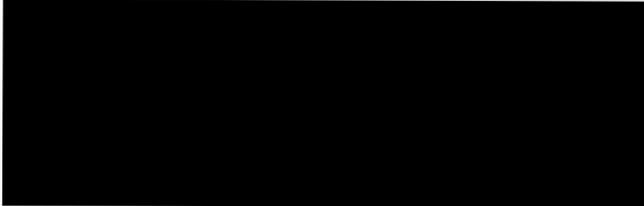


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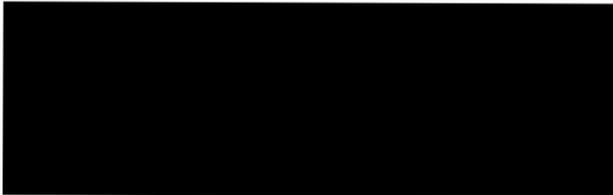
IN RE:

Applicant:

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:



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.

John F. Grissom, Chief
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge, New Delhi, India, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained. The application will be approved.

The applicant, [REDACTED], a native and citizen of India, 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. He sought a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Officer-in-Charge denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Officer-in-Charge, dated May 18, 2006.*

The AAO will first address the findings of inadmissibility.

Section 212(a)(9) 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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

....

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired 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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and ((II) are not counted in the aggregate.¹ For purposes

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).

of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.² The period of time granted for voluntary departure is “a period of stay authorized by the attorney general,” and will not count toward any period of unlawful presence under section 212(a)(9)(B)(i).³ There is an asylee exception to unlawful presence. No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken in to account in determining the period of unlawful presence in the United States under section 212(a)(9)(B)(i) of the Act unless the alien during such period was employed without authorization in the United States. An application is considered bona fide if it has any arguable basis in law or fact. An asylum application pending during any administrative or judicial review (including review in federal court) of the application is considered pending.⁴

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 departure from the United States following accrual 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), do not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The record before the AAO reflects that [REDACTED] entered the United States from India without inspection on May 23, 1993. In July 1993, he filed an asylum application, which an immigration judge denied on January 20, 1999, and granted [REDACTED] voluntary departure until February 19, 1999. On January 22, 2001, the Board of Immigration Appeals (BIA) dismissed an appeal filed by [REDACTED] and granted him 30 days voluntary departure, which was extended by Citizenship and Immigration Services (CIS) until April 22, 2001. The BIA dismissed a motion to reconsider on April 17, 2001. On February 27, 2002, the United States District Court, Northern District of Illinois, dismissed [REDACTED] mandamus, and on May 12, 2003, the Seventh Circuit remanded the mandamus to the district court due to lack of jurisdiction. On April 28, 2003, the BIA denied a motion to reopen, and on November 26, 2003, the Office of the Chief Counsel declined to join in a proposed joint motion to reopen. The applicant departed from the United States on January 22, 2004.

The period of time covering the applicant’s pending asylum application, his appeal and motion to the BIA, and his mandamus to the federal courts in connection with that asylum application count as periods of unlawful presence under the Act because the documentation in the record and U.S.

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

³ *See* Memo, Williams, Executive Assoc. Comm. Office of Field Operations, Unlawful Presence, June 12, 2002 (HQADN 70/21.1.24-P); Cable, DOS, No. 98-State-060539 (April 4, 1998).

⁴ *See* Memo, Cooper, Acting Gen’l Counsel, Office of the General Counsel, & Pearson, Executive Assoc. Comm., Office of Field Operations, INA 212(a)(9)(B)(iii)(II): Asylee Exception to Unlawful Presence, June 8, 1999 (HQPGM 70\6.2.6).

Citizenship and Immigration Service records indicate that the applicant engaged in unauthorized employment. The record only indicates employment authorization for 1998-1999 and in 1993-1994, but that he was employed at other times, which makes him ineligible for the asylee exception to unlawful presence under section 212(a)(9)(B)(iii)(II) of the Act. Thus, the applicant began to accrue unlawful presence from February 20, 1999, when his voluntary departure expired, to January 22, 2001, at which time he was granted voluntary departure by the BIA. He also accrued unlawful presence from April 22, 2001, when the extension of voluntary departure expired, until his departure on January 22, 2004. He therefore accumulated over three years of unlawful presence when he departed from the United States and triggered the ten-year bar. The AAO finds Officer-in-Charge's finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is correct.

The AAO will now address the Officer-in-Charge's finding that a waiver of inadmissibility should not be granted.

The waiver for unlawful presence is found under section 212(a)(9)(B) of the Act, which provides that:

- (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.

A waiver under section 212(a)(9)(B)(v) of the Act is dependent upon the applicant's 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 to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

On appeal, counsel states the submitted evidence establishes extreme hardship to the applicant's wife as she is pregnant and is clinically depressed and is at risk for post-partum depression, has ailing parents, and is accustomed to life in the United States, where she has lived for 13 years. He states that India's inflation is nearly double that of the United States, and Gujarat, the area of India where the applicant and his wife are from, has riots and religious upheavals. Counsel conveys that Ms. psychiatrist states that will require ongoing therapy and medication for depression, which will be unaffordable in India.

The documentation submitted in support of _____ extreme hardship claim include _____ letters, letters concerning her pregnancy, letters by her psychiatrist, and letters by her husband, which are described as follows:

- _____'s letters are summarized as follows. She has a close relationship with her husband and has one child, which was born on September 1, 2003, and is pregnant with another, which she expects to be born on February 3, 2007. She works full-time and her lawful permanent resident parents, who are 72 and 66 years old, live with her and care for her child while she works. She is receiving treatment for depression and takes thyroid medication, which dosage increased on account of stress. She receives public assistance because her \$9.50 hourly wage is not enough for household expenses and the home mortgage. Her daughter misses her father. She no longer has family ties in India. _____ letters dated July 18, 2006, March 5, 2005, August 31, 2005, May 19, 2006, December 18, 2005.
- The June 15, 2006 letter by _____ M.D., conveys that _____ is six months pregnant, and that he saw her for the first time on June 8, 2006 at which time he diagnosed her with major depressive disorder. He states that continued separation from her husband could cause her to become even more severely depressed and that once the baby is born her chance of having post partum depression is very strong.
- The letter dated by _____ that is dated July 20, 2006, states that _____ is receiving psychiatry treatments under state and local public health provisions, which are minimal, and that _____ is offering additional services at no cost. _____ indicates that _____ is to receive a high level of therapy and medications once her health can handle it after the birth of her new child. _____ states that if _____ were to go to an area without a facility for her to receive medical assistance, her mental health would quickly digress. _____ states that _____'s condition has worsened to the point that merely being with her husband would not reverse her condition. _____ indicates that _____'s depression is acute enough that even if her husband were in the United States, she will be required to continue therapy. She states that _____'s reunification with her husband will give her the peace of mind to focus on her treatment, and not worry about the finances or the children. _____ expresses concern about post partum depression.
- Letters by _____'s husband convey that his wife is experiencing financial hardship, earning \$9.50 per hour with \$1,500 in monthly income; his father-in-law has a \$63,199 medical bill for a two-week hospitalization; that it is difficult to settle down in India and obtain employment; and his wife and child will have difficulty living in India. _____ letters dated February 7, 2006, December 25, 2005.

The record also contains an eligibility letter by the State of Illinois, Department of Public Aid, showing _____ and her child have MediPlan eligibility from November 1, 2005 through November 30, 2005, and December 1, 2005 through December 31, 2005; a letter by Wal-Mart Stores, Inc.; a certificate of return to school or work; a letter by _____, concerning Ms. _____ pregnancy; a letter by _____, indicating that _____ is considered a high risk

pregnancy; a letter dated November 30, 2005 by Resources for Living; a wage statement showing [REDACTED]'s hourly rate as \$9.60; a statement showing her monthly home mortgage as \$847.62; and various invoices.

In rendering this decision, the AAO will carefully consider and give proper weight to the evidence in the record.

“Extreme hardship” is not a definable term of “fixed and inflexible meaning” and establishing it is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors the Board of Immigration Appeals (BIA) considers relevant in determining whether an applicant has established extreme hardship under 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 565-566. 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).

Applying the *Cervantes-Gonzalez* here, extreme hardship to [REDACTED] must be established if she remains in the United States without her husband, and alternatively, if she joins him in India. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to [REDACTED] such as her financial straits and the severity of her depression as indicated by [REDACTED], rises to the level of “extreme” hardship” if she were to remain in the United States without her husband.

Furthermore, the totality of the record is sufficient to establish that the applicant’s wife would suffer extreme hardship if she were to join her husband in India. [REDACTED] indicates that [REDACTED] requires ongoing treatment and medication for depression and is receiving psychiatry treatment under state and local public health provisions, and that she will receive additional services by [REDACTED] at no cost. The AAO finds that in light of the severity of [REDACTED] depression and the negative impact that moving to India would likely have upon her mental state, and given the fact that she

receives public assistance for treatment and [REDACTED] is offering to provide services at no cost, Ms. [REDACTED] would experience extreme hardship if she were to join her husband in India. The evidence, weighed collectively, establishes that the applicant's wife would endure extreme hardship in the event that she joins her husband in India.

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's family members, and the passage of over four years since the applicant's immigration violation. The unfavorable factors in this matter are the applicant's periods of unauthorized presence and employment. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the severity of the applicant's unlawful presence is at least partially diminished by the fact that four years have elapsed since the applicant's immigration violation. The AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

The AAO notes that, as stated by the Officer-in-Charge, because the applicant departed from the United States while an order of deportation or removal was outstanding, the applicant is subject to inadmissibility under section 212(a)(9)(A)(ii) of the Act, and is therefore required to file an Application for Permission to Reapply for Admission into the United States (Form I-212).

ORDER: The appeal is sustained. The waiver application is approved.