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U.S. Citizenship and Immigration Services

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MAY 02 2007

FILE: [redacted] Office: NEW DELHI Date:

IN RE: Applicant: [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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant, [redacted] is a native and citizen of Bangladesh 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. [redacted] a naturalized citizen of the United States, is the husband of the applicant. [redacted] seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The OIC found the applicant failed to establish that she merits the grant of a waiver of inadmissibility and denied the application.

On appeal, counsel states the following. The medical condition of the applicant's son has an impact on his father. Unless an applicant was to be put to death upon arrival in the native country, all circumstances resulting from "the normal results of deportation or removal" are to be expected. Congress has enacted legislation to reunite families since the enactment of the Illegal Immigration and Alien Responsibility Act, Pub. L. 104-208. With battered spouses, CIS considers and accepts the opinion of a trained emotional impact professional. The applicant submitted evidence of the child's health problem. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) did not have testimony or evidence of emotional hardship through an expert or opinion witness; the opinion of a trained professional is being submitted here. [redacted] was not aware at the time of his marriage that his wife was acquiring unlawful presence in the United States. The applicant has been diagnosed with a uterine cist requiring surgery, as shown in the medical records, and will be hospitalized and her mother will not be available to care for the child.

The AAO will first address the director's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(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, 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.

. . .

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). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II).[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. DOS Cable, *supra. See also Matter of Rodarte,* 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The record reflects that [redacted] was unlawfully present in the United States for more than one year. She was admitted into the United States on October 15, 1993 as a conditional resident until October 14, 1995 based on a petition filed by her former U.S. citizen spouse. In July 1995, her former spouse filed a petition for dissolution of their marriage and the divorce was finalized on April 3, 1996. On July 21, 1996, the applicant married her present spouse who was a lawful permanent resident. She returned to Bangladesh in January 2001. [redacted] failed to file any application for removal of her conditional resident status in the United States. Thus, she accrued unlawful presence from April 1, 1997 until her departure in January 2001, which triggered the ten-year bar. *Decision of the OIC, dated August 30, 2005.*

The OIC found the applicant did not merit a waiver of inadmissibility. In the decision, the OIC described the extreme hardship factors that must be present in order to waive inadmissibility for unlawful presence. The OIC concluded that the statements of the applicant's husband about employment in Bangladesh, his studies, his health problems, and his son's health problems due to living in Bangladesh did not rise to the level of extreme hardship, as required by the Act.

The AAO will now address the OIC's conclusion that a waiver of inadmissibility is not warranted in the present case.

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 the applicant and her children is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative, which in this case is the applicant's husband. If extreme hardship to the qualifying relative is

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[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] DOS Cable, supra.; and IIRIRA Wire #26, HQIRT 50/5.12.

established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (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, 564 (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 564. 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).

The AAO will now apply the *Cervantes-Gonzalez* factors in its consideration of hardship to the applicant's husband. Extreme hardship to the applicant's husband must be established in the event that he joins the applicant; and in the alternative, that he remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In an affidavit signed on September 29, 2004, the applicant's husband makes the following statements. It was not known to his wife that her attorney did not address her immigration status. They were advised that she needed to return to Bangladesh to obtain an immigrant visa. His son stayed with his wife in Bangladesh and he returned to the United States in order to keep his job. His family has not been together for three years. He works as a shift manager at Papa John's Pizza, earning $402.50 every two weeks. He does not believe he could find employment in Bangladesh. He has been attending classes at Purdue University, Ft. Wayne, Indiana, and will complete his studies in industrial engineering technology in two years. He misses his family and talks with them every night. He has trouble sleeping and concentrating on his studies and job. The separation has been hard on his son who would benefit from medical care and education in the United States, and would suffer less from allergies here.

The record contains letters from medical doctors concerning the applicant's son. The document from [redacted], M.D., F.A.A.P., states that the applicant's son, who was born on October 27, 1997, had health problems the first year after his birth. The doctor indicated that the boy required immunization, and that some were not available in the country. The letter from [redacted] assistant professor, neonate and child specialist, [redacted] (Children) Hospital, states that when the applicant's child was 30 days old he had a major surgery for abdominal problems because of the rota virus and indicates that there is a possibility of a re-attack of this. The doctor states that from then on the child has severe multiple problems

involving gastritis, abdominal pain, rashes, frequent loose motion, blood dysentery, severe separation anxiety, very high fever, and restlessness. The doctor states that the weather and atmosphere of Bangladesh are not suitable for the child's physical and mental health and that he should return to the United States for proper medical support. According to the doctor, there is no government subsidy for medical purposes. The doctor states that the child wants to be with the father. *Letter from* [redacted], dated May 7, 2003.

The letter, dated April 1, 2003, from [redacted] MBBS, at the Skin Care Center, states the following. The applicant's son came to see him regarding generalized rash all over the body, pruritis, fever, tiredness, and mild problems in breathing. His diagnosis was "urticaria of cholinergic variety." The patient was treated and cured, but came back the next week with the same problem. The child has urticaria and abdominal pain, lactose intolerance, eczema, etc. He was under the treatment of a renowned pediatrician in the United States. The weather of Bangladesh is probably not suitable for the patient. The child is totally dependent upon his mother.

U. S. 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).

However, the fact that the applicant has a U.S. citizen child is not sufficient in itself to establish extreme hardship. The general proposition is that the mere birth of a deportee's child who is a U.S. citizen is not sufficient to prove extreme hardship. The BIA has held that birth of a U.S. citizen child is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). In *Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985), the Seventh Circuit has stated that an illegal alien cannot gain a favored status merely by the birth of a citizen child. The Ninth Circuit has found that an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child. *Lee v. INS*, 550 F.2d 554 (9th Cir. 1977). In a per curiam decision, *Banks v. INS*, 594 F.2d 760 (9th Cir. 1979), the Ninth Circuit found that an alien, illegally within this country, cannot gain a favored status on the coattails of his (or her) child who happens to have been born in this country.

Furthermore, in *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the BIA's 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). The Ninth Circuit in *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.

The record contains a clinical evaluation and psychological test of [redacted], dated September 21, 2004. The evaluation by [redacted] licensed clinical psychologist, indicated that [redacted] is dealing with clinical symptoms of depression secondary to the separation from his wife and son. [redacted] stated that the symptom pattern is clinically significant enough to recommend treatment and possible medication evaluation. [redacted] indicated that [redacted] depression is directly related to the current separation from his family.

The input of any mental health professional is respected and valuable. However, the AAO notes that the submitted evaluation is based on a single interview between [redacted] and the psychologist. The record fails to reflect an ongoing relationship between a mental health professional and [redacted] or any history of treatment for the clinical symptoms of depression suffered by [redacted] Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. It has taken into consideration [redacted] depression. However, the AAO finds that [redacted] situation, if he 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. The record before the AAO is insufficient to show that the emotional hardship that has been endured by [redacted] while separated from his family, is unusual or beyond that which is normally to be expected upon deportation.

The conditions of Bangladesh, the country to which [redacted] will join his family, 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). Even a significant reduction in the standard of living is not by itself a ground for relief. *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986). Economic hardship claims of not finding employment in Mexico and not having proper medical care benefits do not reach the level of extreme hardship. *Marquez-Medina v. INS*, 765 F.2d 673, 677 (7th Cir. 1985). "Second class" medical facilities in foreign countries are not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). In *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), the Ninth Circuit upheld the BIA's finding that hardship in finding employment in Mexico and in the loss of their group medical insurance did not reach "extreme hardship."

However, in *Carrete-Michel v. INS*, 749 F.2d 490, 493 (8th Cir. 1984), the court stated that the BIA improperly characterized as mere "economic hardship" [redacted] claim, which was supported by evidentiary material, that he would be completely unable to find work in Mexico. The court stated that "[a]lthough economic hardship by itself cannot be the basis for suspending deportation, *Immigration and Naturalization Service v. Wang,* 450 U.S. at 144, 101 S.Ct. at 1031, we agree with the Ninth Circuit that there is a distinction between economic hardship and complete inability to find work. *Santana-Figueroa,* 644 F.2d at 1356-57."

[redacted]s claim of economic hardship stemming from his inability to find work in Bangladesh is not supported by evidentiary material. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are a hardship consideration. Although hardship to the applicant's child and wife are not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship

endured by the applicant's husband, as a result of his concern about their well-being, is a relevant consideration. Letters pertaining to the health of [redacted]s son and medical records concerning [redacted] are in the record. None of these documents convey that either [redacted] son or his wife have a significant health problem of which suitable medical care is unavailable in Bangladesh. [redacted]'s son has allergies; there is no indication of how serious they are or what treatment is necessary. The record does not contain medical records of the child after 2003.

Counsel states that the director mistakenly believed that the applicant's husband was aware at the time he wed that his wife was unlawfully present in the United States. The AAO finds that the record is not clear in establishing [redacted]s knowledge regarding his wife's immigration status at the time he wed.

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 deportation.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in deportation has not been met 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 she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) 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.