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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEW DELHI Date: DEC 7 2004

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The waiver application was denied by the Officer-in-Charge, New Delhi. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of India who, on or about October 17, 2002, made an application for a "K-3" nonimmigrant visa as the spouse of a U.S. citizen who filed a relative petition on his behalf, for the purposes of awaiting the approval of the relative petition and availability of an immigrant visa, pursuant to INA § 101(a)(15)(K)(ii). The applicant's relative petition was approved as of September 5, 2002. In connection with the application for a K-3 nonimmigrant visa, the officer-in-charge determined that the applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

The officer-in-charge found that that the applicant failed to establish that refusal of his admission would result in extreme hardship to his U.S. citizen spouse and denied the waiver application accordingly. *Decision of the Officer-in-Charge* (August 10, 2004). On appeal, counsel contends that the officer-in-charge applied an incorrect legal standard in making the waiver determination. The entire record was reviewed and considered in rendering this decision.

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 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 U.S. 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 such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B). In the present application, the record indicates that the applicant was admitted to the United States on a B2 nonimmigrant visa on June 5, 1993, authorized to remain for one month. He did not depart the United States until October 20, 2000. 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 of the Act, April 1, 1997. The applicant accrued unlawful presence from April 1, 1997, until October 2000, or a period of over three years. The applicant is now seeking admission within 10 years of his 2000 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. The inadmissibility determination of the officer-in-charge is affirmed.

If an alien seeking a K nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

> (a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or "K" nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

The applicant filed the waiver application on Form I-601 on July 10, 2003 with the American Consulate in Chennai, India. The Department of State promptly forwarded the application to CIS, which denied the application on August 10, 2004. The question raised in the instant appeal is the appropriate standard to be applied to adjudication of the Form I-601.

Counsel contends that, because the underlying application is for a nonimmigrant visa, use of the "extreme hardship" standard contained in the statutory waiver provision applicable to immigrants is inappropriate. Counsel contends that the relevant statutory provision is INA § 212(d)(3), which provides:

> (3) Except as provided in the subsection, an alien
>
> > (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General [now Secretary of Homeland Security (DHS Secretary)] of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [DHS Secretary] . . ..

8 U.S.C. § 1182(d)(3). The BIA has held:

> In deciding whether or not to grant an application under section 212(d)(3)(B), there are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's immigration law, or criminal law, violations, if any. The third

> factor is the nature of the applicant's reasons for wishing to enter the United States.

Matter of Hranka, 16 I&N Dec. 491, 492 (BIA 1978). Counsel contends that the standard enunciated in this precedent decision is the proper standard for determining whether the applicant is eligible for a waiver of inadmissibility under INA § 212(a)(9)(B)(II). As support for this contention, counsel analogizes inadmissibility waivers to affidavits of support, citing the Department of State Foreign Affairs Manual (FAM), which states:

> Since [K visa applicants] are technically applying for non-immigrant visas, they must use the Form I-134, Affidavit of Support, if the consular officer determines that a Form I-134, is necessary. The consular officer shall not require or accept Form I-864, Affidavit of Support Under Section 213A of the Act in K visa cases. Such applicants will, however, have to submit Form I-864, Affidavit of Support Under Section 213A of the Act, to the Bureau of Citizenship and Immigration Services (BCIS) at the time of adjustment of status to that of a lawful permanent resident (LPR).

9 FAM 40.41; *see also* 22 C.F.R. § 40.41. Counsel therefore contends that, similarly, K visa applicants need only apply for a waiver of inadmissibility as a nonimmigrant under 212(d)(3). Counsel states that the immigrant visa standard will not apply until the applicant, having arrived in the United States, makes an application to adjust status to that of a lawful permanent resident.

Counsel's reliance on this analogy is misplaced, inasmuch as there are regulations directly applying to inadmissibility waivers for K visa applicants. The Department of State regulation provides as follows:

> § 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.
>
> . . .
>
> (b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:
>
> (1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.
>
> . . .
>
> (4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.
>
> . . .

> (d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

22 C.F.R. § 41.81 (emphasis added) (amended by 66 Fed. Reg. 19393, Apr. 16, 2001). The related CIS provision is 8 C.F.R. 212.7(a)(1), cited *supra,* specifically providing that K visa applicants shall file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1)(66 Fed. Reg. 42587, Aug. 14, 2001). The supplemental information published in the Federal Register along with this amendment to 212.7(a)(1) stated:

> Although the new K-3/K-4 is a nonimmigrant classification, the alien spouse will still be required to meet certain State Department requirements and regulations as though they [sic] were applying for an immigrant visa. . . . Although entering as nonimmigrants, these aliens plan to ultimately stay in the United States permanently. . . . [A]pplicants for the new K-3/K-4 classification are subject to section 212(a)(9)(B) of the Act. . . . [I]n order to ensure that the K-3/K-4 nonimmigrants have the opportunity to apply for the same waiver provisions as do the K1/K-2's, 8 C.F.R. 212.7 is amended to include them.

66 Fed. Reg. 42587 (August 14, 2001). The requirement that the consular officer determine a K nonimmigrant visa applicant's eligibility as an immigrant "insofar as practicable," as stated in 22 C.F.R. § 41.81(d), is met by the provision in the CIS regulation requiring the K nonimmigrant visa applicant to apply for a waiver under the provisions related to immigrant visas. If CIS were to approve a Form I-601 waiver application, the K nonimmigrant would no longer be inadmissible, and so would not need the benefit of INA § 212(d)(3).

The visa and waiver application process established by regulation ensures that the Department of Homeland Security will not admit to the United States, even temporarily, an individual who is ineligible to fulfill the purpose of his or her admission. Further, the immigration process for eligible individuals is streamlined, in that, since under 8 C.F.R. § 212.7(a)(4) the waiver of inadmissibility is valid indefinitely, the alien's eventual application for adjustment of status will be adjudicated in the United States in light of the already-approved waiver of any identified inadmissibility grounds.

Counsel's citation of cases in support of the proposition that nonimmigrant waivers should be granted somewhat liberally are inapposite to the Form I-601 adjudication, in that a significant reason for the liberal construction is the temporary nature of the applicant's stay in the United States. K-3 visa applicants intend to remain in the United States permanently. The Form I-601 process ensures that waivers for K-3 applicants will be scrutinized under the appropriate standard in recognition of their intent to immigrate to the United States, and also capitalizes on the existing immigrant waiver process to provide for consistency, transparency, and the opportunity for the applicant to be heard on the merits of the application.

Finally, although 8 C.F.R. § 212.3, the CIS regulation governing waivers under INA § 212(d)(3), does not explicitly preclude a K nonimmigrant visa applicant from seeking relief under INA § 212(d)(3), whether to

grant this relief is a matter entrusted to the discretion of the Secretary of Homeland Security, upon the recommendation of the Secretary of State. The Administrative Appeals Office concludes that 8 C.F.R. § 212.7(a)(1), by requiring the K nonimmigrant to seek a waiver on the same terms as an immigrant visa applicant, must be seen as precluding CIS from exercising the discretion under INA § 212(d)(3) in the applicant's favor. The supplemental information cited above, 66 Fed. Reg. 42587, clearly supports this conclusion. Further, as an alternative ground for this decision, the AAO concludes that, even if 212.7(a)(1) does not actually *preclude* granting relief under INA § 212(d)(3) of the Act, it would not be an appropriate exercise of discretion to grant relief under INA § 212(d)(3) of the Act to an alien who does not intend his sojourn in the United States to be temporary.

The officer-in-charge, therefore, correctly concluded that the standard for granting a waiver of inadmissibility stated in INA § 212(a)(9)(B)(v) governs the adjudication of the applicant's Form I-601.

In this instance, the officer-in-charge determined that the applicant did not qualify for an immigrant waiver in that he failed to establish that the hardship faced by the U.S. citizen spouse rose to the level of "extreme," as required by INA § 212(a)(9)(B)(v), *supra*. Evidence of hardship is not supplemented on appeal. Counsel contends that the applicant's spouse "made a *prima facie* showing that she will suffer extreme hardship if her husband is not permitted to travel to the U.S. to join her." *Applicant's Brief in Support of Appeal* (September 7, 2004), at 11. For the reasons explained above, the AAO will examine whether the applicant established eligibility for the immigrant waiver under INA § 212(a)(9)(B)(v), not whether the evidence presented constitutes a "*prima facie* showing."

Eligibility for a waiver of inadmissibility under INA § 212(a)(9)(B)(v) is dependent first upon a showing that the bar would impose an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien himself is not a permissible consideration under the statute. The qualifying relative for whose benefit the waiver may be granted in this case is the applicant's spouse, Ms. Condy.

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. 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). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion favorably to the applicant. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

The record reflects that is a 36-year-old U.S. citizen born in California, trained as an attorney specializing in immigration law. She has lived in the United States her entire life with the exception of brief employment in Canada. She met the applicant in the United States in 1999 and married him in India on May 16, 2002. Of particular significance, she was aware of his unlawful status in the United States prior to their marriage. She traveled to India to marry him after he departed the United States to return to India to visit his father, who was gravely ill, knowing that he may be barred from returning to the United States under INA § 212(a)(9)(B)(II). Her family ties in India consist of the applicant and his extended family. Her U.S. citizen mother and father and her U.S. citizen half-brother live in the United States. Her parents live in California and she visits them regularly. The applicant indicates that her father is 75 years old and is disabled by severe rheumatoid arthritis.

expresses several concerns related to country conditions in India, where she would relocate to avoid separation from the applicant. She fears difficulty adjusting to life in that she does not speak the Indian language of the applicant's region She claims to have tried taking a class to learn it, but found it incomprehensible, even though she learned to speak other languages relatively easily. She also fears discrimination, social isolation, and, at worst, violent attacks directed at her and the applicant because they are an interracial couple, because she is American, and because the applicant belongs to a minority religion in India (Christian). She is particularly concerned about the very different societal attitude towards women in India, including significantly less social freedom for women, acceptance of domestic violence by a large margin of the population, including women, pressure to remain in the home and not work, and customs and traditions related to her role as a young wife and daughter-in-law by which she felt oppressed, including in her husband's home among his extended family, during her 2002 visit to India. Applicant's Exh. 28-35. *See, e.g.*, U.S. Department of State *Country Reports on Human Rights Practices 2001* (March 4, 2002) (citing "extensive societal violence against women; legal and societal discrimination against women . . .. Women experience economic discrimination in access to employment and credit, which acts as an impediment to women owning a business.")

Much of the country conditions documentation in the file addressed to the security situation in India, including several U.S. Department of State (DOS) *Travel Advisories* and *Public Announcements*, is somewhat outdated. Contrary to the situation in mid-2002, a review of the current DOS travel information reveals that there is currently no Travel Advisory or Public Announcement warning or recommending avoiding travel to India. However, the DOS *Consular Information Sheet* for India indicates, "[t]here are occasional terrorist bombing incidents in various parts of India . . .. There is no indication that these attacks are directed against U.S. citizens or other foreigners. However, terrorist groups, some of which are linked to Al-Qaeda and have been previously implicated in attacks against U.S. citizens, are active in India and have attacked and killed civilians." (accessed at http://www.travel.state.gov/travel/india.html on November 12, 2004). DOS also recommends avoiding the reas and the border between India and Pakistan. *Id.*

Ms. Condy also expresses concern for the financial impact if the applicant is refused admission to the United States. As an attorney, she makes between $65,000-120,000 per year in the United States. *Letter of K. David Anderson, Anderson Cross Border Law Corp.* (October 1, 2002). The applicant also has a job offer in the United States, contingent on his admission, that would pay him $40,000-50,000 annually. *Letter of Paul McAleese, Owner, Kells Restaurant* (September 27, 2002). There is evidence in the record that it is difficult for American lawyers to practice law in India, due to laws and policies that favor local firms over outsiders. *See, e.g., Protecting One's Turf?* The Economic Times (May 18, 2002) ("only an Indian citizen has the right to practice and be enrolled as an Advocate in India . . . a national of any other country may be admitted as an Advocate, if citizens of India are permitted to practice law in that other country ('reciprocity')"). She also fears that, in addition to discrimination and societal pressure against women working outside the home, her general prospects for finding employment would be dim. (February 2, 2001) ("high literacy level has failed to better women's economic lot . . . the percentage of women in paid jobs in the state is slightly less than 16 percent. . . has three times the national unemployment level.") She also asserts that it will be harder for the applicant to get work in India at his age (35). She also notes that the cost of airfare between India and the United States ($2000-3000), would make it difficult to mitigate the effects of separation by visiting friends and family or inviting them to visit in India, or visiting the applicant if she remains in the United States and he is refused admission.

During her separation from the applicant, has been diagnosed with stress-related frequent headaches and migraines. *Letter of Peter Marr, MD* (September 24, 2002). A recommendation was made for a neurological consultation, but the record has not been updated with further information regarding her diagnosis, prognosis, or treatment plan. She stated that she has gained 25-30 pounds and experiences sleep disturbances due to stress. A therapist described her condition as "[m]ixed anxiety and depressed mood . . . in response to an identifiable psychosocial stressor(s). . . . in excess of what would be expected from exposure to a stressor, and significant impairment in social and occupational functioning." *Letter from Alison B. Costa, M.A., M.F.T.* (October 1, 2002).

Finally, is concerned that, if she waits in the United States for the bar against the applicant's admission to expire, she will be over 40 years of age and may be unable to have children. She does not want to raise children, especially girls, in India, due to the society's emphasis on maintaining particular gender roles.

In summary, the hardship would face if she relocated to India includes difficulty in finding employment in her own field and difficulty in finding employment in general for herself and the applicant, potentially resulting in a significantly lower standard of living and/or reliance on the applicant's family for support; considerably different and restrictive cultural attitudes towards women and wives, which appear to permeate even the applicant's family circle, and general cultural adjustment difficulties including a language barrier; the general danger Americans face traveling abroad at this time, and in India in particular; and separation from her family in the United States, particularly her elderly and disabled father. If she remains in the United States and the applicant is refused admission faces separation from her husband; loss of his financial contributions to the household; the financial strain of airfare to visit him; potential continuation of migraine headaches, weight gain, depression, and anxiety; and the choice to conceive now, in the absence of the applicant to help her raise their child.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that Ms. Condy faces extreme hardship if the applicant is refused admission. Particularly if she remains in the United States, the record demonstrates that she faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States or refused admission. Although CIS is not insensitive to her situation, the financial strain of visiting the applicant in India and the emotional hardship of separation, including the applicant's physiological symptoms of stress, are common results of separation and do not rise to the level of "extreme" as contemplated by statute and case law. In limiting the availability of the waiver to cases of "extreme hardship," Congress provided that a waiver is not available in every case where a qualifying family relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The issues raised by Ms. Condy with respect to relocating to India are not insignificant, however, the hardship she faces if she relocates to India must be significantly discounted in light of the fact that she married the applicant well after becoming aware of his potential inadmissibility to the United States. *See Carnalla-Nunoz v. INS,* 627 F.2d 1004 (9th Cir. 1980); *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) (after-acquired equities are entitled to less discretionary weight). On the record, the concerns expressed by Ms. [redacted] with regard to relocating to India, particularly when taking into account her prior knowledge of his inadmissibility, do not rise to the level of extreme hardship. The applicant and [redacted] appear to be educated and in a better position financially than many in terms of their ability to adjust and establish a life together in India. Although [redacted] has concerns regarding cultural adjustment, even within the applicant's family, it has not been shown that she and the applicant cannot establish themselves independently in an urban area that would be less bound by traditional customs. Whether or not she is able to practice law, her high level of education will likely enable her to find suitable employment. The AAO notes that inability to pursue one's chosen career or reduction in standard of living does not necessarily result in extreme hardship. *See Ramirez-Durazo v. INS,* 794 F.2d 491, 499 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shooshtary v. INS,* 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.") The AAO therefore finds that the applicant has not established that his spouse faces extreme hardship if she relocates with him to India.

The applicant's spouse faces the decision of whether to remain in the United States or relocate to avoid separation. However, this is a factor that every case will present, and the BIA has held, "election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour,* 11 I&N Dec. 306, 307 (BIA 1965). The spouse's desire not to relocate does not warrant granting a waiver, in the absence of specific facts establishing that her doing so will result in extreme hardship to her. As noted, the applicant has not established this fact.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). The denial of the application for waiver of inadmissibility by the officer-in-charge was therefore proper and is affirmed. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.