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FILE:



Office: NEW DELHI, INDIA

Date: NOV 14 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:



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 Acting 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 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 attempted to procure entry into the United States by fraud or willful misrepresentation. The AAO notes that the Acting Officer in Charge erred in finding the applicant inadmissible under section 212(a)(6)(C)(i), as there is nothing in the record to support this charge. *Decision of the Acting Officer in Charge, dated March 31, 2005.* Though the initial Order to Show Cause (OSC) noted his inadmissibility for fraud, that charge was not entered by the immigration judge in his final order. The record of proceeding contains nothing to support this ground of inadmissibility. A letter written to the Applicant from the American Consular Officer states that the applicant is inadmissible under 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. *Letter, American Consular Officer, dated December 13, 2002.* The AAO concurs with this ground of inadmissibility. The applicant is married to a naturalized U.S. citizen spouse. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse.

The Acting Officer in Charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relatives. The application was denied accordingly. *Decision of the Acting Officer in Charge, dated March 31, 2005.*

On appeal, counsel asserts that the applicant has demonstrated that his spouse would suffer extreme hardship if the applicant were removed from the United States. *Form I-290B, dated April 28, 2005.*

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, a letter from counsel, dated June 24, 2003; a letter from [REDACTED] M.D., dated May 27, 2003; a letter from [REDACTED] PA-C, The Anchorage Neighborhood Health Center, dated June 5, 2003; a Written Notice of Termination, dated January 16, 2003; a letter, Municipality of Anchorage, Workforce Development Division, Workforce Transition Center, dated May 23, 2003; a bill, Alaska Internal Medicine & Ped, dated April 1, 2003; a letter of support from Shekhar Chaobal, dated June 16, 2003; an affidavit from the applicant's spouse, dated December 2, 2002; a memorandum from the Vice Consul, U.S. Embassy, New Delhi; Decision of the Immigration Judge, dated April 29, 1988; Decision of the Board of Immigration Appeals, dated July 17, 1992; Decision of the Board of Immigration Appeals, dated November 13, 1998; and the Decision of the United States Court of Appeals, Ninth Circuit, dated November 29, 2000. 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 at New York on December 5, 1985 as a nonimmigrant with permission to remain until June 6, 1986. *Form I-221S, Order to Show Cause*. He remained in the United States and defensively applied for asylum when he was placed into deportation proceedings in October 1987. *Id.; Decision of the Immigration Judge, dated April 29, 1988*. The Immigration Judge found the applicant deportable and excludable pursuant to Section 241(a)(2) of the Act (nonimmigrant visa overstay). *Form I-221S, Order to Show Cause; Decision of the Immigration Judge, dated April 29, 1988*. The Service had incorrectly charged the applicant with being excludable under Section 212(a)(19) of the Act, and at the deportation hearing, the Service deleted this charge of excludability. *Decision of the Board of Immigration Appeals, dated July 17, 1992*. The Board of Immigration Appeals dismissed the applicant's appeal and affirmed the decision of the Immigration Judge. *Id.* The applicant married his current spouse on September 14, 1992. *Marriage certificate*. The applicant moved to reopen his deportation proceedings in order to apply for suspension of deportation; however, the Board of Immigration Appeals denied the applicant's motion to reopen. *Decision of the Board of Immigration Appeals, dated November 13, 1998*. The applicant appealed to the United States Court of Appeals, Ninth Circuit which dismissed his case for a lack of jurisdiction. *Decision, United States Court of Appeals, Ninth Circuit, dated November 29, 2000*. The applicant was given until January 22, 2001 to depart the United States. *Form G-146*. He departed the United States on January 21, 2001. *Form I-392, Notification of Departure/Bond Case, dated January 21, 2001*. On May 17, 2001 the applicant's spouse naturalized as a United States citizen. *Naturalization certificate*. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until January 21, 2001, 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 January 21, 2001 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 violation of 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 citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant's child or that the applicant himself would experience upon removal is not directly relevant to the

determination as to whether the applicant is eligible for a waiver under section 212(a)(9)(B)(v). The only relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is removed. If 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.

The AAO notes that extreme hardship to a qualifying relative of the applicant must be established in the event that he or she resides in India or the United States, as he or she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse travels with the applicant to India, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in India on March 1, 1956 and remained there until 1985. *Affidavit of the applicant's spouse, dated December 2, 2002; Attorney's brief.* According to the record, the applicant's spouse's mother continues to reside in India. *Form G-325A for the applicant's spouse.* The applicant's spouse does not believe she would be able to obtain gainful employment in India, as she has no job history there. *Attorney's brief.* The AAO observes there is nothing in the record that shows the applicant would be unable to contribute to his spouse's and his own financial well-being from a location outside of the United States. The applicant's spouse suffers from frequent migraine headaches which are occasionally debilitating. *Letter from [REDACTED] The Anchorage Neighborhood Health Center, dated June 5, 2003.* When these migraines occur, it is difficult for her to care for her son or to work. *Id.* The applicant's spouse believes that medical care is not nearly as good in India as it is in the United States. *Affidavit of the applicant's spouse, dated December 2, 2002.* While the AAO acknowledges the inconvenience of this health condition, it notes that the applicant's spouse's health condition is non-life threatening and she is still able to function. Further, the record does not establish that she would be unable to be treated for this condition in India. When looking at the aforementioned factors, the AAO does not find that the applicant demonstrated extreme hardship to his spouse if she were to reside in India.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant lost her job at Kmart on March 21, 2003 due to a store closing. *Written Notice of Termination, dated January 16, 2003.* Even while the applicant's spouse was working, it was difficult for her to pay the bills. *Affidavit of the applicant's spouse, dated December 2, 2002.* It is too expensive for the applicant's spouse and her son to frequently visit the applicant in India. *Affidavit of the applicant's spouse, dated December 2, 2002.* They visited on one occasion, but the applicant's spouse's brother paid for the ticket and she was unable to repay him. *Id.* The applicant's spouse can only afford to call the applicant a few times per month because it is so costly. *Id.* The applicant's son suffers from acute asthma and is in need of medical attention

which creates an added expense upon the applicant's spouse. *Letter from [REDACTED] dated May 27, 2003; Medical bill, Alaska Internal Medicine & Ped, dated April 1, 2003.* The applicant's spouse stated that her migraine headaches are stress-induced, and that they have increased exponentially since the applicant left. *Id.* While the AAO acknowledges these difficulties, 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 spouse 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. Additional expenses such as travel and phone calls are part of the normal results of separation. While the AAO does not minimize the applicant's spouse's increase in migraine headaches, it notes that her health condition does not amount to an extreme hardship. When looking at the aforementioned factors, the AAO does not find that the applicant demonstrated extreme hardship to his spouse if she were to reside in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's qualifying relatives 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 section 212(a)(9)(B) 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.