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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



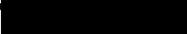
U.S. Citizenship
and Immigration
Services



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Date: **SEP 12 2012**

Office: New Delhi

FILE: 

IN RE:

Applicant: 

APPLICATION:

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

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.

A handwritten signature in black ink that reads "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

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)(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 again seeking admission within ten years of his last departure from the United States. The applicant is the spouse of a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his wife.

In a decision dated April 30, 2010, the Field Office Director denied the application as a matter of discretion, finding that negative factors outweighed positive factors. The application was denied accordingly. *See Decision of the Field Office Director* dated April 30, 2010.

On appeal, counsel for the applicant submitted a brief in support of the applicant's waiver application. In her brief, the applicant's counsel asserts the USCIS erred in application of the discretionary analysis as it failed to properly balance the extreme hardship that was established against what it determined to be unfavorable factors. Counsel contends that USCIS found extreme hardship as it proceeded to deny the applicant by discretion, the "second tier of analysis once extreme hardship is found," but did not then consider extreme hardship as a favorable factor. Counsel also contends USCIS failed to consider other positive factors, including the lack of a criminal record, six and a half years of residence in the United States, and years passed since the applicant's illegal entry into and departure voluntarily from the United States. Counsel then asserts USCIS "mischaracterized" facts of the case in order to find unfavorable factors for discretionary analysis, notably that the applicant left the United States due to the illness of a family member rather than an effort to rectify his immigration status and that his marriage to the qualifying relative was "questionable".

The record contains an Application for Waiver of Grounds of Inadmissibility (Form I-601) and a Notice of Appeal (Form I-290B); declarations from the qualifying spouse; letters from the qualifying spouse's son and daughter from a previous relationship; letters from family members; school records for the daughter of the qualifying spouse; medical documentation indicating the qualifying spouse suffers from high blood pressure and diabetes; a letter from the qualifying spouse's employer; financial documentation showing the qualifying relative is behind on student loan payments, medical bills, utility bills, car payments, and real estate taxes; as well as an approved Petition for Alien Relative (Form I-130).

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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Counsel General [now Secretary of Homeland Security] 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 . . . 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.

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. The applicant's wife 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-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-I-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.

The applicant’s qualifying relative in this case is his wife, who is a United States citizen. The record indicates that the applicant entered the United States without inspection in January 2001 and remained until November 2007, when he departed voluntarily. The applicant accrued unlawful presence from January 2001 until November 2007, a period in excess of one year. In applying for an immigrant visa, the applicant is seeking admission within ten years of his departure from the United States. The applicant has not disputed his inadmissibility. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of more than one year.

The District Director found, and the AAO agrees, that the qualifying relative spouse would experience extreme hardship were she to relocate to Pakistan to join the applicant. The qualifying spouse was born and has always resided in the United States, does not speak a language of Pakistan, has no family there, and would likely be unable to access proper medical care given her health issues as the Department of State reports medical facilities vary in level and range of services and

Americans may find them below U.S. standards. Further, the Department of State Travel Advisory warns of U.S. citizens being potential targets of terrorism and foreigners being crime targets.

The applicant's counsel asserts that the qualifying spouse is suffering from emotional stress and financial difficulties due to her separation from the applicant. The Field Office Director found evidence of economic hardship and stress-related ailment due to separation, but did not specify whether this hardship was found to amount to extreme hardship. The AAO finds extreme hardship to the qualifying relative due to separation. Medical information supports that high blood pressure is affected by stress, and financial documentation submitted with the application establishes that the qualifying relative, despite having a full-time job, is behind on multiple payments.

Letters from the applicant's spouse and her children also note that applicant had been a stabilizing force in their lives. The spouse's daughter states that the separation has affected her mother, missing the applicant's support in caring for the family, and causing her to struggle emotionally and financially.

A letter from the spouse's employer describes a change in her personality, appearing depressed and under stress, since being separated from the applicant. It further states that on one occasion the applicant's spouse was taken to a hospital emergency room when stress caused elevated blood pressure, resulting in several days of missed work.

When considered in the aggregate, the documentation provided regarding the qualifying spouse's medical, emotional and financial hardships demonstrate that the qualifying spouse would suffer extreme hardship were she to remain in the United States without the applicant. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, his qualifying spouse would suffer extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 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.

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 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.

In denying the application as a matter of discretion, the Field Office Director found favorable factors to be the applicant's U.S. citizen spouse and an approved I-130. As unfavorable factors she found the applicant's illegal entry into the United States, six years of unauthorized employment and unlawful presence, a departure which was predicated on the illness of a family member, not to rectify illegal status in the United States, and a questionable second marriage 115 days after the termination of a first marriage.

In her brief the applicant's counsel asserts that the USCIS did not consider the finding of extreme hardship as a favorable factor, nor include the applicant's lack of a criminal record and passage of time since the applicant's illegal entry into and subsequent departure voluntarily from the United States. Counsel further contends that in denying the application USCIS mischaracterized other facts, determining that the applicant left the United States because of an ill family member, as indicated on the I-601, rather than to rectify his status and that his marriage to the qualifying relative was "questionable." Counsel points out that the applicant indicated on the I-130 petition that he wished for consular processing in [REDACTED] and that nothing previously had been raised questioning the bona fides of the applicant's marriage to his current spouse, the qualifying relative. Counsel further asserts that although the applicant's current marriage in February 2004 came 115 days following his divorce, he had not lived with his first wife since 2001 and the filing for divorce had occurred several months before the divorce became final.

The favorable factors in this matter are the extreme hardships faced by the applicant's United States citizen spouse and her children if the applicant were not granted this waiver, letters from the spouse's family members in support of the applicant; the passage of time since the applicant's unlawful entry, and the applicant's lack of a criminal record.

The unfavorable factors in this matter are the applicant's illegal entry into the United States, six years of unauthorized employment and unlawful presence.

Although the applicant's violations of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. The AAO finds that a favorable exercise of discretion is warranted. 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.