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



U.S. Citizenship
and Immigration
Services



tlc

DATE: Office: COLUMBUS, OHIO
JUN 03 2011

FILE:



IN RE: Applicant:



APPLICATION: Application for Waiver of Ground 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:



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

The record reflects that the applicant is a 39-year-old- native and citizen of Pakistan who 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 readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen (USC) and is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 reside in the United States with his USC spouse and children.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated January 7, 2009.

On appeal, counsel asserts that the director did not properly evaluate the evidence submitted by the applicant in support of his application. Counsel asserts that the evidence in the record is sufficient to establish that the applicant's spouse and children will suffer extreme hardship if the applicant's waiver request is denied. *See Form I-290B, Notice of Appeal*, dated February 5, 2009.

The record includes, but is not limited to, affidavits from the applicant's spouse, two reports from [REDACTED], a licensed psychologist, dated October 20, 2008 and August 21, 2009, respectively, a letter from [REDACTED] a licensed psychologist, copies of financial and tax documents, and copies of a U.S. Department of State Human Rights Report on Pakistan for 2008, a copy of a United States Department of State Travel Warning to Pakistan dated June 12, 2009, and copies of various country condition reports on Pakistan. The entire record was reviewed and considered in rendering this decision on appeal.

Section 212(a)(9) 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 [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 the present case, the applicant claims that he entered the United States without being inspected and admitted or paroled in 1996. The applicant remained in the United States until sometime in 2004, when he traveled to Pakistan. On March 19, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), which was denied on March 26, 1998. On April 19, 2004, the applicant's United States citizen spouse filed a Form I-130 on the applicant's behalf, which was approved on August 10, 2005. On the same date, the applicant filed a new Form I-485. On November 18, 2008, the applicant filed a Form I-601 waiver. On January 7, 2009, the Field Office Director denied the Form I-485 and the Form I-601, finding that the applicant failed to establish extreme hardship to a qualifying relative. The applicant accrued unlawful presence from March 26, 1998, the date of the denial of the first Form I-485 until April 19, 2004, the date of the proper filing of a new Form I-485. The applicant's departure from the United States in 2004, triggered the ten-year bar under section 212(a)(9)(B)(i)(II) of the Act. Thus, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 or parent of the applicant. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and

not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on the qualifying relative, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

In this case, the record reflects that the applicant’s spouse, [REDACTED], is a 27-year-old native of Pakistan and citizen of the United States. The applicant and his spouse were married in Jersey City, New Jersey, on July 30, 2002, and they have three children.

The applicant's spouse states that separation from the applicant will result in extreme emotional and financial hardship to her and her children. The applicant's spouse states that the applicant is the sole financial provider for the family, and that without the applicant's income, the family will not be able to pay the mortgage or meet their financial obligations. The applicant's spouse states that she has formed a very strong bond with the applicant and that the emotional impact of separation from the applicant will be "tremendously devastating." *See Affidavit of* [REDACTED] dated September 3, 2009. The applicant's spouse also states that she is in constant fear of being separated from the applicant and moving her children to Pakistan where they will be subjected to great danger, and as a result, she has been diagnosed with Major Depressive Disorder. *Id.* The applicant's spouse further states that she will not be able to survive without the applicant and that she has constant thoughts of ending her own life if the applicant is forced to return to Pakistan. *Id.*

In this case, a preponderance of the relevant evidence demonstrates that the applicant's spouse would face extreme hardship if the applicant's waiver request is denied and he is removed from the United States to Pakistan while his spouse and children remain in the country. The reports from [REDACTED] [REDACTED] amply demonstrate the severity of the applicant's spouse's mental and psychological conditions as a result of the applicant's immigration problems. [REDACTED] first diagnosed the applicant's spouse with Adjustment Disorder with Mixed Anxiety and Depressed Mood on October 18, 2008, which he stated was caused by the applicant's spouse's fear of separation from the applicant. [REDACTED] also stated that the applicant's children would develop depressive symptomatology and separation anxiety disorder, if they become separated from the applicant. *See Psychological Evaluation and Report of the applicant's family by* [REDACTED] dated October 20, 2008. Upon reexamination of the applicant's spouse in 2009, [REDACTED] diagnosed her with Major Depressive Disorder. [REDACTED] found that the applicant's spouse is significantly more depressed that she was when he first examined her in October 2008 and he referred her to a psychologist for psychotherapy. *See Psychological Evaluation and Report of the applicant's family by* [REDACTED] dated August 21, 2009. [REDACTED] states that the applicant's spouse has been experiencing depression and high state of anxiety as a result of her fear that the applicant will be forced to leave the United States, and that as a result of these symptoms, she is now under treatment with him in individual psychotherapy. [REDACTED] also states that the applicant's spouse's symptoms are so severe that he has spoken to her physician, [REDACTED], who has prescribed an antidepressant for her. *See Letter from* [REDACTED] *New York City, New York.*

Based on the psychological reports in the record, the AAO finds that the applicant has provided evidence of serious emotional and psychological hardship to his spouse as a result of his inadmissibility. Accordingly, the AAO determines that denial of the applicant's waiver request will impose hardship to the applicant's spouse that is beyond the common results of removal or inadmissibility to the level of extreme hardship.

Regarding relocation, a preponderance of the relevant evidence demonstrates that the applicant's spouse would experience extreme hardship if she were to relocate to Pakistan with the applicant and her children. The applicant's spouse states that she does not want to relocate to Pakistan because with lack of security in Pakistan and threats directed to United States citizens, she will always feel threatened. The applicant's spouse states that her entire immediate family, her parents and siblings, are living in the United States and that she does not have family ties in Pakistan. The applicant's

spouse states that she will be unable to continue her education and pursue a career in accounting or seek employment because of her gender and her U.S. citizenship. The applicant's spouse also states that she will be concerned for her safety and the safety of children at all times in Pakistan. The applicant's spouse further states, "as a mother, I will never be able to live with myself knowing that I bring [her children] back to a country where they will be deprived of a bright future and suffer permanent threats and discrimination as U.S. citizens." *Affidavit by* [REDACTED] dated September 3, 2009. The record contains ample evidence documenting the high level of violence in Pakistan and that foreign nationals including United States citizens have been specifically targeted for attacks.

The U.S. Department of State notes that:

The presence of Al-Qaida, Taliban elements, and indigenous militant sectarian groups poses a potential danger to U.S. citizens throughout Pakistan, especially in the western border regions of the country... Since 2007, several U.S. citizens throughout Pakistan have been kidnapped for ransom or for personal reasons... 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.

Travel Warning, U.S. Department of State, Bureau of Consular Affairs, Pakistan, dated July 22, 2010.

Based on the applicant spouse's significant family ties in the United States and no family ties in Pakistan, her long-term residence in the United States, her concern for the health and safety of herself and her family while in Pakistan, and the documented high level of violence and lack of security in Pakistan, the AAO finds that the applicant has established that his spouse would suffer extreme hardship if she were to relocate to Pakistan with the applicant due to his inadmissibility.

A review of the evidence in the record, when considered in the aggregate, shows that the applicant has established that his United States citizen spouse would suffer extreme hardship if the applicant's waiver request is denied. Here the range of factors considered in the aggregate takes the case beyond those hardships ordinarily associated with deportation or inadmissibility, and supports a finding of extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. at 383; *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The negative factors in this case are the applicant's entry into the United States without inspection and his unlawful presence in the United States. The positive factors in this case include the extreme hardship the applicant's United States citizen spouse and children will face if the waiver is denied, his employment in the United States and payment of taxes, and the lack of a criminal record.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.