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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H6

FILE: [redacted] Office: BANGKOK, THAILAND (MUMBAI, INDIA) Date: JAN 19 2011

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Bangkok, Thailand. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of India who was found to be inadmissible to the United States 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 one year or more and seeking admission within ten years of her last departure. She is the daughter of two Lawful Permanent Residents (LPRs). She 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 District Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her LPR parents, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on August 20, 2008.

On appeal, counsel for the applicant asserts that the record contains sufficient evidence to establish extreme hardship to the applicant's qualifying relative father based on her inadmissibility. *Form I-290B*, received on September 22, 2008. Counsel also asserts that the applicant's mother obtained a waiver based on the hardship to the applicant's father and that based on that finding the applicant should qualify for a waiver as well.

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-
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> . . . .
>
> (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.
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> . . . .

The record indicates that the applicant entered the United States without inspection in 1993. She remained until she was deported on February 14, 2004. The applicant accrued unlawful presence from May 27, 2001, the date she turned 18, until she was removed on February 14, 2004. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within ten years of her last departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The record includes, but is not limited to, statements from counsel for the applicant; statements from the applicant; statements from the applicant's father; copies of birth and marriage certificates; extensive copies of medical records pertaining to the applicant's father, including lab reports, test

results, hospital discharge and care records, doctors' examination reports, correspondence between doctors and the applicant's father, pharmacy receipts and other medical records; psychological evaluations of the applicant's father by [redacted], dated August 3, 2005, and October 3, 2008; a statement by [redacted], dated June 28, 2008; copies of passports and identification cards for the applicant.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's LPR parents are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying

relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

On appeal, counsel for the applicant asserts the applicant's father will experience physical and emotional hardship if he relocates with the applicant to India. *Brief in support of appeal*, October 14, 2008. Counsel explains that the applicant's father has several serious medical conditions, suffers

from depression and may not be able to travel to see his daughter for much longer. He asserts that the applicant's father has resided in the United States for the last seventeen years and has no family in India, and that it would be impossible for him to find gainful employment at his age after having been away from India for so long. He further asserts that neither the applicant's father, nor his spouse, have any property in India, and that after his spouse's and the applicant's deportation in 2004 they suffered hardship attempting to adjust to India. Counsel also asserts that the applicant's mother suffers from depression.

The applicant's father has submitted a statement discussing the hardships noted by counsel, primarily his delicate medical condition, lack of family and community ties and his age and employment prospects. *Statement from the applicant's father in support of waiver application*, August 2007. He explains that he has been depressed since an early morning immigration raid on his apartment which resulted in the deportation of his wife and the applicant and currently has a range of physical hardships related to medical conditions. He fears returning to India after having been away for so long and doubts that he or his wife could find employment at their age which would support his family.

The record includes extensive medical documentation of the medical conditions of the applicant's father. In a June 28, 2008, letter, [redacted] explains that the applicant's spouse suffers from complications from Diabetes, Diabetic Neuropathy, high blood pressure and high cholesterol. [redacted] also explains that the applicant has coronary artery disease, a rare form of leprosy and has been confined to a wheelchair. He notes that the applicant's spouse is on pain killers, nerve stabilizers and steroids, and that these physical illnesses have had a substantial impact on his emotional psyche, requiring medications for anxiety and depression. The record also contains two psychological evaluations of the applicant's father by [redacted], both of which conclude that the applicant's father suffers from depression and anxiety. *Psychological evaluations of the applicant's father*, [redacted], August 3, 2005, October 8, 2008.

The AAO finds this evidence is sufficient to establish that the applicant's father has significant, life threatening medical conditions. The relationships he has established with his doctors and care providers are crucial to the maintenance of his health, and severing these relationships in order to relocate with the applicant to India would result in extreme hardship.

With regard to extreme hardship upon separation, counsel asserts on appeal that many of the same hardship factors apply. Counsel for the applicant asserts that the emotional stress of separation from his daughter, as well his history of depression, is exacerbating the medical conditions of her father and thus impacting him physically. Counsel also asserts that the applicant's mother is suffering depression due to the separation from her daughter.

In an August 2007 statement the applicant's father describes the emotional impact of an early morning immigration raid on his apartment in 2004 which resulted in the detention and deportation of his spouse and daughter, the applicant. He asserts that his young son, a U.S. citizen, was emotionally impacted by having immigration agents burst into their apartment and take his mother and sister in

the middle of the night. Compounding the emotional strain of these events, he states, was his deteriorating health. The applicant's father explains that he was diagnosed with Diabetes in 1999 which affects the operation of his kidney, that he has been diagnosed with multibacillary Hansen's disease, a form of lepresy and that he suffers from Myoshi Myopathy, a form of muscular dystrophy, which impairs his ability function physically on a day to day basis. He explains that he suffered a heart attack in 2005, requiring surgery, and must take a heavy regimen of medications to manage his conditions.

As noted above, the record clearly establishes that the applicant's father has a number of serious medical conditions. Documentation includes correspondence to the applicant from his doctors, examination reports and background materials on the various conditions of the applicant's father. The record also contains a statement from [redacted], the physician attending the applicant's father, listing his conditions and explaining that the emotional strain of separation from his daughter is physically impacting him, exacerbating his already delicate medical condition. In his October 8, 2008, statement, [redacted] also notes the applicant's mother is also experiencing major depression and is receiving treatment, however, the AAO would note that there is nothing from a licensed mental health care practitioner to support [redacted] assertion. [redacted] concludes that, based on the physical impacts arising from the separation from his daughter, the applicant's father's medical conditions would improve if his daughter were present in the United States.

The record also contains two psychological evaluations of the applicant's father by [redacted]. In her evaluations she discusses the background of the applicant's father, and notes that he feels a tremendous amount of emotional stress related to his medical conditions, the traumatic arrest and deportation of his spouse and the applicant in 2004 and the continued separation from the applicant. [redacted] in her October 3, 2008, evaluation, notes that she examined the applicant's medical and psychological history, and concludes that he suffers from Adjustment Disorder with Depressed Mood, and Stress Related Physiological Response Affecting Medical Condition.

This evidence is sufficient to corroborate counsel's assertion that the applicant's father is experiencing not only an emotional hardship from separation from his daughter, but that this emotional stress is impacting him physically and further jeopardizing his corporal health.

When these emotional and physical impacts are examined in the aggregate, the record establishes that the applicant's father will experience extreme hardship due to his physical and mental conditions.

As the AAO has determined that the record establishes a qualifying relative will experience extreme hardship upon relocation and separation, it may now move to consider whether the applicant warrants a waiver as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300 (citations omitted). This process applies to current proceeding as well.

The AAO finds that the unfavorable factors in this case include the applicant's unlawful presence in the United States. The favorable factors in this case include the presence of the applicant's LPR parents, the extreme hardship her father would experience and her lack of any criminal record while resident in the United States. The favorable factors in this case outweigh the negative factors; therefore favorable discretion will be exercised. The director's decision will withdrawn and the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.