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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

H4

FILE: [REDACTED] Office: NEW DELHI, INDIA

Date: **JUL 25 2008**

IN RE: [REDACTED]

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

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 Officer-in-Charge (OIC), New Delhi, India, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of India who was found 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. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the OIC denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the OIC, dated October 20, 2006.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The record reflects that the applicant entered the United States from Mexico without inspection in April 2004 and remained in the country until he voluntarily departed in January 2006. For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence in April 2004. From that date until January 2006, he accrued more than two years of unlawful presence, and when he departed from the United States he triggered the ten-year-bar. Consequently, the

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is correct.

The AAO will now address the finding that a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 an applicant is not a consideration under the statute, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994)).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant’s wife must be established in the event that she remains in the United States without the applicant, and in the alternative, that she joins the

applicant to live in India. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

On appeal, counsel states that courts have consistently regarded family unity as the most important factor in considering extreme hardship. He stated that the decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 459 (1987), citing *INS v. Errico*, 385 U.S. 214 (1966), indicates that "extreme hardship" is not a fixed and inflexible concept; and its application and interpretation must be carried out in favor of the alien. Counsel asserts that extreme hardship to the applicant's wife is present here based on her close relationship to her husband and family members; her lack of family ties outside the United States; her acculturation to life in the United States; the unavailability of medical care in India for fertility and gynecological problems; and the economic and social hardships in India.

The psychological report by [REDACTED] which was based on an interview conducted on November 29, 2006, indicated the following. [REDACTED] reported that her husband provides her with physical, emotional, and financial support and losing him would devastate her and her family. Her parents and five siblings and her husband's two sisters live in the United States and in several years his parents will relocate here. She fainted three times in her work place and home and required emergency room care, where she was treated for depression and anxiety and was proscribed Prozac. She has a history of depression, which increased because of the immigration proceedings, and has often thought of ending her life. She has generalized anxiety, including nervousness, somatic complaints, feelings of restlessness, psychomotor agitation, poor concentration, irritability, and sleep disturbance; and has had panic attacks. She cannot live in her husband's village in India because she would not have the basic necessities and benefits she now has in the United States, and would she lose family contacts, finances, and healthcare. She wishes to provide care to her 60-year-old father who has uncontrolled diabetes and to her 56-year-old mother. Her education, employment, healthcare, and religious freedom as a Sikh will be limited in India. Her prior lifestyle in India, which was modern, differs from her husband's and his family's rural lifestyle in India. She and her husband will not find employment in India, where wages are low. During prior visits to India she was hospitalized on account of illnesses and had fever, diarrhea, weakness, fatigue, dehydration, loss of weight, poor appetite, and vomiting and prophylactic medications did not help. She may require gynecological and fertility specialists, which are not available in her husband's village. [REDACTED] indicated that her husband grew up in poverty and that he presently works on the family's farm as a means to keep his mind occupied; he worries about separation from his family.

The record fails to establish that the applicant's wife would endure extreme hardship if she remains in the United States without the applicant.

The AAO agrees with counsel in that with regard to family separation, courts have stated that "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).

The record reflects that the applicant's wife is very concerned about separation from her husband. [REDACTED] reports [REDACTED] as having a history of depression, which increased on account of her husband's immigration problems, and as being prescribed Prozac. However, the AAO finds that the record contains no documentation that would substantiate that [REDACTED] has a history of depression, was treated for fainting, and was prescribed Prozac for depression and anxiety. 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)).

In the psychological report [REDACTED] diagnosed [REDACTED] with Major Depressive Disorder, Panic Attacks, R/O Generalized Anxiety Disorder, and Psychosocial Issues. Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted report is based on a single interview between the applicant's spouse and [REDACTED]. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the depressive and generalized anxiety disorders experienced by the applicant's spouse. Moreover, the conclusions reached in the submitted report, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering [REDACTED] findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

Furthermore, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir. 1980) (severance of ties does not constitute extreme hardship). In *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shoostary's lawful permanent resident wife and two U.S. citizen children are separated from him. *Id.* 1050-1051. As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of the applicant's wife, if she remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which will be endured by the applicant's wife, is unusual or beyond that which is normally to be expected upon removal. See *Hassan*, *Shoostary*, *Perez*, and *Sullivan*, *supra*.

The applicant makes no claim of financial hardship to his wife if she remained in the United States without him.

The record is insufficient to establish that the applicant's wife would endure extreme hardship if she joined the applicant in India.

The conditions in the country where the applicant's wife would live if she joined her husband are a relevant hardship consideration. While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted).

The applicant's wife asserts that they will be unable to find employment in India, and that her education, healthcare, and religious freedom will be limited in India. However, no documentation was furnished in support of her assertion. Nor does the record contain documentation substantiating the applicant's wife's claim of being hospitalized during prior visits to India and of requiring gynecological and fertility specialists which are 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, supra*.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

The record fails to support a finding of significant hardships over and above the normal economic and social disruptions involved in removal so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.