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

U.S. Citizenship and Immigration Services

SOUTH OZONE PARK, NY 11420

DATE: MAY 16 2013 OFFICE: NEW DELHI FILE: A

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h); section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

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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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Pakistan who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for procuring entry to the United States by fraud or willful misrepresentation. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude and section 212(a)(9)(B)(i)(II) of 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 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his lawful permanent resident spouse and U.S. citizen children.

The Field Office Director concluded that the record did not establish the existence of extreme hardship for a qualifying relative and that the applicant did not merit a favorable grant of discretion, and denied the application accordingly. *See Decision of the Field Office Director*, dated February 17, 2012.

On appeal, counsel for the applicant asserts that the applicant has established that his spouse is suffering extreme financial and emotional hardship in his absence. Counsel further asserts that the applicant's spouse cannot relocate to Pakistan because she is not a native, would face danger upon relocation, and her children would not receive the educational support they require.

In support of the waiver application and appeal, the applicant submitted identity documents, background information concerning Pakistan, financial documentation, letters from the applicant's children's school, statements from the applicant and his spouse, a psychological evaluation of the applicant's family, a letter from the applicant's spouse's father and accompanying medical documentation, and documents concerning the applicant's criminal record. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record reflects that the applicant was convicted of making false statements in a document relating to the registry of aliens, a class C felony, pursuant to 18 U.S.C. § 1426(b), on June 23, 2005 in the Southern District of New York. It is noted that the Board of Immigration of Appeals, in *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980), determined that a violation of 18 U.S.C. § 1426(b) is a crime involving moral turpitude because it inherently involves a deliberate deception of the government and an impairment of its lawful functions. The applicant's conviction carried a maximum sentence of 10 years imprisonment, three years supervised release, and fines. The applicant was sentenced to time served and three years supervised release.

The field office director found the applicant to be inadmissible for having been convicted of a crime involving moral turpitude. As the applicant has not disputed his inadmissibility based upon his convictions for crimes involving moral turpitude and the record does not show the field office director's finding of inadmissibility under this ground to be erroneous, the AAO will not disturb the field office director's finding

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.

The indictment against the applicant, to which he pled guilty on June 23, 2005, states that the applicant unlawfully, willfully, and knowingly made false statements on an application submitted to the Immigration and Naturalization Service in order to gain status as a lawful permanent resident. The applicant does not dispute his inadmissibility to the United States pursuant to section 212(a)(6)(C)(i) of the Act.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
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> (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.
>
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

Section 212(i) of the Act provides:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (Secretary), 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 (Secretary) 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...

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is 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. Hardship to the applicant is not considered in section 212(i) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. 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). As the applicant's waiver application under 212(i) of the Act is the most restrictive of the waivers for which he is applying, his appeal will be adjudicated in accordance with this section.[1]

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

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[1] It is noted that the field office director's decision found that the applicant is also inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of 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 10 years of his last departure from the United States. The record does not clearly demonstrate that the applicant had accumulated more than one year of unlawful presence in the United States subsequent to the effective date of the unlawful presence statute, April 1, 1997. In any case, the waiver for this ground of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act contains the same elements as the section 212(i) waiver sought by this applicant, and meeting the requirements of a waiver under section 212(i) of the Act will also establish that the applicant meets the requirements for a waiver under section 212(a)(9)(B)(v) of the Act.

"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 record reflects that the applicant is a 40-year-old native and citizen of Pakistan and the applicant's spouse is a 36-year-old native of Guyana and lawful permanent resident of the United States. The applicant is currently residing in Pakistan and his spouse and children are residing in South Ozone Park, New York.

The applicant's spouse asserts that she loves the applicant and without him in her life, she has nobody else upon whom she can depend. The applicant's spouse contends that she needs the applicant with her to help her take care of the needs of their two children. The record contains a psychological evaluation of the applicant's spouse and children. It is noted that the applicant's children are not qualifying relatives under section 212(i) of the Act so that any hardship they suffer will be considered only insofar as it affects the applicant's spouse.

The psychological evaluation of the applicant's spouse states that she is suffering from major depressive disorder based upon her depressed mood throughout most of the day, diminished interest or pleasure in activities, significant weight gain, insomnia, fatigue or loss of energy, feelings of worthlessness, and diminished ability to think or concentrate. The psychological evaluation also states that the applicant's spouse is additionally stressed, not only because she is raising her two children alone, but because the children are challenging and need so much assistance. The psychological evaluation of the applicant's son states that he has been labeled as mentally retarded, does not speak well, and is inarticulate. The psychological evaluation of the applicant's daughter states that she has been held back once in her kindergarten class and may have to repeat kindergarten for the third time. The record also contains supporting documents and letters from the applicant's children's schools. A letter from the applicant's daughter's principal

states that the applicant's daughter is not performing at a level to meet the requirements for promotion to the next grade and needs additional support. Documents from the applicant's son's school indicate that he has been classified as mentally disabled and receives special classes, speech therapy, and adaptive physical education .

The applicant's spouse asserts that she is currently working as a nursing assistant on a part-time basis and is unable to cover her household costs with her earnings. The applicant's spouse's 2011 tax return indicates an income lower than $11,000 for the year. Counsel for the applicant asserts that the applicant's spouse's household bills exceed her income by nearly $800 per month so that she cannot meet her financial responsibilities. The applicant's spouse contends that she has only been able to pay her bills thus far from the $46,000 from the applicant's bond and her father's gift of $10,000. However, the applicant's spouse asserts that since the applicant's departure in 2006, this lump sum has been largely depleted. The most recent statement from the applicant's spouse's account indicates a balance of less than $10,000.

Counsel asserts that the applicant's spouse will soon be destitute, as she has no other means for obtaining income. The applicant's spouse asserts that the applicant has been financially surviving in Pakistan by living on the proceeds from the sale of their home. The applicant's spouse also asserts that her father is no longer employed due to his age and a health condition so that he cannot provide any further financial support. The record contains medical documentation indicating that the applicant's spouse's father suffers from a heart condition and a letter from the applicant's spouse's father stating that he is unable to provide his daughter with financial assistance. The record contains credit card and Verizon invoices for the applicant's spouse indicating that she has been delinquent in her payments. The applicant's spouse asserts that she was forced to create a payment plan with her electric company and that she now owes over $400. The applicant's spouse also contends that she is currently unable to pay a medical bill for her son in an amount exceeding $800. In the aggregate, there is sufficient evidence in the record to show that the applicant's spouse is suffering from a level of hardship due to separation from the applicant that is beyond the common results of inadmissibility or removal of a spouse.

The applicant's spouse asserts that she cannot relocate to Pakistan because her son is currently receiving specialized education and this type of education will not be available for him in Pakistan. The applicant's spouse contends that her son is currently receiving, free of additional charge, speech training and a small class with two teachers to support him. As noted, the record contains supporting documentation for the applicant's spouse's assertions concerning her son's specialized education in the United States.

Counsel asserts that the applicant's spouse and her family cannot financially survive in Pakistan and will face danger if they relocate. Counsel contends that the applicant has no means of employment in Pakistan and has only been subsisting on his prior earnings from the United States. Though the record indicates that the applicant's spouse and her children have visited the applicant in Pakistan, it is noted that the applicant's spouse is a native of Guyana. It is also noted that the Department of State has issued a travel warning, dated April 9, 2013, stating that all U.S. citizens should defer all non-essential travel to Pakistan due to the frequent occurrence of terrorist attacks.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if his waiver request is denied.

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 her 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 favorable factors include the extreme hardship the applicant's spouse and children would experience whether they remained in the United States, separated from the applicant, or accompanied the applicant to Pakistan; evidence of the applicant's employment and payment of taxes during his residence in the United States; and letters of support including a prospective letter of employment. The unfavorable factors in this matter include the applicant's prior failure to attend immigration proceedings, order of exclusion from the United States, the applicant's misrepresentation of his identity for immigration benefits, and the corresponding criminal conviction. We do note that the applicant's criminal actions underlying his 2005 conviction took place in January 1998.

Although the applicant's violations of immigration and criminal 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. The waiver application is approved.