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U.S. Citizenship
and Immigration
Services



H3

FILE: [REDACTED] Office: ISLAMABAD, PAKISTAN Date: FEB 23 2009

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Islamabad, Pakistan. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Pakistan who was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act, for having been unlawfully present in the United States after having been ordered removed. *Decision of the Officer in Charge*, dated February 6, 2007. The applicant filed a timely appeal, asserting that he departed and reentered the country prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") and, therefore, he was not inadmissible under section 212(a)(9)(C)(i)(II) of the Act because the statute does not apply retroactively. Considering the applicant's appeal as a motion to reopen and reconsider, the officer in charge agreed and vacated her prior decision. *Decision of the Officer in Charge*, dated April 10, 2007. However, at the same time, the officer in charge found the applicant was inadmissible under 212(a)(9)(B)(i)(II) of the Act for being unlawfully present for more than one year, and section 212(a)(6)(C)(i) of the Act for willful misrepresentation. *Id.* The applicant is married to a naturalized U.S. citizen and seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act in order to reside with his wife in the United States.

As fully explained below, the AAO concludes that the officer in charge erred in considering the applicant's appeal as a motion to reopen and reconsider. Therefore, the officer in charge's April 10, 2007 Decision is withdrawn for lack of jurisdiction. In addition, because the April 10, 2007 Decision is withdrawn, and because the AAO agrees that the applicant is not inadmissible under section 212(a)(9)(C)(i)(II), counsel's request for oral argument on the issue is denied. *See* 8 C.F.R. § 103.3(b)(2) (granting CIS the sole authority to grant or deny a request for oral argument). Furthermore, it is not evident from the record that the applicant's wife has suffered or will suffer extreme hardship as a result of the applicant's waiver being denied. Accordingly, the appeal will be dismissed.

The record contains, *inter alia*: a copy of the marriage license for the applicant and his wife, [REDACTED] indicating they were married on May 6, 2000; a copy of [REDACTED]'s naturalization certificate; several statements from [REDACTED] the U.S. Department of State's Travel Warning for Pakistan; copies of [REDACTED]'s 2001 tax return and the couple's 2005 tax return; a letter from [REDACTED] physician; letters from [REDACTED] mother and sister; copies of the applicant's two asylum applications; decisions from the Immigration Judge and the Board of Immigration Appeals denying the applicant's requests for relief; an Order of the Immigration Judge ordering the applicant be removed *in absentia*; documentation purporting to show the applicant missed his hearing before the immigration judge due to ineffective assistance of counsel; a copy of [REDACTED]'s diploma indicating she received her *Juris Doctor* on July 29, 2005; and a copy of an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

In this case, the record shows that the applicant entered the United States on or about December 8, 1992. On November 5, 1993, the applicant filed a request for asylum.¹ On February 23, 1994, the former INS sent the applicant a Notice of Intent to Deny his request for asylum. *Letter from [REDACTED]* dated February 23, 1994. On June 22, 1994, the former INS issued an Order to Show Cause to the applicant, charging him with entering the United States without inspection in violation of section 241(a)(1)(B) of the Act. On July 15, 1994, after receiving no response to the Notice of Intent to Deny, the former INS denied the applicant's asylum application.² *Letter from [REDACTED]* dated July 15, 1994. On October 5, 1994, the applicant failed to appear for his hearing. *Memorandum to the Assistant District Director*, dated November 9, 1994.

At this point, the events regarding the applicant's departure and reentering the United States are unclear from the record. According to the applicant, he departed the United States in March 1995 and reentered in April 1995. *See Application to Register Permanent Resident or Adjust Status (Form I-485)* (stating his last arrival into the United States was April 1995). However, the record contains a copy of a removal order by an Immigration Judge on July 27, 1995, for an individual with the name of [REDACTED]. *See Order of the Immigration Judge*, dated July 27, 1995. A Record of Exclusion and Deportation in the record indicates that [REDACTED] was deported from JFK via Gulf Air on August 31, 1995. *See Notice to Alien Ordered Excluded by Immigration Judge (Form I-296)*, dated August 31, 1995. As described below, the applicant has identified himself as [REDACTED] to immigration officials and told immigration officials that he reentered the United States in November of 1995.

On April 4, 2000, the former INS served a Notice to Appear on the applicant, charging him with inadmissibility under section 212(a)(6)(A)(i) for being present in the United States without being admitted or paroled.

On April 19, 2000, while executing an arrest warrant and a search warrant for another individual, the applicant was arrested. The applicant signed a Record of Sworn Statement in Affidavit Form indicating his name was [REDACTED] and that his date of birth was July 2, 1972. *See Record of Sworn Statement in Affidavit Form*, dated April 19, 2000. The record contains a copy of an Illinois driver's license in the name of [REDACTED] listing a date of birth of July 20, 1972. According to the Special Agent's notes, "[d]uring the initial stages of the interview . . . , he

¹ Although counsel, who happens to be the applicant's wife, contends the applicant "originally entered the United States legally and with inspection when he applied for political asylum immediately after landing in New York in 1992," *Respondent's Brief in Support of I290(b) Appeal*, dated April 4, 2007, at 12, the record indicates the applicant did not file his asylum application until eleven months after he entered the United States.

² According to the applicant's second asylum application, the applicant claimed that "the disposition of that [first] application is unknown." *See Application for Asylum and Withholding of Removal (Form I-589)*, filed February 5, 2001, at 6.

originally claimed that he was a permanent resident of the United States. . . . After extensive questioning this information proved to be false. . . . He dropped his claim to LAPR status and said he would be truthful for the remainder of the interview.” See *Record of Deportable/Inadmissible Alien (Form I-213)*, dated April 20, 1990. The applicant proceeded to inform the Special Agent that he was removed from the United States to Pakistan on August 31, 1995, after having been ordered removed by an immigration judge. *Id.* The applicant proceeded to state that he stayed in Pakistan for two months, then went to Canada where he paid a smuggler \$500 to help him enter the United States. *Id.* He claimed he entered the United States in November 1995 with four other individuals. *Id.* Based on this information, a Notice of Intent/Decision to Reinstate Prior Order was issued to a [REDACTED] See *Notice of Intent/Decision to Reinstate Prior Order (Form I-871)*, dated April 19, 2000.

The next day, on April 20, 2000, the applicant “claim[ed] that the sworn statements he provided yesterday were false statements. He claims now that he has never appeared before an Immigration Judge and was never removed to Pakistan.” See *Record of Deportable/Inadmissible Alien (Form I-213)*, *supra*. He further claimed that his true name is [REDACTED] and that his date of birth is November 15, 1967. *Id.* He stated that he was arrested in New York City on or about November 30, 1992, and was placed in immigration proceedings, but that his mother was ill so he returned to Pakistan and never attended his hearing. *Id.* The interviewer noted that the applicant “provided numerous names and dates of birth in a strong effort to hide his true identity. He has used the names of: [REDACTED] [REDACTED] and] has dates of birth of 11/15/67, 11/15/70, 7/20/72, 7/2/72, and 12/29/59.”³ *Id.*

On May 6, 2000, the applicant married [REDACTED].⁴ On October 3, 2000, [REDACTED] filed a Petition for Alien Relative (Form I-130) on the applicant’s behalf. On February 5, 2001, the applicant filed a second application for asylum. On April 2, 2001, the applicant failed to appear for a hearing before the Immigration Judge, allegedly because his attorney had informed him the hearing was two days later, on April 4, 2001. The immigration judge ordered the applicant removed *in absentia*. *Order of the Immigration Judge*, dated April 2, 2001. After several unsuccessful attempts to overturn the *in absentia* removal order, the applicant departed the United States while under a final order of

³ A notation in the record recommending no bond states that the applicant is “heavily involved in identity theft, *i.e.* passports, visas, & social security documents.” *Custody Conditions/Escort Worksheet*, dated April 20, 2000.

⁴ Although the applicant’s Form I-130 indicates he has never been previously married, the record contains a copy of a letter from a [REDACTED] which states that her husband, [REDACTED], is from Pakistan and is a physician. *Letter from [REDACTED]*, dated January 1, 1994. The letter, which states that her husband has lived in the United States for five years and that they have a fourteen month old son, requests that her husband’s visa be expedited so that they may visit his ill mother in Pakistan. *Id.*

deportation on March 16, 2005. He now seeks a waiver of inadmissibility in order to reside with his wife in the United States.

As an initial matter, the AAO finds that the officer in charge erred in accepting the applicant's appeal as a motion to reopen and reconsider. *Decision of the Officer in Charge*, dated April 10, 2007. According to the regulations at 8 C.F.R. §§ 103.3(a)(2)(ii) and (iii), the official who made the unfavorable decision being appealed shall review the appeal and decide whether or not favorable action is warranted. If the reviewing official decides favorable action is not warranted, the official must forward the appeal to the AAO. *See* 8 C.F.R. § 103.3(a)(2)(iv). Here, the officer in charge accepted the applicant's timely appeal as a motion to reopen and reconsider, but did not render a favorable decision. Accordingly, the April 10, 2007 decision is withdrawn for lack of jurisdiction.

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

Aliens previously removed

(A) Certain aliens previously removed

(ii) Other aliens

Any alien not described in clause (i) who--

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

In this case, there is no evidence conclusively establishing when the applicant reentered the United States. However, assuming he reentered the country sometime between April and November of 1995 as counsel asserts, *see Respondent's Brief in Support of I290(b) Appeal, supra*, at 6, his reentering occurred prior to April 1, 1997, the effective date of section 212(a)(9)(C)(i)(II) of the Act. Therefore, the officer in charge's February 6, 2007 decision was erroneous and the applicant is *not* inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

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

(B) Aliens Unlawfully Present.-

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

....

(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 Attorney General [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.

In this case, the record indicates, and the applicant does not contest, that he entered the United States in December 1992 and departed sometime in 1995. He again entered the United States sometime in 1995 and departed in March 2005. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until his departure from the United States in March 2005. Therefore, the applicant accrued unlawful presence of almost eight years. He now seeks admission within ten years of his March 2005 departure. Accordingly, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(6)(C)(i) of the Act provides:

In general.—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.

Section 212(i) provides:

(1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien. . . .

In the instant case, the record shows that the applicant willfully misrepresented his identity to immigration officials. Therefore, the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting a material fact in order to procure an immigration benefit.

Both section 212(a)(9)(B)(v) and 212(i) waivers of the bar to admission are dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. *See* Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and Section 212(i) of the Act, 8 U.S.C. § 1182(i). 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999), provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship under the Act. These 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.

In this case, it is not evident from the record that the applicant's wife would suffer extreme hardship as a result of the applicant's waiver being denied.

Although the AAO recognizes that [REDACTED] has suffered hardship as a result of being separated from the applicant and is sympathetic to her circumstances, she and the applicant did not marry until after the applicant's first asylum application was denied and he was served with a Notice to Appear, placing him in removal proceedings. Therefore, the equity of their marriage, and the weight given to any hardship on [REDACTED] is diminished as they began their marriage with the knowledge that the applicant might be deported and not be permitted to reenter the United States. *See Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992) (finding it was proper to give diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation);

cf. Garcia-Lopes v. INS, 923 F.2d 72, 76 (7th Cir. 1991) (less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1007 (9th Cir. 1980) (a “post-deportation equity” need not be accorded great weight).

█'s claim almost exclusively addresses the hardship she would suffer if she moved to Pakistan to be with her husband. If she had to move to Pakistan to be with her husband, the AAO finds that she would experience extreme hardship. █ would be separated from her parents, with whom she lives and helps care for given their health problems. *Letter from █ dated January 23, 2006*; *Letter from █ dated July 29, 2007*. She would also be separated from her sister, her only sibling, with whom she is very close and has always lived near. *Letter from █ dated January 30, 2006*; *Letter from █ to the Department of Homeland Security, Islamabad, Pakistan, undated*. In addition, █, who is now thirty-one years old, would need to re-adjust to living in Pakistan, the country where she was born, after having lived in the United States since high school, a particularly difficult situation considering the Department of State's Travel Warning urging against non-essential travel to Pakistan. *Travel Warning, United States Department of State*, dated December 5, 2006. Furthermore, as █ states, she would have an extremely difficult, if not impossible, time obtaining employment as a female attorney in Pakistan. *Letter from █ supra*.

Nonetheless, █ has the option of staying in the United States and the record does not show that she has suffered or will suffer extreme hardship if she were to remain in the United States without her husband. █ claims, and the record shows, that she is depressed. *Letter from █ dated January 25, 2006* (█ is under my care for depression since June of 2005.”); *Letter from █ to the Department of Homeland Security, Islamabad, Pakistan, supra* (stating that she is depressed and under a lot of stress); *Letter from █ supra* (stating █ is depressed and unhappy all the time); *Letter from █ supra* (stating █ gets upset easily, has periods of acute depression when she gets really down and is inconsolable”). Although the AAO is sympathetic to her circumstances and does not doubt that █ is depressed, if █ remains in the United States, their situation is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship based on the record. The Board of Immigration Appeals and the Courts of Appeals have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *See also Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported).

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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. The AAO notes, however, that contrary to [REDACTED]'s contention that the applicant's immigration problems stem merely from the fact that the applicant's former attorney told him the wrong hearing date, *Letter from [REDACTED] to the Department of Homeland Security, Islamabad, Pakistan, supra*, even if the applicant established extreme hardship, several factors would weigh negatively against granting the applicant a waiver as a matter of discretion, including his unlawful entry into the United States in 1992, his subsequent unlawful entry in 1995, his unlawful presence in the United States, and his willful misrepresentation to law enforcement officials in order to conceal his identity.

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 remains entirely 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.