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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

Date: SEP 12 2011 Office: NEWARK FILE: [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The record establishes that the applicant, a native and citizen of Pakistan, was found inadmissible to the United States 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. The applicant was also found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure an immigration benefit by fraud or willful misrepresentation.[1] The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director,* dated October 7, 2008.

In support of the appeal, counsel for the applicant submits a brief and referenced exhibits. The entire record was reviewed and considered in rendering a decision on the appeal.

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

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

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[1] The record shows that the applicant was convicted of Possessing/Selling Unstamped Cigarettes by the State of Maryland in 1997. *District Court of Maryland Criminal System Inquiry Charge/Disposition Display,* dated October 1, 2001. In addition, the applicant was convicted of a noise ordinance violation by the State of New Jersey in 2004. *Record of the Docket of the City of Jersey City Municipal Court,* dated June 12, 2008. The field office director did not address whether or not these convictions are for crimes involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Nevertheless, because the applicant is inadmissible under both section 212(a)(9)(B) and section 212(a)(6)(C)(i) of the Act and demonstrating eligibility for a waiver under sections 212(a)(9)(B)(v) and 212(i) also satisfies the requirements for a waiver of criminal grounds of inadmissibility under section 212(h), the AAO will not determine whether the applicant is inadmissible under section 212(a)(2)(A)(i)(I).

. . . .

> (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...

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

> (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.
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> . . . .
>
> (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

> (1) The Attorney General may, in the discretion of the Attorney General, 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 Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

Regarding the field office director's finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, the record indicates that the applicant entered the United States in January 1986 with a valid nonimmigrant visa. He was authorized to remain in the United States until February 10, 1986. The applicant remained in the United States beyond the period of authorized stay. In October 1987, the applicant submitted an Application for Temporary Resident Status as a Special Agricultural Worker (Form I-700). On September 10, 1990, the Form I-700 was denied. A subsequent appeal of the Form I-700 denial was dismissed in February 1993. In December 2000, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), based on a concurrently filed Form I-130, Petition for Alien Relative, submitted on the applicant's behalf by his

U.S. citizen wife.[2] On April 16, 2001, the applicant was issued the Form I-512, Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and re-enter the United States in 2001. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until the Form I-485 filing in December 2000. The field office director correctly found the applicant to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence for more than one year. On appeal, the applicant does not contest this finding of inadmissibility.

Regarding the field office director's finding that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act, for fraud or willful misrepresentation, the record establishes that in June 2002, the applicant filed the Form I-131, Application for Travel Document. On the Form I-131, the applicant stated his reason for travel abroad as follows: "My mother die in Iran." *See Form I-131,* dated June 7, 2002. However, in a letter from the applicant's spouse to the USCIS, dated July 21, 2001, she informed the USCIS that her husband's mother had died and he had gone to the funeral. *Letter from* [redacted] dated July 21, 2001. The applicant was thus found inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C), for having attempted to procure an immigration benefit, specifically, Advance Parole, by fraud or willful misrepresentation. On appeal, counsel for the applicant contends that the applicant did not intend to mislead the USCIS about the date of his mother's death. Counsel goes on to explain that the discrepancies were innocent in nature, brought about by the applicant's difficulties in communicating in fluent, correct English, rather than malicious and deliberate. Counsel contends that the applicant did intend travel to Iran after his mother's death, but on the anniversary of her death to conduct a memorial ritual, not when she died. *Brief in Support of Appeal,* dated December 4, 2008.

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In *Matter of S- and B-C-*, 9 I&N Dec 436 (BIA 1960 AG 1961), the Attorney General established the following test to determine whether a misrepresentation is material:

> A misrepresentation . . . is material if either (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. *Id.* at 447.

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States,* 485 U.S. 759 (1988). In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had

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[2] The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,* dated May 6, 2009.

a natural tendency to influence the decision of the Immigration and Naturalization Service. *Id.* at 771.

The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this case, it has not been established, by a preponderance of the evidence, that the applicant did not materially misrepresent himself by claiming to need an advance parole document because of his mother's death, when the record shows that his mother had died in 2001, pursuant to the applicant's spouse's letter to the USCIS. As such, based on the evidence in the record, the AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

Waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act are 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. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. 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-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

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

The Board has also held that the common or typical results of 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*, 138 F.3d at 1293 (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.

Counsel contends that were the applicant's U.S. citizen spouse to accompany the applicant abroad based on the denial of the applicant's waiver request, she would suffer emotional and financial hardship. To begin, counsel explains that if the applicant's spouse were to relocate abroad, she would have to sell the family home and in view of the current housing market, she would be forced to absorb a significant loss. Moreover, counsel explains that the applicant's spouse was born in Haiti and is unfamiliar with the country, culture and customs of Pakistan, and a relocation abroad would cause her hardship. Finally, counsel references the problematic country conditions in Pakistan, including persecution against the applicant's spouse's religion, Christianity[3], and terrorist activity.[4] *Brief in Support of Appeal,* dated December 4, 2008.

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[3] As documented by counsel, the Pakistani government limits freedom of religion, societal discrimination against religious minorities is widespread, and societal violence against minority religious groups occurs. *International Religious Freedom Report 2010-Pakistan, U.S. Department of State,* dated November 17, 2010.

[4] As documented by counsel, the U.S. Department of State issued a Travel Warning for Pakistan due to terrorist activity. *Travel Warning-Pakistan, U.S. Department of State,* dated August 8, 2011.

The record indicates that were the applicant's U.S. citizen spouse to relocate to Pakistan to reside with the applicant due to his inadmissibility, she would be concerned about her safety and well-being due to terrorist activity. In addition, the applicant's spouse would encounter financial hardship due to the economic situation in Pakistan, as corroborated by the U.S. Department of State.[5] Finally, the applicant's spouse would suffer hardship due to the struggles she would encounter in Pakistan, including unfamiliarity with the country, language and culture and separation from her community and church and loss of her gainful employment

With respect to remaining in the United States while the applicant relocates due to his inadmissibility, the applicant's spouse asserts that she would be emotionally heartbroken. She contends that she cannot live without him as he is the rock that she can lean on, her companion and her partner. The applicant's spouse further explains that her husband suffers from Hepatitis C and is undergoing an eighteen-month therapy via injections and pills, but were he to relocate to Pakistan, he would not have access to effective treatment, causing her additional emotional hardship. Finally, the applicant's spouse asserts that she works two jobs but needs her husband's continued financial contributions to make ends meet. *Affidavit of* dated January 27, 2006.

In support of the emotional hardship referenced by the applicant's spouse, an affidavit has been provided by Ph.D. Dr. states that the applicant's spouse is suffering from Major Depressive Disorder as a result of her fear that her husband will return to Pakistan. He concludes that were the applicant unable to remain in the United States, his spouse's "depressive symptomatology will become clinically exacerbated...." *Affidavit of* , dated November 19, 2008. Documentation has also been provided establishing that the applicant's spouse is being treated in the United States for Hepatitis C through weekly injections of medication. *See Letter from* In addition, documentation has been provided establishing that the applicant's spouse plays a critical role in the finances of the household, based on his employment as a taxi driver with *See Letter from* dated July 2, 2006. Moreover, the U.S. Department of State confirms that medical care in Pakistan may be below U.S. standards and emergency response is virtually nonexistent. *Country Specific Information-Pakistan, U.S. Department of State,* dated March 24, 2011. Finally, as noted above, the U.S.

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[5] The U.S. Department of States confirms the following regarding economic conditions in Pakistan:

> The World Bank considers Pakistan a low-income country.... No more than 55.0% of adults are literate, and life expectancy is about 64 years. In FY 2008-2009, the GDP growth rate was 3.7%, and unemployment was estimated at 14%. Year-over-year consumer price inflation averaged 13.6% in 2009.... Low levels of spending in the social services and high population growth have contributed to persistent poverty and unequal income distribution. Pakistan's extreme poverty and underdevelopment are key concerns, especially in rural areas. The country's economy remains vulnerable to internal and external shocks due to internal security concerns and the global financial crises.

Background Note-Pakistan, U.S. Department of State, dated October 6, 2010.

Department of State warns U.S. citizens of the risks inherent in traveling to Pakistan, in light of terrorist activity, religious intolerance, crime and violence. *Supra* at 1.

The record reflects that based on a totality of the circumstances, and in particular considering the problematic country conditions in Pakistan and the warning issued by the U.S. Department of State to U.S. citizens outlining the risks of travel to Pakistan, the AAO concludes that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States due to his inadmissibility.

Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance 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 favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse would face if the applicant were to reside in Pakistan, regardless of whether she accompanied the applicant or remained in the United States, the payment of taxes, home ownership and gainful employment. The unfavorable factors in this matter are the applicant's misrepresentation when

attempting to procure Advance Parole in 2002, periods of unlawful presence and employment while in the United States and the above-referenced convictions.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved. The field office director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.