



U.S. Citizenship
and Immigration
Services

H4

FILE:

Office: NEW DELHI, INDIA

Date: JUL 14 2005

IN RE:

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

ON BEHALF OF APPLICANT:

Administrative data deleted to
protect identity and privacy of
individuals.
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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, India. The matter 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 pursuant to § 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 is married to a naturalized citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his wife and child.

The officer in charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly. On appeal, counsel asserts that the applicant was not unlawfully present for one year or more, and is only subject to the three year bar set forth at § 212(a)(9)(B)(i)(I). Counsel also contends that the officer in charge abused her discretion in failing to analyze all the evidence on the record relative to the applicant's spouse's potential hardship. On appeal, counsel submits copies of the applicant's child's medical records from India. 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:

(B) Aliens Unlawfully Present.-

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

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, . . . is inadmissible.

(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.

....

(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.

The record indicates that the applicant entered the United States without inspection on or about March 22, 1992. His affirmative application for asylum was denied, and he was placed in proceedings on February 8, 1993. The Immigration Judge (IJ) denied his request for asylum and ordered the applicant deported on March 17, 1994. The applicant appealed the denial, and the Board of Immigration Appeals (BIA) dismissed his appeal on October 3, 2000. The applicant filed a Petition for Review and Motion for Stay of Deportation with the Ninth Circuit Court of Appeals. The appellate court denied the Petition for Review on July 23, 2001. The applicant's spouse's Petition for Alien Relative (Form I-130) filed on behalf of the applicant was approved on May 10, 2002.

Counsel contends that the applicant did not begin to accrue unlawful presence until the court of appeals issued its decision on September 14, 2001. The AAO notes that the appeals court's decision was filed on July 23, 2001. Nevertheless, counsel provides no precedent decisions or other support for his contention. Time spent as an alien in proceedings before an immigration judge or higher appellate authority has not been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under § 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, dated September 19, 1997.* The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until May 14, 2002, the date of his departure under deportation, and he currently seeks admission to the United States within 10 years of that departure. The applicant is, therefore, inadmissible to the United States under § 212(a)(9)(B)(II) of the Act.

A § 212(a)(9)(B)(v) waiver of the bar to admission resulting from § 212(a)(9)(B)(i)(II) 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 the alien himself or his child experiences upon deportation is irrelevant to § 212(a)(9)(B)(v) waiver proceedings, except inasmuch as it causes the alien's qualifying relative to suffer extreme hardship. 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).

Counsel asserts that hardship as required under § 212(a)(9)(B)(v) waivers should be interpreted more broadly than the hardship required to be demonstrated under, for example, § 212(h) waivers of inadmissibility for aliens who commit crimes involving moral turpitude. Counsel suggests that the applicant's unlawful presence constitutes a less egregious offense than would a crime involving moral turpitude; hence the standard of hardship he should have to demonstrate should be less stringent. Counsel does not indicate any legal support for this position, however.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the BIA deems relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act, which is the same standard as required under § 212(a)(9)(B)(v). 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.

Counsel asserts that the applicant's spouse would face extreme hardship if she relocated to India in order to remain with the applicant. Counsel points out that the applicant's child's asthma worsened during the period she was in India with the applicant's wife, and he contends that the child's suffering inflicts suffering on the applicant's wife. A letter written by [REDACTED] on April 3, 2004 indicates that the applicant's child reacted to some allergen in the immediate environment, causing her to suffer several bouts of respiratory infection. [REDACTED] suggests that the applicant's child would fare better in the United States, as apparently she did not suffer from so many complications in this country. While the record lacks information regarding the child's ongoing health condition in the United States and the effects of her health problems in India on the applicant's wife, it may be presumed that her daughter's ill health while in India caused the applicant's wife stress and concern.

Counsel also states that the applicant's wife has become accustomed to life in the United States, and that she found it difficult to adjust to life in the applicant's village in India. In her affidavit dated June 17, 2003, the applicant's wife noted that she has extensive family ties in Northern California, including her parents and two brothers. Although the record lacks detail with respect to the applicant's spouse's personal experience while she was with the applicant in India, the AAO finds that the applicant has provided evidence that the cumulative effect of the hardships she would endure in India could be considered extreme.

The record, however, does not establish extreme hardship to the applicant's spouse if she remains in the United States. Counsel states that the applicant's wife would experience financial hardship as a result of separation from the applicant. The record reflects that the applicant's spouse earns an income and contributes to the family's financial expenditures. The record fails to establish that the applicant's wife is unable to address her financial responsibilities with her earnings or that her financial obligations are nondiscretionary or unalterable. The applicant's wife states that the applicant is unemployed, but the record fails to demonstrate that the applicant is unable to contribute to his family's financial well being from a location outside of the United States. Also, the evidence does not show that the applicant's spouse is unable to derive assistance from any other source, such as a family member. It is noted that the U.S. Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

Regarding the psychological impact of the separation from the applicant, the record contains a psychological evaluation prepared by [REDACTED] Ph.D. The evaluation is dated June 3, 2003 and is based on an interview of unknown duration. [REDACTED] that the applicant's spouse will suffer extreme emotional hardship if the applicant is not allowed to return to this country. She noted that the applicant's spouse is clearly depressed and overwhelmed by the responsibilities of her situation. [REDACTED] did not indicate whether the applicant's spouse had ever before received psychological or psychiatric treatment, nor did she recommend any type of therapy to alleviate the applicant's symptoms. The record contains insufficient

evidence upon which to conclude that the applicant's wife's emotional hardship would go beyond that which is normally experienced by similarly situated individuals.

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. The AAO recognizes that the applicant's wife will endure hardship as a result of separation from the applicant. However, her situation, if she remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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 § 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* § 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.