U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: NEW DELHI Date: NOV 03 2005

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, New Delhi, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India who was found to be 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 engaging in fraud or misrepresentation in order to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act. The applicant was further deemed inadmissible 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 10 years of his last departure from the United States. The applicant seeks waivers of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), and section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), in order to enter the United States and reside with his U.S. citizen wife.

The officer in charge concluded that the applicant failed to establish that he was erroneously deemed inadmissible, or 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 Officer in Charge*, dated March 5, 2004.

On appeal, counsel for the applicant contends that the applicant qualifies for an exception to the unlawful presence provisions under section 212(a)(9)(B)(i)(II) of the Act as he was an applicant for asylum, and he did not engage in unlawful employment during his stay. *Brief in Support of Appeal* at 2-3, dated March 25, 2004. Counsel asserts that the applicant's wife will suffer economic and emotional hardship if the applicant is prohibited from entering the United States. *Id.* at 3-5.

The record contains a brief from counsel; a statement from the applicant's wife in support of the appeal; a statement from an accountant regarding whether the applicant was considered an employee while running his own business; a letter from counsel in support of the initial Form I-601 application; a letter from a doctor who provides care for the applicant's son; documentation to show that the applicant and his wife purchased a hotel; copies of 2001 federal tax filings for the applicant and his wife; a report from a licensed psychologist regarding the mental health of the applicant's wife; a copy of the applicant's marriage certificate, and; documentation regarding the applicant's immigration history. The entire record was reviewed and considered in rendering this decision.

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.

Section 212(i) of the Act provides that:

> (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 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.

The record reflects that the applicant entered the United States on or about December 11, 1992 under the name Using this name, he filed an asylum application on April 30, 1993 under the jurisdiction of the Citizenship and Immigration Services (CIS) Newark Asylum Office. Using a different name, the applicant then filed a second asylum application on October 14, 1993 under the jurisdiction of the CIS Los Angeles Asylum Office. Though Form I-589, Application for Asylum and for Withholding of Removal, requests that an applicant state whether he has previously applied for asylum in the United States, the applicant failed to reveal his prior asylum application. Whether the applicant had made a prior application for asylum was material to whether he was eligible under the second application. Thus, by failing to disclose his prior asylum application, the applicant made a willful misrepresentation of a material fact in order to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act. Further, regarding the applicant's entry to the United States and first asylum application, the applicant's true identity was material to whether he was eligible for admission or asylum. Thus, by misrepresenting his identity, the applicant made additional willful misrepresentations of material facts in order to procure admission into the United States or other benefit provided under the Act. Accordingly, the applicant was correctly found to be 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). On appeal, the applicant does not contest his inadmissibility based on this ground.

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.
>
> . . . .
>
> (iii) Exceptions –
>
> (II) Asylees. No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

. . . .

> (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.

In the present application, the record indicates that the applicant was admitted to the United States as a non-immigrant visitor on or about December 11, 1992 with authorization to remain until December 25, 1992. The applicant did not depart the United States until February 17, 2000. Thus, the applicant was in the United States without a legal status for approximately seven years. As noted above, in 1993 the applicant filed two applications for asylum. He pursued one of the applications to conclusion, and the case was examined by an immigration judge and the Board of Immigration Appeals. The applicant's asylum request was ultimately denied by an immigration judge on February 4, 2000, and the applicant was granted voluntary departure until March 11, 2000. The applicant departed the United States on February 17, 2000, while the order of voluntary departure was active. The applicant potentially accrued unlawful presence in the United States from April 1, 1997, the date the unlawful presence provisions were enacted, until February 4, 2000, the date the applicant's asylum application was denied. This period of unlawful presence would total approximately two years and 10 months. Yet, under Section 212(a)(9)(B)(iii)(II) of the Act, as the applicant had a pending asylum claim during this period, he would qualify for an exception to unlawful presence so long as he did not engage in employment without authorization.

Pursuant to a pending application for asylum, the applicant received employment authorization documents covering the period from December 6, 1993 to January 5, 1998. The record reflects that on September 10, 1999, the applicant and his wife purchased a hotel and commenced performing the tasks necessary to operate the business. The applicant's wife states that the business was not profitable enough to hire additional help. *Statement from Applicant's Wife in Support of Appeal.* The 2001 IRS Form 1040, U.S. Individual Income Tax Form, for the applicant and his wife reflects that they paid no wages to employees in the covered period, yet they paid self-employment taxes. In a report discussing the applicant's wife's mental health, [redacted] explained that the applicant's wife worked part-time during the day at a store while the applicant operated their hotel business. *Report from* [redacted] at 2. Thus the record shows that the applicant was self-employed during a period when he did not have authorization to work.

Though the applicant operated his own business during a period when he did not have employment authorization, counsel contends that such work does not constitute engaging in unauthorized employment. Counsel asserts that the applicant only received profits from his business, and that he hired other workers to perform the daily tasks of the hotel. *Brief in Support of Appeal* at 3. The applicant submits analysis from an accountant, [redacted] expressing the view that, under U.S. Internal Revenue Service Rulings, the applicant is not considered an employee for tax reporting purposes. *Letter from* [redacted] *CPA*, dated March 25, 2004. [redacted] suggests that the applicant is considered "self-employed." *Id.* Counsel asserts that, as the applicant has not engaged in unauthorized employment, he is eligible for the exception to unlawful presence for asylum applicants provided in section 212(a)(9)(B)(iii)(II) of the Act.

Upon review, counsel's assertion is not persuasive, and the record clearly reflects that the applicant engaged in unauthorized employment. For the purpose of assessing whether an applicant has engaged in unauthorized employment, U.S. immigration law makes no distinction between self-employment and employment for the business of another. While the applicant may not be considered an "employee" under U.S. tax law for the purpose of assessing tax obligations, such definition does not govern whether the applicant was considered "employed" in the United States for immigration purposes. The record shows that the applicant was self-employed, and he regularly performed the tasks necessary to operate a hotel business in order to receive financial gain. While counsel asserts that the applicant hired other workers to perform the daily tasks of the hotel, such statement is inconsistent with statements by the applicant's wife and [redacted] as well as the applicant's 2001 federal tax forms. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, the applicant was self-employed from approximately September 10, 1999 until he departed the United States on February 17, 2000. As he did not have authorization to work during this period, he engaged in unauthorized employment. Accordingly, he does not qualify for the exception to unlawful presence afforded to applicants for asylum, and he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

As the applicant is inadmissible under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act, he requires waivers pursuant to both sections 212(i) and 212(a)(9)(B)(v) of the Act.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) 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. A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is also 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 the alien himself experiences upon deportation or exclusion is irrelevant to section 212(i) and section 212(a)(9)(B)(v) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's wife. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Bureau of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant. These 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.

On appeal, counsel asserts that the applicant's wife will suffer economic and emotional hardship if the applicant is prohibited from entering the United States. *Brief in Support of Appeal* at 3-5. Counsel states that the applicant's wife is experiencing emotional hardship due to separation from the applicant. *Id.* at 4-5. Counsel explains that the applicant's wife has been diagnosed with mental health disorders that have been aggravated by the stress of trying to operate her hotel and raise her child without the assistance of the

applicant. *Id.* at 5. The applicant's wife states that the applicant's absence is causing her significant emotional distress due to the effort required to maintain their business and care for her son. *Statement from Applicant's Wife in Support of Appeal* at 1.

examined the applicant's wife at the request of counsel in connection with the applicant's prior deportation proceeding. *Report from* at 1, dated June 28, 1999 and July 14, 1999. discussed the background of the applicant's wife, and observed that she displayed symptoms of several disorders, including adjustment disorder with mixed anxiety and depressed mood and obsessive compulsive personality disorder with avoidant characteristics. *Id.* at 5. further noted that the applicant's wife exhibited social isolation and stress resulting from the applicant's immigration difficulties. *Id.* Counsel contends that the applicant's wife cannot be treated in India. *Brief in Support of Appeal* at 5.

Counsel asserts that the applicant's absence is causing their son to develop abnormally, which is creating further hardship for the applicant's wife. *Id.* In a letter from the doctor for the applicant's son, the doctor states that the applicant's son's growth has been less than appropriate for his age, and that the applicant's wife is having difficulty raising him alone. *Letter from* dated July 21, 2002.

Counsel provides that, with the exception of the applicant, all of the applicant's wife's family members reside in the United States, thus she would experience hardship due to separation from her family if she returns to India with the applicant. *Brief in Support of Appeal* at 5. The applicant's wife states that she does not want to raise her son outside of the United States. *Statement from Applicant's Wife in Support of Appeal* at 2. She anticipates that her standard of living will decrease in India, and she will not have sufficient means to visit her family in the United States should she relocate. *Id.* The record reflects that, though the applicant's wife was born in the United States, she returned to India at age six and resided there for approximately sixteen years. noted that the applicant's wife returned to the United States approximately three years prior to the date of his evaluation. *Report from* at 2.

Counsel further asserts that the applicant's wife is experiencing economic hardship due to the applicant's absence, as she must operate their hotel and provide for their son alone. *Brief in Support of Appeal* at 5.

Upon review, the applicant has not established that his wife will experience extreme hardship if he is prohibited from entering the United States. Counsel suggests that the applicant's wife will experience significant emotional hardship if she remains separated from the applicant, and that she suffers from mental health disorders that are being exacerbated. The applicant submits a single evaluation from a licensed psychologist that discusses his wife's mental health. However, the evaluation, conducted in June and July 1999, is of limited use in the present proceeding due to the passage of over five years. Further, the evaluation was conducted for the purpose of the applicant's prior deportation proceeding, and does not represent treatment for a mental health disorder. The applicant has provided no evidence that his spouse received or required follow-up care from a mental health professional. While the evaluation is helpful in providing an understanding of the background and challenges of the applicant's wife, it does not establish that, should the applicant be prohibited from entering the United States, his wife will suffer emotional consequences beyond those ordinarily experienced by families of those who are deemed inadmissible.

While counsel asserts that the applicant's wife will be unable to obtain adequate health care in India, the applicant has provided no clear evidence of what treatment his wife currently requires, or evidence to reflect

that such treatment is not available in India. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The applicant's wife explains that her family members are in the United States, implying that she would be deprived of their support and companionship should she return to India. If the applicant's waiver application is denied, the applicant will be placed in the position of choosing whether to live close to her family in the United States, or with the applicant in India. The AAO recognizes that the applicant's wife will endure hardship as a result of separation from the applicant or her family members. However, her situation is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

Counsel contends that the applicant's wife is enduring additional hardship due to developmental problems of her son that are exacerbated by the applicant's absence. However, the brief letter from the doctor of the applicant's son fails to identify specific conditions or developmental difficulties. The letter does not serve as conclusive evidence that any conditions suffered by the applicant's son are the result of separation from his father.

The applicant's wife states that she would experience significant difficulty if she returns to India, and she expresses that she wishes to raise her son in the United States. It is noted that, as U.S. citizens, the applicant's wife and son are not required to live outside of the United States. However, as the applicant's wife resided in India for the majority of her life, approximately 16 years, it is evident that she is accustomed to the language and culture there, and she would not experience the difficulties associated with adapting to a new country should she return.

Counsel suggests that the applicant's wife will endure financial hardship if the applicant is prohibited from entering the United States, as she is currently operating their business alone. However, while conducting the hotel's business without the applicant's assistance may be challenging, the record reflects that the applicant's wife is capable of doing so. It is further noted that the applicant's wife has worked for a store, thus she has employable skills and may take a position with an employer should operating the hotel prove too difficult. The applicant has not shown that his wife will be unable to meet her financial needs in his absence.

As correctly observed by counsel, the elements of hardship that will be experienced by the applicant's wife must be considered together in order to determine if she will experience extreme hardship. However, based on the foregoing, the instances of hardship that will be experienced by the applicant's wife should the applicant be prohibited from entering in the United States, considered in aggregate, do not rise to the level of

extreme hardship. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.