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U.S. Citizenship and Immigration Services

SILVER SPRING, MD 20905

FILE: A Office: FRANKFURT, GERMANY Date: NOV 14 2008

IN RE:

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

ON BEHALF OF APPLICANT:

MITCHELL ZWAIK
3900 VETERANS MEMORIAL HIGHWAY
BOHEMIA, NY 11716

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge (OIC), Frankfurt, Germany, 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 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)(i), for having procured admission 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)(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 a period of more than one year after April 1, 1997. The applicant is the beneficiary of an approved Petition for Alien Relative Petition (Form I-130) filed by his U.S. citizen spouse and seeks a waiver of inadmissibility pursuant to sections 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v) respectively, in order to reside in the United States with her.

The record reflects that the applicant was admitted to the United States on June 14, 1995 in B-2 status using a fraudulent passport. The applicant subsequently filed an application for asylum. The applicant and his spouse were married in the United States on December 9, 1997. On April 6, 1998, the applicant's asylum application was referred to an immigration judge in removal proceedings. On November 23, 1998, the applicant was ordered deported *in absentia*. The applicant appealed the order to the Board of Immigration Appeals (BIA). The appeal was dismissed on March 28, 2002. The applicant has indicated that he departed the United States for Pakistan on April 4, 2004.

On March 24, 2000, the applicant's spouse became a naturalized U.S. citizen. She filed a Form I-130 petition on February 27, 2004 and it was approved on May 24, 2005. The applicant filed an Application for Immigrant Visa (Form DS-230), an Application for Waiver of Ground of Excludability (Form I-601), and an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) in November 2005.

The OIC concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of OIC*, dated May 31, 2006.

On appeal, counsel contends that OIC "failed to consider all of the relevant factors and did not utilize the requisite balancing test in adjudicating the waiver application." *Appeal Brief,* dated June 29, 2006, at 1. Counsel asserts that the OIC failed to give adequate weight to the fact that the applicant and his spouse were married before he was placed in removal proceedings, that the applicant's spouse faces dangerous conditions in Pakistan because she is Hindu, that the applicant's spouse suffers from Dependent Personality Disorder rendering her clinically depressed and dysfunctional in the applicant's absence, and that the applicant has been unable to find employment in Pakistan to support himself and his spouse should she move there. *Id.* at 1-7. Counsel also contends that the adverse discretionary factors in the case—the applicant's use of a fraudulent passport and failure to appear at an immigration court hearing—are outweighed by hardship to his U.S. citizen spouse and children, his history of stable employment and payment of taxes, his good reputation in the community, his repeated and persistent efforts to reopen his removal proceedings, his lack of any criminal record, his faithful appearances before government officers during the period in which his motions to

reopen were pending, his payment of personal debts and liabilities prior to leaving the United States and his cooperation in departing from the United States at his own expense. *Id.* at 7-8.

The record contains, among other documents, statements from the applicant and his spouse; copies of phone bills; copies of credit card and bank statements; copies of tax returns; a copy of a mortgage loan statement; copies of family photographs; a psychological evaluation by Dr. Arthur Blecher; a letter from Dr. V. Subramanian; a letter from Dr. Anees Ahsan; medical records; a letter from the applicant's sister; a letter from the applicant's brother; a letter from Eileen Macfarlan, principal at the school attended by the applicant's daughter, Sehar; and reports and articles concerning conditions in Pakistan and Burma. The entire record was considered in rendering a decision on the appeal.

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

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that the applicant was admitted to the United States on June 14, 1995 in B-2 status using a fraudulent passport. The applicant has not disputed that he is inadmissible under section 212(a)(6)(C)(i) of the Act.

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

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

As stated above, the record reflects that the applicant was admitted to the United States on June 14, 1995 in B-2 status using a fraudulent passport. The applicant subsequently filed an application for asylum. On April 6, 1998, the applicant's asylum application was referred to an immigration judge in removal proceedings. On November 23, 1998, the applicant was ordered removed *in absentia*. The applicant appealed the order to the BIA. The appeal was dismissed on March 28, 2002. The applicant did not depart the United States until April 4, 2004. Therefore, the applicant was unlawfully present from March 28, 2002 to April 4, 2004, a period in excess of one year, and is again seeking admission to the United States. Consequently, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

> 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.

Section 212(i)(1) of the Act provides that:

> 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 alien 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 waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and his children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The only qualifying relative is the applicant's U.S. citizen spouse. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

*Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The Ninth Circuit Court of Appeals has stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In her affidavit dated June 29, 2006, the applicant's spouse indicates that she was then visiting the applicant in Pakistan, but was a "virtual prisoner in the family house owned by his parents" because of fear of "the terrible violence that continues in Pakistan between Muslims and non-Muslims...." She states that before the applicant left for Pakistan, they were forced to sell their home and transfer ownership of their business, a pizzeria, to members of the applicant's family in order to pay off loans and bills. The applicant's spouse asserts that she is "desperately trying to cope with the pain of . . . separation" and that she speaks to the applicant by phone "several times a day." She states that it is a "weight" to work part-time in the pizzeria to provide financial support for herself, her children and the applicant while living in a single bedroom in the house of her in-laws, who "barely [tolerate her] because of her Hindu beliefs."

In his affidavit dated June 29, 2006, the applicant states that he has been unable to find employment since returning to Pakistan, and is financially dependent on his family and money his spouse earns working at the pizzeria he previously owned. The applicant contends that because his spouse must send him money, "she deprives herself and [their] children of many of the necessities of life, including adequate medical care, food and clothing." The applicant indicates that while his spouse and children were visiting him in Pakistan, "he did not let them out of the house unless they are accompanied at all times by one or more family members and even then only in those few areas . . . [known] to be totally secure." The applicant asserts that "Pakistan is simply not a country where Muslims and Hindus can intermarry and live safely."

In his evaluation, Dr. Belcher states that he conducted interviews with the applicant's spouse during the week of May 30, 2005 and diagnoses the applicant as having a "highly dependent personality." He indicates that without the applicant, the applicant's spouse "suffers greatly above and beyond what is normal and becomes dysfunctional."

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that the applicant's spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

The evidence shows that the applicant's spouse suffers emotionally as a result of separation from the applicant and the added responsibility of providing financially for him while caring for their children. The financial hardship she experiences has resulted in her losing her independence and having to work for and reside with members of the applicant's family to whom he sold his business. Although the inability to maintain one's present standard of living or pursue a chosen profession does not generally constitute extreme hardship, *Matter of Pilch*, 21 I&N Dec. 627, 631 (BIA 1996), the AAO determines that the applicant's departure has made the applicant's spouse dependent on members of the applicant's family who do not respect her right to openly practice her Hindu religion and exert pressure on her to convert to Islam. When viewed cumulatively, the evidence demonstrates that the applicant's spouse experiences extreme hardship as a consequence of the applicant's inadmissibility.

The applicant has also demonstrated that his spouse would suffer extreme hardship if she relocated to Pakistan. The record reflects that the applicant's spouse is a native of Burma and a Hindu who has no family or other ties to Pakistan. The applicant is currently unemployed in Pakistan, and the evidence reflects that the applicant's spouse would not have employment opportunities there. Furthermore, marriage between a Muslim and a Hindu is illegal under the Islamic law of Pakistan, and the applicant's spouse has experienced hostility from members of the applicant's family because she refuses to practice Islam. *See* U.S. Department of State, *International Religious Freedom Report 2008: Pakistan* (September 19, 2008).

In this case, the record contains sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has established extreme hardship to his U.S. citizen spouse as required under sections 212(i) and 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the Board held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (Secretary of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The equities in this case warrant a favorable exercise of discretion. The negative factors in this case consist of the applicant's use of a fraudulent document to procure admission to the United States and his unlawful presence in the United States. The positive factors in this case include the applicant's family ties to the United States, the hardship that the applicant's spouse and children suffer in his absence, the applicant's lack of criminal record, and the applicant's economic contributions to the United States while he resided in the country. Although the applicant's violations of the immigration laws of the United States are serious and cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.