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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: ISLAMABAD, PAKISTAN Date: FEB 25 2010

IN RE: [redacted]

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

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.

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Islamabad, Pakistan. An appeal was subsequently dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, but the appeal will be dismissed. The waiver application will be denied.

The applicant, , is a native and citizen of Pakistan. He was found to be inadmissible to the United States pursuant to 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 admission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to return to the United States to join his United States citizen wife, Sobia Akhtar, and their U.S. citizen children,

The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. On appeal, counsel asserted that the applicant's spouse is suffering from extreme hardship as a result of the applicant's inadmissibility. The AAO dismissed the appeal, finding that the applicant failed to establish extreme hardship to his spouse if he is refused admission to the United States.

On the present motion, counsel asserts that the applicant has the education, training and experience to obtain gainful employment in the United States to support his family. Counsel states that medical records confirm that the applicant's spouse suffers from extreme depression as well as debilitating rheumatoid arthritis. Counsel states that these conditions greatly limit the applicant's spouse's ability to work and support herself and her two children. Counsel states that the record contains evidence of the applicant's daughter's developmental problems. Counsel contends that the record confirms the extreme and continuing hardship suffered by the applicant's spouse as a result of the denial of the applicant's immigrant visa.

In support of the motion, counsel furnished additional medical documentation on behalf of the applicant's spouse and child, employment documentation on behalf of the applicant, and the applicant's father's death certificate. The entire record was reviewed and considered in rendering this decision.

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-
>
> . . . .
>
> (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 record reflects that the applicant is a native and citizen of Pakistan who arrived in the United States on September 28, 1992 and requested asylum. The applicant was placed in exclusion proceedings and charged with section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation of a material fact; section 212(a)(7)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(B)(i)(I), as a nonimmigrant without a valid passport; and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an alien without a valid immigrant visa. On March 29, 1995, the Immigration Judge denied the applicant's request for asylum and ordered him excluded and deported pursuant to section 212(a)(7)(A)(i)(I) of the Act. On April 10, 1996, the Board of Immigration Appeals dismissed the applicant's appeal. The applicant remained in the United States unlawfully until, according to his testimony, he departed for Pakistan in March 2001. Time in unlawful presence begins to accrue on April 1, 1997, the date of enactment of unlawful presence provisions under the Act. Therefore, the applicant accrued unlawful presence from April 1, 1997 to March 2001. As such, 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. The applicant has not disputed this finding of inadmissibility.

On appeal, counsel asserted that the applicant's spouse is suffering from Rheumatoid Arthritis, Reactive Depression and Tension Type Headaches, for which she takes medication. The applicant's spouse noted in the letter she filed with the waiver application that she is finding it hard to work and support her family alone because of her medical problem.

In support of these assertions, counsel furnished a report from [redacted] M.D., dated June 7, 2005, which states that the applicant's spouse has Rheumatoid Arthritis. Dr. [redacted] prescribed the applicant's spouse medication and noted that she should be seen for follow-up. Counsel also furnished a letter, dated May 7, 2007, from M.D., of the [redacted] Center, which states that the applicant has been diagnosed with Tension Type Headache and Reactive Depression. Dr. [redacted] notes that the applicant's depression is secondary to concerns of the sickness of her daughter and separation from her family. Dr. [redacted] states that the applicant was treated for headaches and was referred to a psychiatrist for evaluation. Lastly, counsel furnished the applicant's spouse's lab results for her blood and urine tests.

The AAO determined that the medical documentation furnished by counsel was insufficient evidence. For instance, Dr. indicated in his June 7, 2005 letter that the applicant should be seen for a follow-up. However, the appeal, filed March 15, 2007, did not contain any additional documentation on the follow-up appointment with Dr. or any other information related to the status of the applicant's treatment for Rheumatoid Arthritis. Similarly, the letter from Dr. states that the applicant was referred to a psychiatrist for an evaluation. However, counsel had not furnished the applicant's spouse's psychiatric evaluation to establish the severity and implications of her depression, its connection to her separation from the applicant, and whether she is currently engaged in a treatment plan.

In support of the motion to reopen, counsel furnished a letter from Dr. Hospital, located in Gujrat, Pakistan. The letter, dated August 16, 2009, states that the applicant's spouse is suffering from depressive illness and has been under his treatment since March 1, 2009. Counsel also furnished a letter from Ph.D., Clinical Psychologist with Aristotle's Psychological and Biofeed Services, located in Astoria, New York. The letter, dated February 4, 2009, states that the applicant's spouse is a patient at who has been receiving therapy since May 2007. It states that she is being treated for depression and anxiety and is taking Zoloft. Finally, counsel furnished a second letter from M.D., Bronx- Center, located in Bronx, New York, dated August 18, 2009. The letter states that the applicant's spouse has been coming to the neurology clinic since April 2007, and was diagnosed with Rheumatoid Arthritis, headache and depression. The letter further states that the applicant's spouse "is followed in the clinic for management of her pain and most of her symptoms are psychosomatic, secondary to her depression."

Counsel also furnished with the motion a letter from Dr. Consultant Medical Specialist and Gestroenterologist with the Center in Pakistan. The letter, dated August 16, 2009, states that the applicant's spouse is "having rheumatoid arthritis since five years. She is having swelling of joints[,] hands, feet and knees with morning stiffness." In addition, counsel furnished a second letter from ., located in Forest Hills, New York. The letter, dated February 3, 2009, states that the applicant's spouse has been under his care for Rheumatoid Arthritis since 2005. The remainder of the letter is in handwriting that is illegible. Attached to Dr. letter are laboratory results of medical tests.

On appeal, counsel asserted that the applicant's younger daughter, who resides with the applicant in Pakistan, has developmental problems. Counsel cited to a letter, dated May 6, 2007, from Dr. which states that the applicant's younger daughter is suffering from gastroenteritis, dehydration and malnutrition.

The AAO determined that Dr. letter failed to describe the medical hardship indicated by counsel. Dr. letter states that the applicant's child had gastroenteritis, an inflammation of the lining of the intestines caused by a virus, bacteria or parasites.[1] The AAO found that there is no indication in the record that the applicant's child's illness is an ongoing condition that is the result of

[1] http://www.nlm.nih.gov/medlineplus/gastroenteritis.htm

her separation from the applicant's spouse or related to developmental problems. Nor is there any other medical documentation in the record related to counsel's assertion that the applicant's child has developmental problems.

In support of the motion to reopen, counsel furnished a letter dated August 15, 2009 from Dr. of the located in Guliana, Pakistan. The letter states that the applicant's daughter has been his regular patient since February 2009 and she has variable health problems such as acute gastroenteritis, respiratory tract infections, worm infestation, malnutrition and scabies as a result of environmental factors. Counsel also furnished a document entitled "medical certificate" from Dr. of the Hospital located in Pakistan, dated August 17, 2009. The letters state that the applicant's daughter is suffering from gastroestritis, dehydration and malnutrition.

On appeal, counsel asserted that the applicant's spouse works 30-40 hours a week at Marshall's Department store and earns less than $300 per week. Counsel states that this is made increasingly more difficult by the applicant's spouse's physical disabilities, including Rheumatoid Arthritis, Reactive Depression and Tension Type Headaches. Counsel states that the applicant's spouse's disabilities are made worse by the economic and emotional strains that have separated her family.

The AAO noted that although the applicant's spouse's average annual income of $11,752 is below the U.S. Department of Health and Human Services 2007 federal measure of poverty for a family of two, sufficient documentation had not been provided to show that the applicant's spouse's financial hardship is created or exacerbated by the applicant's inadmissibility. The AAO stated that the record failed to demonstrate that if the applicant returned to the United States with his younger daughter, he would find employment that would raise the family income above the federal measure of poverty for a family of four.

In support of the motion, counsel furnished an offer of employment from , dated August 20, 2009. Mr. letter states, "This letter is to verify that One Stop Petroleum Inc. will employ when he arrives from overseas to The United States. He will serve as an evening manager and will earn four hundred dollars ($400) weekly."

Upon review of the above evidence and the AAO finds that the cumulative hardships faced by the applicant's spouse rise to the level of extreme hardship. The evidence in the record demonstrates that the applicant's spouse is suffering from depression, anxiety and Rheumatoid Arthritis. The record further reflects that the applicant's spouse is suffering from financial hardship as she is earning an income that is below the federal measure of poverty. The record shows that if the applicant has a job offer available to him if he were admitted to the United States. Moreover, the applicant's spouse is separated from her daughter, who currently resides with the applicant in Pakistan. The AAO observes that the record still does not contain a psychological evaluation of the applicant's spouse to establish the severity of her depression and anxiety and its connection to her separation from the applicant. However, the other factors in this case, when considered in the

totality, establish that the applicant's spouse will continue to suffer extreme hardship if she remains separated from the applicant due to his inadmissibility.

Extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad. In the present case, the record does not establish that the applicant's spouse would suffer hardship if she moved with the applicant to Pakistan. The record shows that the applicant's spouse is a former national and citizen of Pakistan. The AAO noted in its previous decision that according to counsel's appeal brief, the applicant's spouse visited Pakistan in May 2001 to partake in her arranged marriage to the applicant. Based on these facts, the applicant's spouse should have less difficulty in adjusting to culture and residence in Pakistan. Counsel asserted on appeal that conditions in Pakistan make it nearly impossible to provide minimally for the health, education and future employment of the applicant's U.S. citizen children. However, counsel did not explain, identify, or document any particular conditions in Pakistan. Further, the record contains no information on the potential financial, medical or social hurdles the applicant's spouse would endure if she returned to Pakistan. Several of the medical documents submitted with the motion to reopen reflect that the applicant's spouse has recently received medical care and treatment in Pakistan. Accordingly, the AAO cannot conclude that the applicant's spouse would face extreme hardship if she returned to Pakistan. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

Beyond the decision of the director, the AAO notes under its de novo review that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for the willful misrepresentation of material facts.[2] The record reflects that on September 28, 1992 the applicant applied for admission to the United States at John F. Kennedy Airport in New York under the name [redacted]. The applicant presented a passport under this name and confirmed his identity as [redacted] in a sworn statement before an immigration officer. During the sworn statement, the applicant testified that he had never used or been known by any other names. The applicant was placed in exclusion proceedings where he filed an application for asylum and withholding of deportation (Form I-589). The record reflects that the applicant obtained employment authorization under the name [redacted] while his asylum application was pending. On March 29, 1995, the applicant had a hearing before an Immigration Judge to establish the merits of his asylum application. During the hearing, the applicant presented himself as [redacted] a student and political activist.

The record reflects that the applicant failed to disclose on his immigrant visa application (Form DS-230 Part 1, Biographic Data, and Form DS-230 Part 2, Sworn Statement) his prior residence in the United States, his use of the alias [redacted], and his order of deportation. At question #2

[2] The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

of the application, where applicants are asked to list any other names used or aliases, the applicant responded, "none." At question #25, where applicants are asked to list their dates of prior visits or residence in the United States, the applicant responded, "never." At question #27, where applicants are again asked to list any other names used or aliases, the applicant responded, "none." At question #30, where applicants are asked about their prior unlawful presence in the United States and prior order of removal, the applicant responded "no," indicating that he was not previously in the United States. At question #32, where applicants are asked if they have ever been refused admission to the United States, the applicant responded, "no." At question #33a, where applicants are asked if they have ever applied for a Social Security Number, the applicant responded, "no." However, the record contains the applicant's employment authorization application (Form I-765), filed March 10, 1994, which shows that he, in fact, had been issued a Social Security Number. At question #34, the applicant stated that he was not assisted in completing his application. On January 17, 2006, the applicant swore to the contents of his application under oath before an immigration officer.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) 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.

According to the U.S. Department of State's Foreign Affairs Manual, "materiality does not rest on the simple moral premise that the alien has lied, but must be measured pragmatically in the context of individual cases as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa." *9 FAM 40.63 N6.1.* The Board of Immigration Appeals (BIA) articulated the test for materiality in *Matter of S- and B-C-* as "(1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." 9 I&N Dec. 436, 447 (BIA 1960).

In *Matter of Box*, Int. Dec. 1247 (BIA 1962), the BIA applied the *Matter of S- and B-C-* test for materiality and determined that the respondent's willful misrepresentations as to his place and date of birth, parentage, marital status, prior residence, and use of an alias were not material because on the true facts a ground of inadmissibility would not have been revealed nor would inquiry have resulted in a proper determination of excludability. The present case can be distinguished from *Matter of Box* because the true facts in this case reveal that the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for his unlawful presence in the United States for a period of more than one year. The AAO observes that the applicant's failure to disclose his prior residence in the United States was an attempt to shut off a line of inquiry relevant to his eligibility for an immigrant visa.[3] Therefore, the AAO finds under its de novo review that the

[3] The applicant's inadmissibility was discovered through a Federal Bureau of Investigation (FBI) background check based on the applicant's fingerprints.

applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for the willful misrepresentation of material facts.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval 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, though the applicant's motion to reopen the AAO's prior decision is granted, the appeal will be dismissed on the grounds that the applicant has failed to demonstrate extreme hardship to his spouse and as required under section 212(a)(9)(B)(v) of the Act.

ORDER: The appeal is dismissed. The waiver application is denied.