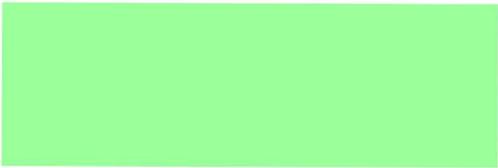


(b)(6)

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

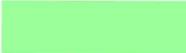


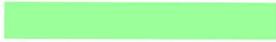
U.S. Citizenship
and Immigration
Services



DATE: OCT 01 2013

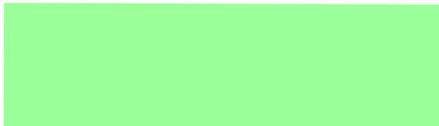
Office: NEW DEHLI, INDIA

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) and under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in cursive script, reading "Michael Shumway".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by Field Office Director, New Delhi, India, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 committed a crime involving moral turpitude and under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

In a decision, dated February 8, 2013, the field office director concluded that the applicant had failed to submit evidence to show that his spouse would experience extreme hardship as a result of his inadmissibility. In addition, the field office director found that the negative factors in the applicant's case outweigh the positive factors such that a favorable exercise of discretion is not warranted. The application was denied accordingly.

On appeal, counsel asserts that the field office director erred in not considering the applicant's spouse's medical condition and the documentation submitted in support of this condition causing her extreme hardship. Counsel asserts further that the field office director unlawfully misconstrued section 212(a)(9)(B)(v) of the Act when she stated that the applicant had not established extreme hardship to his U.S. citizen spouse as a result of relocation to Pakistan. Counsel states that this statement is erroneous and irrelevant as a matter of law because the statute does not require the applicant leave the United States to avoid extreme hardship. Counsel submits a brief and additional hardship evidence on appeal.

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.

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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

The record indicates that on February 27, 1997, the applicant was convicted of Forging Endorsements on Treasury Checks or Bonds or Securities of the United States under 18 U.S.C. §510(b). The maximum sentence for this conviction is ten years. The applicant was sentenced to two years of probation and a \$100 fine.

Unlike a removal hearing in which the government bears the burden of establishing a respondent’s removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States “to the satisfaction of the Attorney General [Secretary of Homeland Security].” *See* Section 291 of the Act, 8 U.S.C. § 1361. As counsel does not contest the field office director’s finding that the applicant’s conviction is a crime involving moral turpitude we will not disturb the field office director’s finding. Therefore, the applicant is inadmissible under section 212(a)(2)(A) of the Act.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . 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 . . .

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the events which led to the criminal conviction for which the applicant was found inadmissible occurred more than 15 years ago, they are waivable under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

Although the applicant is eligible for a waiver under section 212(h)(1)(A) of the Act, no purpose would be served in waiving this ground of inadmissibility as the applicant remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act and has not shown that his inadmissibility is causing his qualifying relative extreme hardship.

Section 212(a)(9) of the Act provides:

(B) ALIENS UNLAWFULLY PRESENT.-

(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 (whether or not pursuant to section 244(e) 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 or 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver.-The Attorney General 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 Attorney General 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant entered the United States without inspection on or around December 19, 1989. On July 7, 1994, the applicant filed an Application for Asylum (Form I-589), which was referred to an immigration judge on April 24, 1996.

The applicant filed an (Form I-485) supported by an Alien Relative Petition (Form I-130) filed by his U.S. citizen spouse at the time. On September 14, 1999, this petition was denied, the applicant appealed and the petition was ultimately denied by the BIA on March 13, 2003. On August 22, 2000, the applicant was ordered removed by an immigration judge and on October 16, 2002, the appeal of this removal order was denied. On August 18, 2005, a second Form I-130 was denied. On May 16, 2008, the applicant was removed from the United States. Thus, the applicant accrued

over one year of unlawful presence in the United States and is inadmissible under section 212(a)(9)(B)(i) of the Act. The applicant's qualifying relative is his U.S. citizen spouse.

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For

example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record of hardship includes: a statement from the applicant's spouse, a statement from the applicant's mother-in-law, medical documentation, documentation regarding the applicant's spouse's mental health treatments, financial documentation, a letter from the applicant's former spouse, and country conditions reports on Pakistan.

We find that the applicant has shown that his U.S. citizen spouse is suffering extreme hardship as a result of separation and would suffer extreme hardship as a result of relocation. The applicant's spouse states and the record supports that if she relocated to Pakistan she would experience a drastic change in lifestyle in that discrimination against women, rape, domestic violence, and so-called "honor" killings in Pakistan are serious problems. The applicant's spouse states that although she converted to Islam, she was raised Catholic and while in the United States, her husband respects her independence. She states that in Pakistan this independence would not be tolerated. She states that she has always been financially independent and currently works as a teaching assistant for 2nd Grade Special Education in [REDACTED]. She states that she would want to continue to work in Pakistan, but believes cultural barriers would not allow her to do so. The applicant's spouse also states and the record supports that she would experience hardship in Pakistan because she would separate from close family members in the United States, she would experience anxiety over political unrest in Pakistan, and she would lack access to adequate medical care for her medical conditions in Pakistan.

We find that the applicant's spouse is also suffering extreme hardship as a result of separation. The record indicates that the applicant has been diagnosed with Major Depression requiring therapy and medication. Medical documentation in the record indicates that the applicant's spouse also suffers from anterior hypopituitarism and struggles to afford care due to her limited income. Considering the emotional, medical and financial hardships in the aggregate, we find that the hardship presented in the applicant's spouse's case rises to the level of extreme.

In that the applicant has established that the bars to his admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 . . . 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, 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 entry into the United States without inspection, the applicant's unlawful presence for which he now seeks a waiver, as well as his unlawful residence in the United States prior to April 1, 1997; his failure to comply with his order of removal; and his 1997 conviction.

We note that although the record establishes extreme hardship to the applicant's spouse, extreme hardship is but one favorable factor in a determination of whether the Secretary should exercise discretion. *See Matter of Mendez, supra.* Based on the record before it, the AAO finds the favorable or mitigating factors in the present case to be the applicant's U.S. citizen spouse and the extreme hardship to his spouse if his waiver application is denied.

The applicant's criminal conviction occurred more than 15 years ago. The same, however, cannot be said of the applicant's violations of immigration law. The applicant entered the United States without inspection by crossing the border with Mexico in 1989. He refused to comply with his 2000 removal order continuing to reside in the United States until he was arrested by a Fugitive Operations Unit of U.S. Immigration and Customs Enforcement and removed on May 16, 2008. Furthermore, the record lacks documentation concerning the applicant's character or rehabilitation from his criminal past and disregard for immigration laws.

Thus, while the AAO regrets the hardship that the applicant's spouse will face as a result of a denial of the applicant's waiver request, it does not find the favorable factors in the present matter to outweigh the negative and will not favorably exercise the Secretary's discretion.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden.

The AAO notes that the field office director denied the applicant's Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision as his waiver application. An application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964). As the applicant is inadmissible under sections 212(a)(2)(A)(i)(I) and 212(a)(9)(B)(i)(II) of the Act, and no waiver has been granted, no purpose would be served in granting the applicant's Form I-212. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.