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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]

FILE: [redacted] Office: NEW DELHI, INDIA Date: AUG 12 2009

IN RE: [redacted]

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

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

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 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 and seeking readmission within ten years of her last departure from the United States. The applicant is married to a naturalized United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their two United States citizen children.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the Field Office Director,* dated May 4, 2007.

On appeal, counsel asserts that the applicant's spouse and children would suffer extreme hardship in India and the United States. *Form I-290B, Notice of Appeal to the Administrative Appeals Office, and attached statement*, dated May 24, 2007.

In support of these assertions, counsel submits statements. The record also includes, but is not limited to, medical records for the applicant's children; money transfers; medical records, medical statements and prescriptions for the applicant's spouse; statements from a tax professional; a statement from a real estate broker; a loan statement; statements from the applicant's children's preschool director; medical records for the applicant; a credit card statement; tax statements; statements from friends; statements from the applicant's spouse; a statement from the applicant's pastor; a statement from a city administrator; and tax notices. The entire record was reviewed and considered in rendering a decision on the appeal.

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 the 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 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.

In the present application, the record indicates that the applicant entered the United States without inspection through Mexico on July 14, 1999. *Consular Memorandum, Consulate General of the United States of America, Mumbai, India*, dated November 14, 2006; *Record of Sworn Statement*, dated November 14, 2006. She voluntarily departed the United States on July 8, 2006 to return to India. *Consular Memorandum, Consulate General of the United States of America, Mumbai, India*, dated November 14, 2006. The applicant, therefore, accrued unlawful presence from July 14, 1999 until she departed the United States on July 8, 2006. In applying for an immigrant visa, the applicant is seeking admission within ten years of her July 8, 2006 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of section 212(a)(9)(B)(i)(II) 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. The plain language of the statute indicates that hardship that the applicant or her children would experience as a result of her inadmissibility is not directly relevant to the determination as to whether she is eligible for a waiver under section 212(a)(9)(B)(v). The only relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. If 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in India or the United States, as he is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse joins the applicant in India, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of India. *Naturalization certificate*. The record does not address whether the applicant's spouse has family members who reside in India. Counsel asserts that if the applicant's spouse were to relocate to India, it would be difficult for him to find employment. *Attorney's statement*, dated May 24, 2007. He notes that the applicant's spouse owns and manages a motel in the United States and that motels do not exist in rural India. *Id.* As such, the applicant's spouse would have to live in the closest large city to obtain a motel manager position, and it would take him two-and-a-half hours to get from his village to this city. *Id.* He would again be forced to live apart from his family for much of the time. *Id.* While the AAO acknowledges these assertions, it notes that the record fails to show that the hotel industry is the only means of employment for the applicant's spouse in India. The record also does not demonstrate why the applicant's spouse and his family would be unable to reside in an area of India where employment in the hotel industry would be readily available. The record fails to include published country conditions reports documenting the economy in India and available employment opportunities. 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). The AAO notes that the applicant's spouse suffers from depression, hypertension and diabetes and has been prescribed medication. *Progress Notes,* [redacted]., dated June 25, 2007; *Medical prescriptions*. While the AAO acknowledges these medical conditions as documented by a licensed healthcare professional, it notes that the record does not demonstrate that the applicant's spouse would be unable to receive adequate care for his conditions in India. The record fails to include published country conditions reports documenting the availability and quality of medical care in India. The AAO also observes that the applicant's child has been diagnosed with malaria and is receiving treatment in India. *Statement from* [redacted] dated May 9, 2008. While the AAO acknowledges the applicant's child's illness, it notes that the applicant's child is not a qualifying relative for the purpose of this case and the record fails to address how any hardship the applicant's child may encounter would affect the applicant's spouse if he returned to India. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in India.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse is a native of India. *Naturalization certificate*. The record does not address whether the applicant's spouse has any additional family members in the United States. In 2007 and early 2008, the applicant's spouse visited a psychiatrist on four separate occasions where he was diagnosed with depression and was prescribed medication. *Updated report,* [redacted], undated; *Medical prescriptions*. At the time of his most recent visit, the applicant's spouse's psychiatrist diagnosed him as still being depressed due to the separation from his spouse and children. *Id.* He recommended that the applicant's spouse continue with his medication and requested a follow-up appointment to be scheduled one month from the visit. *Id.* In addition to his depression, the applicant's spouse has been diagnosed as having hypertension and diabetes. *Progress Notes,* [redacted], dated

June 25, 2007. In 2008, the applicant's spouse went to the emergency room because of his depression over his separation from his family. *Adult Physician Emergency Record and Discharge Instructions*, dated February 9, 2008. He was diagnosed with anxiety disorder and depression, and found to be suicidal. *Id.* He was prescribed medication and told to follow-up with his physician in two days. *Id.* As previously noted, the AAO also observes that the applicant's child has been diagnosed with malaria and is receiving treatment in India. *Statement from* [redacted], dated May 9, 2008. The record, however, fails to address how the applicant's child's illness is affecting the applicant's spouse, the only qualifying relative in this case. In addition to his physical conditions, the applicant's spouse suffers on an economic level. *Attorney's statement*, dated May 24, 2007. He sends money to the applicant in India. *Money transfers*. When looking at the aforementioned factors, particularly the deteriorating mental health of the applicant's spouse as documented by licensed healthcare professionals, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in the United States.

However, as the record has failed to establish the existence of extreme hardship to the applicant's qualifying relative caused by the applicant's inadmissibility to the United States if he relocates to India, the applicant is not eligible for a waiver of her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. 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)(9)(B) 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.