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FILE: [redacted] Office: SAN FRANCISCO DISTRICT OFFICE Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 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 District Director, San Francisco. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of India, who was found inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i), 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the spouse of a U.S. citizen.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly.

On appeal, counsel contends that the applicant has established extreme hardship to his wife, and that the district director erred in finding the applicant inadmissible for unlawful presence. In support of the appeal, counsel submits a brief and additional medical documentation regarding the health of the applicant's wife. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—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.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the applicant's fraudulent use of a passport to procure admission to the United States in 1991. *Decision of the District Director* (July 28, 2003) at 2. The applicant does not contest the district director's determination of inadmissibility 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.

8 U.S.C. § 1182(a)(9)(B). Counsel contends that district director erred in stating, "the applicant has been working in the United States since May 1992, and the applicant has remained unlawfully in the United States

for the last eleven years" and concluding that the applicant was inadmissible under this section. *See Decision of the District Director, supra,* at 2.

Section 212(a)(9)(B)(iii)(II) of the Act states, in pertinent part, "[n]o 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 . . . unless the alien during such period was employed without authorization in the United States." 8 U.S.C. § 1182(a)(9)(B)(iii)(II). The record does not reflect that a determination has been made as to the bona fides of the applicant's asylum claim. The proper filing of an affirmative application for adjustment of status has also been designated as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum of Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). Furthermore, the accrual of unlawful presence for purposes of inadmissibility determinations under section 212(a)(9)(B)(i)(II) of the Act begins no earlier than the effective date of this amended section, April 1, 1997.

The record reflects that applicant admitted unlawful entry into the United States in 1991. He departed pursuant to advance parole in 2003, and was paroled back into the United States on June 6, 2003 to continue pursuing his application for adjustment. By applying to adjust status, the applicant is seeking readmission within 10 years of his 2003 departure.

The record also reflects that the applicant filed an application for asylum on August 16, 1991, shortly after his entry into the United States. Pursuant to the regulations in effect at that time, the applicant was approved for employment authorization on the basis of that application, in increments of one year, from September 17, 1991, until October 6, 2001. He filed an affirmative application for adjustment of status to that of lawful permanent resident on April 3, 2001. He then obtained employment authorization on the basis of his pending adjustment application on the same date. The record reflects that he appeared at the San Francisco Asylum Office on April 13, 2001, "re District's request, was told to withdraw in order for husband's final petition to be approved." *San Francisco Asylum Case Status Inquiry Form* (April 13, 2001).[1] His asylum application was withdrawn as of that date.

The record in this case thus reflects that the applicant has not accrued any unlawful presence for purposes of the Act. Although he concedes entering the United States unlawfully, all times since April 1, 1997, the applicant had either an affirmative asylum application or affirmative adjustment pending. Therefore, on the present record, the applicant is not inadmissible to the United States under section 212(a)(9)(B) of the Act and the appeal of the district director's finding in this regard is sustained.

As the district director's error with respect to inadmissibility under INA § 212(a)(9)(B) does not affect the finding of inadmissibility based on the applicant's fraudulent use of a passport to enter the United States, the

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[1] The AAO notes that the applicant was not required to withdraw his application for asylum in order to adjust status to that of a lawful permanent resident. A lawful permanent resident remains an "alien," and as such, if not otherwise barred, retains eligibility to pursue an application for asylum. *See* INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) ("Any alien who is physically present in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section . . .."). *See also* INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States.") Section 245 of the Act, under which the applicant seeks to adjust status, also does not require an applicant to withdraw a pending asylum in order to be eligible for adjustment. *See* 8 U.S.C. § 1255.

question remains as to whether the applicant qualifies for a waiver of inadmissibility. Section 212(i) of the Act provides, in pertinent part:

> (i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . ."

8 U.S.C. § 1182(i)(1). Hardship to the alien himself is not a permissible consideration under the statute. A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. In this case, the only qualifying relative is the applicant's wife.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[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). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (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); *Mejia-Carillo v. INS,* 656 F.2d 520, 522 (9th Cir. 1981) ("[T]his court has stated that separation from family alone may establish extreme hardship.") The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit

Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

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).

The record reflects that the applicant's wife of five years has been diagnosed with several medical conditions, including valvular heart disease, rheumatic heart disease, heart enlargement, hypertension, chronic joint pain, severe allergies, spinal, shoulder, and neck injuries and pain, carpal tunnel syndrome, spinal stenosis (narrowing), tendinitis, rapid heart rate, and chest pain, all of which at times render her bedridden and unable to work. *See Letter of* August 20, 2003); *Letter of* *MD* (July 11, 2002); *Doctor's Notes, Octagon Risk Services* (July 11, 2003-September 11, 2003). She states that stress and anxiety can serve to exacerbate her conditions. *Supplemental Declaration of* (September 11, 2003). She takes several medications to cope with these conditions. *See id. and medical documentation, cited in full, supra.* When she does work, she is on "light duty." *Doctor's Notes, supra.* Counsel and the applicant's wife indicate that these conditions could cause stroke or heart attack at any time; however, this assertion is not supported in the medical documentation. There is little in the record to address her long-term prognosis or treatment plan, or to support several of the specific health claims made in the statement of the applicant's wife and by counsel. Nevertheless, the medical documentation submitted is sufficient to support a finding that the applicant's wife suffers from serious and significant health conditions. With respect to the availability of health care in India, a country report in the record indicates only, "[m]edical care is free to all citizens; however, availability and quality are problems, particularly in rural areas." *U.S. Department of State Country Reports on Human Rights Practices*, "India" (2001).

The record is silent as to whether the applicant's wife has family ties in India, although it is noted that she was born in the Philippines. In the United States, she has an adult son and an adopted teenage daughter, who lives with the couple. Her father is deceased, and her mother lives in San Francisco, California. The applicant's wife states that she relies on her husband for emotional support, and is particularly concerned that if they are separated, her adopted daughter will lose the only father she has known. She is also concerned that her ill health might lead to death or further incapacitation, leaving her daughter without any parent at all.

As to financial hardship, counsel and applicant's wife state that her continued employment is in danger, due to the high number of absences and her inability to perform the full range of duties. Although there is nothing submitted from her employer to show her absences, the medical records reasonably support the contention that she would have serious difficulty maintaining employment or obtaining new employment. In 1999, the latest year for which financial records are provided, the applicant and his wife supplied household income in roughly equal proportions. *See* Form I-864, *Affidavit of Support under Section 213A of the Act* (approved April 2, 2002). It appears that the applicant and his wife are still employed consistently with their employment in 1999. *See Doctor's Notes, supra* ("The patient . . . works as a nurse case manager at Seton Medical Center. She is known to me from that work."); *Letter of Alicia Young, Co-manager, Daily [sic] City Cab Company* (June 25, 2002).

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that the applicant's wife faces extreme hardship if the applicant is refused admission. The record reflects that his wife suffers from numerous health conditions which, while not currently requiring 24-hour care, greatly increase her financial, medical, and emotional reliance on her husband to a degree that is far above and beyond that which would be ordinarily be expected between spouses not similarly afflicted. If she relocates to India, it is likely that she will not receive the uninterrupted medical care she requires for her several serious medical conditions, at least one of which (spinal stenosis) appears to be in the early stages of diagnosis and treatment. She would also face significant cultural barriers to adjustment to India, including a language barrier, and difficulty obtaining and maintaining employment due to her ill health. The risk to her health in relocating to India constitutes extreme hardship. Additionally, and particularly in view of 9th circuit law emphasizing the weight of hardship that would result from family separation, separation from her husband under these circumstances would constitute an extreme hardship, significantly greater than that which is commonly experienced in most cases of separation. Accordingly, the totality of the circumstances in this case warrants a finding of extreme hardship to the applicant's spouse.

The AAO also 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 that are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the applicant's fraudulent use of a passport to enter the United States. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's spouse if he were refused admission, his subsequent attempts to comply with immigration laws, his otherwise clean criminal record, his *bona fide* marriage to a U.S. citizen for over five years, and the letter on his behalf from his step-daughter.

The AAO finds that, although the immigration violation committed by the applicant was serious and cannot be condoned, when 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.