian cysts, fibroids, and severe arthritis in her neck, back, knees, ankles, and feet. She added that she takes medication for her conditions. She provided that she has become depressed, and that a clinical psychologist advised that she is suffering from depressive symptomatology. She stated that her condition would likely evolve into Major Depressive Disorder should the applicant return to Pakistan.

The applicant’s wife explained that the applicant is suffering from serious heart disease and he has opted for angioplasty although a physician recommended coronary bypass surgery. She expressed concern that the applicant would not have the same level of cardiac care in Pakistan as he would in New Jersey.

In a joint letter dated July 29, 2008, the applicant’s children asserted that the applicant is a wonderful and responsible person, and that he is committed to assisting them in furthering their education. They noted that they reside with the applicant and their mother, and that they perform well in their academic pursuits. They expressed concern for conditions in Pakistan. They indicated that, should

they become separated from the applicant, they will develop depressive symptomatology and they may have to take jobs to support their mother.

The record contains two psychological evaluations of the applicant's family members, conducted by [REDACTED]. The report from [REDACTED] contains detailed information about the applicant's family members' history and likely challenges should they relocate to Pakistan with the applicant or become separated from him. [REDACTED] indicated that the applicant's wife stated she would not relocate her children to Pakistan due to numerous difficulties there, including poor health standards, crime, terrorism, ideological and religious extremism, and anti-American sentiment. [REDACTED] noted that the applicant's children would face difficulty continuing their academic activities in Pakistan due to a lack of [REDACTED] language skill. [REDACTED] report contains statements from the applicant, the applicant's wife, and their children that express concern for conditions in Pakistan, their health problems, and their family's continued unity in the United States.

The applicant submitted a letter from a physician for his wife, [REDACTED] who reports that the applicant's wife has been diagnosed with ovarian cysts, uterine fibroids, heavy vaginal bleeding, dizzy spells, backaches, insomnia, depression, and arthritis. [REDACTED] noted that the applicant's wife was scheduled for a hysterectomy and prescribed numerous medications.

The applicant submitted a letter from his physician, [REDACTED] who reports that the applicant has cardiac disease, he takes multiple medications, and he has undergone procedures including multi-vessel angioplasty. [REDACTED] indicates that the applicant has dextrocardia, multi-vessel coronary artery disease, hypertension, dyslipidemia, diabetes mellitus, and hypercalcemia. [REDACTED] states that the applicant has been advised to follow regularly with cardiology and with another doctor [REDACTED] in an Endocrine clinic.

Upon review, the applicant has shown that his wife will endure extreme hardship should the present waiver application be denied. The AAO acknowledges that conditions in Pakistan pose significant concerns, particularly for U.S. citizens. The U.S. Department of State (DOS) issued a Travel Warning for Pakistan on August 8, 2011 citing many risks and concerns for those visiting the country, including kidnappings, terrorist attacks, and demonstrations with anti-American sentiments. The warnings to U.S. government personnel are telling, as follows:

Visits by U.S. government personnel to Peshawar, Karachi and Lahore are limited, and movements by U.S. government personnel assigned to the Consulates General in those cities are severely restricted. U.S. officials in Islamabad are instructed to restrict the frequency and to minimize the duration of trips to public markets, restaurants, and other locations. Only a limited number of official visitors are placed in hotels, and for limited stays. Depending on ongoing security assessments, the U.S. Embassy places areas such as hotels, markets, and/or restaurants off limits to official personnel. U.S. citizens in Pakistan are strongly urged to avoid hotels that do not apply stringent security measures and to maintain good situational awareness, particularly when visiting locations frequented by Westerners.

The applicant has submitted sufficient evidence to support that he and his wife have significant health challenges that require consistent medical care. Reports on medical care in Pakistan show that the applicant's wife's concern for the availability and quality of health care there is warranted. For example, the DOS stated the following:

Adequate basic non-emergency medical care is available in major Pakistani cities but is limited in rural areas. Facilities in the cities vary in level and range of services, resources, and cleanliness, and U.S. citizens may find them below U.S. standards; facilities in rural areas are consistently below U.S. standards. Medical facilities require prepayment and most do not accept credit cards.

Water is not potable anywhere in Pakistan and sanitation in many restaurants is inadequate. Stomach illnesses are common.

Effective emergency response to personal injury and illness is virtually non-existent in Pakistan. Ambulances are few and are not necessarily staffed by medical personnel. Any emergency case should be transported immediately to a recommended emergency receiving room. Many U.S.-brand medications are not widely available, but generic brands from well-known pharmaceuticals usually are. The quality of the locally produced medications is uneven.

U.S. Department of State Country Specific Information - Pakistan, dated March 24, 2011.

The applicant's wife would face other challenges should she relocate to Pakistan, including concern for the well-being of her children, loss of the ability to reside in the home that she and her family own in the United States, an interruption of her financial stability due to the applicant's loss of his employment in the United States, and separation from the medical professionals who provide her care in the United States. The applicant's wife is a native of Pakistan, yet she has resided in the United States for over 20 years, and the record supports that her Pakistani heritage would not relieve the substantial hardship she would face should she now return there.

Should the applicant's wife remain in the United States, she would face significant emotional difficulty due to separation from the applicant. Psychological difficulty is a common consequence when family members are separated due to inadmissibility, yet due consideration is given to the fact that the applicant and his wife have been married for over 20 years and they continue to reside with their three adult children. The AAO has carefully reviewed the reports from [REDACTED] and notes the clinical assessments of the applicant's wife's mental health challenges. It is evident that the applicant's wife's emotional difficulty would be exacerbated by the risks to the applicant's health should he reside in Pakistan and lose access to the medical professionals who provide his care. The applicant has been diagnosed with cardiac problems for which he takes medication and has undergone procedures. The lack of emergency medical care and quality medical facilities in Pakistan pose a risk to his health that reasonably creates apprehension in his wife. The

applicant's wife would also share in the emotional hardship faced by her children should they become separated from their father after lifelong family unity.

The AAO has examined the submitted financial documentation to assess the applicant's wife's financial circumstances should she reside in the United States without the applicant. The applicant has provided documentation from a medical professional that supports that the applicant's wife's has health challenges. While the letter from [REDACTED] does not specifically address the impact such conditions have on the applicant's wife's ability to engage in employment, the applicant's wife's concerns are noted.

The applicant has not shown that his family faces unusual expenses. His three children have reached the age of majority, currently ages 18, 20, and 23. His eldest son reported an income of \$35,586 for 2008. In her letter of July 29, 2008, the applicant's wife indicated that her children were not then working. If the assertions in the record are consistent, the applicant's eldest son earned \$35,586 for a partial year's employment in 2008. This reflects that he has significant earning capacity. As he resides in the same household as the applicant's wife, it appears he is capable of contributing to the household in a meaningful way. The applicant has not asserted or shown that his other two children lack the capacity to work or contribute to their household financially. The AAO acknowledges the applicant's children's academic goals, and the fact that attending school while working poses challenges. Yet, the record lacks sufficient explanation or evidence to show that they would be unable to continue study or that they or the applicant's wife would have unmet financial needs should the applicant depart the United States. However, all elements of hardship are considered in aggregate, and the AAO gives due consideration to the impact losing the applicant's financial contribution to his household would have on his wife.

Considering the totality of the consequences discussed above, the applicant has shown that denial of his waiver application under section 212(h) of the Act "would result in extreme hardship" to his wife.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection on or about July 16, 1953 and remained for a lengthy duration without a legal immigration status. The applicant pled guilty to Offering a False Instrument for Filing in the First Degree pursuant to New York Penal Law § 175.35, and the fact that he was ordered to pay \$9,110 restitution suggests that he attempted to obtain a significant sum of funds through fraud. The record contains information that calls into question whether the applicant was arrested for a prior crime, grand larceny, on October 10, 1997.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime in the over 10 years since his guilty plea on September 14, 2000; the applicant's permanent resident wife would experience extreme hardship if he is prohibited from residing in the United States; the applicant's U.S. citizen children will face hardship should he reside outside the United States; the applicant has shown a propensity to work and pay taxes, and to support his wife and children; the applicant has health problems for which he receives care in the United States, and he would likely face challenges obtaining continued care in Pakistan, particularly should he suffer a cardiac emergency; and the applicant would face other significant challenges should he return to Pakistan after an over 20 year residence and marriage in the United States.

The applicant's criminal conviction is a substantial concern, particularly given that it involved fraud. The indication in the record that the applicant may have also been arrested for a theft crime in 1997 further raises concerns regarding his honesty and respect for the property of others. The applicant's residence in the United States without a legal immigration status for approximately 58 years calls into question his respect for the laws of the United States. Significant positive factors are required to overcome these negative factors. However, as discussed above, conditions in Pakistan are unusually poor and pose risks to the applicant and his family members. The applicant's and his wife's medical challenges exacerbate the impact such conditions would have on them, and the hardship of separation. The AAO finds added persuasion in the applicant's history of cultivating a strong family unit for over 20 years, and his record of refraining from criminal activity over the last 10 years. It is noted that the applicant's entry to the United States without inspection occurred when he was an infant, so he is not prejudiced by this unlawful act. Accordingly, the benefits of keeping the applicant's family intact in the United States outweigh the gravity of his prior misconduct, such that a favorable exercise of discretion is warranted.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met his burden that he is eligible for a waiver and he merits approval of his application.

ORDER: The appeal is sustained.