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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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PUBLIC COPY

[REDACTED]

FILE:

Office: NEW DELHI, INDIA

Date: AUG 15 2006

IN RE:

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:

[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, Chief
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 sustained.

The applicant is a native and citizen of India 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 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 U.S. citizen 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. *Decision of the Officer in Charge dated March 10, 2004.*

On appeal, counsel asserts that the CIS has not properly considered all of the factors relevant in this matter regarding the hardships faced by the applicant's U.S. citizen wife. The applicant is appealing in order to demonstrate extreme hardship to his U.S. citizen wife. *Form I-290B dated April 2, 2004.*

In support of these assertions, counsel submits a Brief dated June 7, 2004 in support of the applicant. Also included in the record are Tab 1, Copy of the Birth Certificate of the Applicant's U.S. Citizen Daughter; Tab 2, Copy of the Naturalization Certificate of the Applicant's Spouse's Mother, [REDACTED]; Tab 3, Copy of the Resident Alien Card of the Applicant's Spouse's Father, [REDACTED]; Tab 4, Copy of the Naturalization Certificate of the Applicant's Spouse's Sister, [REDACTED]; Tab 5, Copy of the Naturalization Certificate of the Applicant's Spouse's Sister, [REDACTED]; Tab 6, Psychological Evaluation of the Applicant's Spouse written by [REDACTED] III, Ph.D, Clinical and Forensic Psychologist dated May 28, 2004; Tab 7, Affidavit of the Applicant's Spouse [REDACTED] dated June 3, 2004; Tab 8, Affidavit of the Applicant's Spouse's Sister, [REDACTED] dated June 3, 2004; Tab 9, Affidavit of the Applicant's Spouse's Mother, [REDACTED], dated June 3, 2004; Tab 10, Letter from The Family Services Agency, Inc. dated June 2, 2004; Tab 11, Letter from Companion Benefit Alternatives, Inc., dated May 18, 2004; Tab 12, Letter written by [REDACTED] MD dated June 2, 2004; Tab 13, Medical Records from Punia Hospital & Nursing Home for the Applicant's Spouse dated October 4, 2003; Tab 14, Medical Records from [REDACTED] for the Applicant's Spouse dated November 21, 2003; Tab 15, Medical Records from [REDACTED] for the Applicant's Spouse dated November 3, 2003; Tab 16, Medical Records from Sood Hospital, Jind, for the Applicant's Spouse dated November 18, 2002; Tab 17, Copy of the Applicant's Spouse's Transcript from Montgomery College; Tab 18, Copy of the Applicant's Spouse's Transcript from Northern Virginia Community College; Tab 19, Affidavit from the Applicant's brother, [REDACTED], dated May 28, 2004; Tab 20, Copy of News Article dated May 2, 2004; Tab 21, Copies of Photographs of the Applicant, his Spouse, and their Daughter. The record also includes a Copy of the Naturalization Certificate of the Applicant's Spouse and several tax statements. 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-

....

(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.

In the present application, the record indicates that the applicant entered the United States on or about August 1, 1991 and was admitted with a visitor visa valid until March 31, 1992. The applicant remained in the United States and filed for asylum on August 26, 1992. On April 17, 1993 the Immigration and Naturalization Service (Service) issued the applicant a Notice of Intent to Deny and subsequently denied the asylum application on September 13, 1993. The applicant had an immigration court hearing, and on May 24, 1994 the Immigration Judge issued an order of voluntary departure to the applicant. Initially, the applicant was to leave the United States by June 23, 1994; however, the voluntary departure order was extended until September 30, 1994 and again extended until December 15, 1994. The applicant did not leave the country, and the Service issued him a Warrant of Deportation on August 3, 1995. On April 18, 1996 the applicant married a lawful permanent resident (who is now a naturalized U.S. citizen). On May 18, 1998 the applicant left the United States, thus executing the order of deportation. On March 29, 2001 the applicant's wife naturalized, and on February 4, 2002, the Form I-130 was approved with a priority date of January 13, 1998. On December 6, 2001 the applicant filed a Form I-212 that the District Director approved on January 10, 2002. The applicant filed a Form I-601 waiver on December 12, 2002. On March 10, 2004 the Officer in Charge denied the Form I-601 waiver, finding that the applicant had failed to establish extreme hardship to his spouse. *See Decision of the Officer in Charge dated March 10, 2004.*

The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until May 18, 1998, the date he departed the United States. In applying to adjust his status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of his May 18, 1998 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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 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 is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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 a waiver should be granted because failure to do so will impose extreme hardship upon the applicant's qualifying relative. *Form I-290B*. The AAO notes that extreme hardship to the Applicant's qualifying relative must be established in the event that she resides in India or in the United States, as the qualifying relative is not required to reside outside of the United States based on denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in India. The applicant's spouse has many family ties to the United States, including her six-year old U.S. citizen daughter, U.S. citizen mother, lawful permanent resident father, two U.S. citizen sisters, seven U.S. citizen aunts and uncles, and over 15 U.S. citizen cousins. *Attorney's Brief dated June 7, 2004 and Tabs 1-5*. The applicant's spouse lives with her parents and sisters in the United States. *Attorney's Brief, p.2*. The applicant's spouse has no immediate family members in India apart from distant uncles and aunts with whom she has had little contact since coming to the United States in 1995. *Id.* The applicant's spouse has significant conditions of health. She has burn scars over 70% of her body as a result of two childhood accidents. *Tab 6, Psychological Evaluation of the Applicant's Spouse written by [REDACTED] Clinical and Forensic Psychologist dated May 28, 2004; Tab 7, Affidavit of the Applicant's Spouse dated June 3, 2004; Tab 8, Affidavit of the Applicant's Spouse's Sister [REDACTED] dated June 3, 2004; and Tab 12, Letter written by [REDACTED] MD dated June 2, 2004*. In the first accident, the applicant's spouse's dress caught on fire resulting in serious burns. *Id.* In the second accident, she was playing in the house when she fell against a heater, resulting in burns to her back. *Id.* When the applicant's spouse was 15-16 years old, a close cousin sexually molested her in India. *Tab 6, Psychological Evaluation of the Applicant's Spouse written by [REDACTED] III, Ph.D, Clinical and Forensic Psychologist dated May 28, 2004*. According to the record, the applicant's spouse is suffering from a major depressive disorder as well as a generalized anxiety disorder. *Id.* The applicant's spouse's current symptoms suggest that she is clinically depressed and is likely to feel helpless and overwhelmed. *Id.* A personality test administered by her psychologist revealed scores for psychotic experiences, thought disorder, and social detachment that were elevated, suggesting that with increased stress, her depression could cause a psychotic break and the need for

psychiatric hospitalization. *Id.* The applicant's spouse was also administered several psychological tests measuring the severity of depression and anxiety. *Id.* The results of the psychological assessment indicated that she is currently suffering from very severe symptoms of depression to the degree that she is at risk for psychosis and/or suicide. *Id.* 10 days after her husband departed the United States, the applicant's spouse went to India for six months. *Tab 7, Affidavit of the Applicant's Spouse.* The applicant's spouse again visited India in June 2002 and remained there with their U.S. citizen daughter until November 2003. *Id.* The applicant's spouse became increasingly depressed and anxious while in India. *Id.* She experienced post-traumatic stress disorder during her last trip to India due to her return to a country where she previously experienced extensive traumatization. *Tab 6, Psychological Evaluation of the Applicant's Spouse written by [REDACTED] Clinical and Forensic Psychologist dated May 28, 2004.* A high level of medical care is necessary for treatment of the applicant's spouse's severe psychological problems. *Id.* Medical records corroborate that the applicant's spouse had a substantial increase of her psychological difficulties while in India, with very little amelioration of her depression as a result of the medical care she received. *Id.* See Also *Tabs 13-16 showing hospitalizations and medical treatment in India due to mental stress and depression.* She was never treated by a well-trained psychiatrist or other mental health professional in India in spite of obvious and severe psychological disorders. *Tab 6, Psychological Evaluation of the Applicant's Spouse written by [REDACTED] Clinical and Forensic Psychologist dated May 28, 2004.* Additionally, if she were separated from her family in the U.S., she would also be at a high risk for continued clinical depression and anxiety disorder and potentially psychotic decompensation or even suicide. *Id.* Considering the applicant's spouse's strong family ties to the United States, lack of family ties in India, and significant health conditions, the AAO finds that the applicant has demonstrated extreme hardship to his spouse in the event that she resides in India.

The second part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in the United States. The applicant's spouse's dependency upon her husband goes beyond her need for his support. *Tab 6, Psychological Evaluation of the Applicant's Spouse written by [REDACTED] III, Ph.D, Clinical and Forensic Psychologist dated May 28, 2004.* In her husband, she has found the first person where she can feel safe and secure and move beyond her profoundly traumatic past. *Id.* Without the applicant's emotional support, the applicant's spouse risks significantly increased emotional distress, which likely in turn will seriously impact her ability to parent her daughter. *Id.* The applicant's spouse's severe symptoms of depression, anxiety and psychosis in the absence of her husband, have rendered her much less available to her daughter, and have affected her motherhood abilities, thereby increasing her depression, sense of uselessness, and hopelessness. *Attorney's Brief, p.7.* The applicant's spouse's family members have noticed her depressed state, finding her to be more impatient and irritated with her U.S. citizen daughter. *Tabs 7-8, Affidavits of Support from the Applicant's Spouse's Sister and Mother.* Additionally, there has been a financial impact upon the applicant's spouse by remaining in the United States while her husband resides in India. The departure of the applicant led to the abandonment of the applicant's spouse's studies and as a result, a loss of better job opportunities in the future. *Attorney's Brief, p.9.* While the applicant was in the United States, the applicant's spouse started to complete courses toward an associate degree at Montgomery College, and then transferred to Northern Virginia Community College. *Id.; See Also Tabs 17-18, Educational Transcripts.* The applicant was paying his spouse's tuition. *Attorney's Brief, p.9.* The applicant's spouse had to stop her studies after her husband departed, and she had to vacate her apartment because she could not maintain it alone. *Tab 9, Affidavit from the Applicant's Spouse's Mother dated June 3, 2004.* The applicant's spouse and her daughter moved in with her parents whose income is limited. *Id.* In

Perez v. INS, 96 F.3d 390 (9th Cir. 1996) the court 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. The applicant's spouse's situation is not typical due to her significant health conditions as well as her financial situation. Based on all of the aforementioned factors, the AAO finds that separation will result in extreme hardship to the applicant's spouse.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case is the applicant's overstay of his visitor visa, his untimely departure pursuant to a voluntary departure and subsequent deportation order, and his unlawful presence.

The favorable factors include the presence of his U.S. citizen spouse and six-year old child, extreme hardship to his spouse, his consistent filing of taxes in the United States, and his lack of criminal record.

The AAO finds that the applicant's violation is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.