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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEW DELHI, INDIA Date: APR 02 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, New Delhi, India, and 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 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 enter the United States by fraud or willfully misrepresenting a material fact. The record indicates that the applicant is married to a lawful permanent resident of the United States and the father of two lawful permanent resident children. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his lawful permanent resident wife and children.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 14, 2007.

On appeal, counsel notes that the applicant's "alleged incidents of fraud and/or misrepresentation occurred in 1990 and 1991, more than sixteen and seventeen years ago, respectively." *Form I-290B*, filed September 18, 2007. Counsel contends that, as the applicant's acts occurred before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), "[t]he decision of DHS-USCIS to use the modern version of the statute is to give impermissibly retroactive effect to the current version, which is an error." *Form I-290B, supra*. Although the AAO notes counsel's assertion, it does not find her reasoning to be persuasive.

Landgraf v. USI Film Prods., 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), held that a statute has retroactive effect when:

> [I]t would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280, 114 S.Ct. 1483.

Citing to *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996), and *Landgraf*, *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), stated that a statute is not retroactive if:

> [I]t does not impair the rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and thus, presumptively is to be applied in pending cases. [citation omitted]. Likewise, the Attorney General concluded [in *Soriano*] that the

> new provisions in section 212(c) applied to pending cases because the new legislation acted to withdraw her authority to grant prospective relief; it did not speak to the rights of the affected party. [citation omitted]. The effect was therefore to alter both jurisdiction and the availability of prospective relief to the alien. [citation omitted].

Cervantes-Gonzalez at 564.

The AAO notes that, as held in *Cervantes-Gonzalez,* a request for a section 212(i) waiver of the Act is a request for prospective relief and as such its restrictions may be applied to conduct that predates passage of the current statute.

The record includes, but is not limited to, current counsel's appeal brief; prior counsel's brief; a letter and affidavits from the applicant's wife, mother-in-law, father-in-law, and sister-in-law; documentation relating to the elementary schools attended by the applicant's son; and a psychological evaluation of the applicant's family. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) 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.
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> . . . .
>
> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

> (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], 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 resident spouse or parent of such an alien...

In the present case, the record indicates that, in 1990, the applicant attempted to enter the United States by presenting a fraudulent nonimmigrant visa. The applicant was denied entry into the United States. In 1991, the applicant presented a fraudulent birth certificate and school records in an attempt to qualify as the unmarried son of lawful permanent residents, who were later determined to be the applicant's aunt

and uncle. On January 18, 2007, the applicant filed a Form I-601. On August 14, 2007, the Field Office Director denied the applicant's Form I-601, finding the applicant had attempted to enter the United States on two separate occasions by fraud or willfully misrepresenting a material fact and had failed to demonstrate extreme hardship to his qualifying relative.

Based on the applicant's use of fraudulent documents to seek admission to the United States, the AAO finds that the applicant willfully misrepresented a material fact in order to obtain a benefit under the Act and is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO notes that counsel does not dispute this finding.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) 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. Hardship the applicant experiences as a result of his or her inadmissibility is not directly relevant to a section 212(i) waiver proceeding. The AAO also notes that the record contains references to the hardship that the applicant's children would suffer if the applicant were denied admission into the United States. Section 212(a)(6)(C)(i) of the Act provides that a waiver, under section 212(i) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. Therefore, hardship to the applicant's children is not considered in section 212(i) waiver proceedings except to the extent that it creates hardship for a qualifying relative. 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 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, supra* at 565. In *Cervantes-Gonzalez*, the BIA set forth a list of non-exclusive factors relevant to determining whether an applicant 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 also 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).

U. S. courts have stated, "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). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *see also 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). Only "in cases of great actual or prospective injury...will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984).

The AAO observes that extreme hardship to the qualifying relative in the present case, the applicant's wife, must be established in the event that she relocates to India or in the event that she resides in the United States, as there is no requirement that a qualifying relative reside outside the United States based on the denial of an applicant's waiver request.

On appeal, counsel relies on three AAO cases to support her assertion that the applicant's wife and children will suffer extreme hardship if the applicant is denied entry into the United States. Counsel states that in "none of these three prior waiver appeal cases from New Delhi did the adjudicator insist, as in this matter, that the qualifying relative spouse could leave the United States and return to India." Counsel also asserts that "[t]here is no indication that the present case adjudicator ever considered 'the prevailing Hindu customs and social traditions in this matter' in his weighing of the factors that would constitute a finding of 'extreme hardship.'" Counsel further states that the adjudicator erred in not considering the status of women in the United States as compared to the status of women in India, and in not considering the effects of the caste system.

The AAO notes counsel's assertions. However, the AAO does not find the submitted decisions to be relevant to the present case. Each immigrant petition and/or application is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, United States Citizenship and Immigration Service (USCIS) is limited to the information contained in the record of proceeding before it. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the three decisions are unpublished and, therefore, not binding on the AAO in this matter. The AAO also finds the applicant to have failed to submit any documentation, e.g., country conditions information on the status of women or the caste system in India, to establish the impact of Indian societal norms on the applicant's spouse. Without

supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In his March 5, 2007 psychological evaluation of the applicant and his family, [redacted] reports that the applicant's wife "does not wish to return to a country where she experienced severe economic problems, and many other social and political difficulties." He also states that "[d]ue to systemic corruption and a poor economy, [the applicant] is barely able to survive in India. [redacted] states that the applicant claims that since his business supports many families, his income is "quite small," and there is a big problem with systemic corruption in India, "which makes it impossible to manage a business fairly and also support one's family." In a statement dated March 9, 2007, the applicant's wife states she "lived in poverty all [her] life." The AAO notes that the record does not address what specific economic problems or what social and political difficulties were faced by the applicant's wife when she previously lived in India. Although the record does establish that the applicant owns a printing business in India, it does not contain documentation, e.g., country conditions information on the economy in the geographic region where the applicant owns his business or on corruption in India, to support his claims. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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)). The AAO also finds that the record fails to establish through documentary evidence that the applicant's wife would be unable to obtain employment in India and financially assist her family upon relocation. The AAO further notes that the applicant's wife is a native of India who spent her formative years there. Additionally, the AAO notes that the record does not establish that the applicant's wife suffers from any medical condition, physical or mental, that would preclude her relocation to India.

The applicant's wife states that her parents are frail and that she has "a strong duty and obligation to care for them as they age." The applicant's wife further claims that she and her parents were separated for a long time when her parents moved to the United States. She states that if she returns to India, her parents will fall into "further depression." The record does not, however, support the applicant's wife's claims. Although the applicant's father-in-law states that he is "not medically fit and in old age, [he] just wish[es] [his] children's happiness," the record fails to document, e.g., a letter from a medical doctor or other medical evidence, that the applicant's wife's father has any type of medical condition. It also fails to establish that he relies on her for care as it indicates that the applicant's wife's parents live in Missouri, while the applicant's wife resides in New York or New Jersey. The record further fails to establish that the applicant's wife's parents are suffering from depression or any other mental health problem that would worsen if she were to return to India. Additionally, the AAO notes that the applicant's parents-in-law are not qualifying relatives for the purposes of a section 212(i) proceeding and that the record fails to document how any hardship they might experience in their daughter's absence would affect her, the only qualifying relative.

In his evaluation of the applicant's family, [redacted] states the applicant's children "would experience severe educational, social, employment and other deficits if forced to live in India." The AAO notes that,

as previously indicated, hardship to the applicant's children is not directly relevant to a determination of extreme hardship in section 212(i) proceedings and the record fails to demonstrate how any hardships they might experience as a result of relocation would affect their mother, the only qualifying relative. Accordingly, the record does not establish that the applicant's wife would suffer extreme hardship if she were to return to India.

The record also fails to establish extreme hardship to the applicant's wife if she remains in the United States, in close proximity to her family and with access to educational opportunities for her children. Counsel claims that the applicant's wife, as a single parent, will "suffer expenses and difficulties not encountered in whole families, which in turn lead to ongoing psychological and emotional problems." The applicant's sister-in-law states her sister "cannot envision her life without [the applicant] in [the] United States because she will not be able to sustain the load of responsibilities of being a single mother." The AAO acknowledges that the applicant's wife is functioning as a single parent, but finds the record to indicate that the applicant's wife and children reside with family members and the applicant has submitted no documentary evidence that establishes that these family members are either unwilling or unable to assist the applicant's wife in fulfilling her parental responsibilities.

The applicant's wife states the applicant "has provided essential and irreplaceable physical, emotional, financial and instrumental care and love for [her children and her]." The applicant's wife further states that they "are shattered due to the separation from [the applicant]." In an affidavit dated March 2, 2007, the applicant's mother-in-law states her daughter is suffering emotionally, physically, and financially." In an affidavit dated March 2, 2007, the applicant's sister-in-law claims that her sister's "separation from her husband is extremely heart breaking, as she is forced to live a widowed life, in spite of being married.... [T]his distance between the family, has inevitably caused irreparable rifts and emotional trauma for [her sister] as well [as] the children."

In his March 5, 2007 evaluation, [redacted] diagnoses the applicant's wife with major depressive disorder and adjustment disorder with mixed anxiety and depressed mood as a result of her separation from the applicant. While the AAO acknowledges [redacted] findings and notes that the input of any mental health professional is respected and valuable, his assessment is based solely on a single interview with the applicant's family. In that the conclusions reached in the submitted assessment are based solely on this interview, the AAO does not find them to reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering them speculative and diminishing their value to a determination of extreme hardship.

The applicant's sister-in-law states her sister does not work because she has to take care of her children and the record indicates that the applicant's wife may be unemployed. [redacted] states that without the applicant, the applicant's wife "will be destitute and fully dependent on others." However, as just discussed, the applicant's wife lives with family members who have not indicated they are unable or unwilling to assist her. Neither, as previously noted, does the record demonstrate that the applicant is unable to financially assist his wife from outside the United States.

In an affidavit dated March 2, 2007, the applicant's father-in-law states that the applicant's children "have been living without [the applicant's] love." In his assessment, [redacted] states that the absence of the applicant during this stage of his children's development would be devastating and that children who lose a parent risk a host of serious mental health problems. However, as previously indicated, [redacted] findings are based on a single interview with the applicant's family and, as such, are of diminished evidentiary value to a determination of extreme hardship. Further, the applicant's children are not qualifying relatives for the purposes of this proceeding and the record does not establish how any hardship they might experience in the absence of their father would affect their mother, the qualifying relative.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's wife 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)(6)(C)(i) 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.