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**U.S. Citizenship
and Immigration
Services**

H3

FILE:

Office: NEW DELHI, INDIA

Date: NOV 28 2008

IN RE:

APPLICATION:

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

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.

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 Officer in Charge (OIC), New Delhi, India. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of India. She was found to be inadmissible to the United States pursuant to sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(B)(i)(II) and 1182(a)(6)(C)(i). The applicant was found inadmissible under section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of her last departure from the United States. She was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for seeking to procure admission into the United States by fraud. The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), in order to return to the United States to join her United States citizen husband, [REDACTED], and son, [REDACTED].

The OIC concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, her United States citizen spouse, and denied the Application for Waiver of Ground of Excludability (now referred to as Inadmissibility) accordingly.

The appeal notice in the present case was filed by [REDACTED] of [REDACTED] in Mumbai, India. Mr. [REDACTED] submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, which states that he is an attorney practicing in Mumbai, India and he is the applicant's representative. The regulation at 8 C.F.R. § 292.1(a)(6), in pertinent part, provides that an alien who is entitled to representation may be represented by an attorney outside the United States, if that attorney is licensed to practice law and is in good standing in a court of general jurisdiction of the country in which he resides. Mr. [REDACTED] has not provided any information on his license to practice law and his standing in a court of general jurisdiction in India. Accordingly, the AAO finds that [REDACTED] failed to comply with the regulatory provision at 8 C.F.R. § 292.1(a)(6) to establish his eligibility to represent the applicant. The AAO, therefore, will not recognize Mr. [REDACTED] as the applicant's attorney in this proceeding.

On appeal, the applicant asserts that the OIC did not consider the facts properly. The applicant further asserts that the OIC misunderstood the facts and has not appreciated the hardship. The applicant indicated on the appeal notice that a brief and/or additional evidence would be submitted to the AAO within 30 days; however she failed to submit such documentation within the 30 day time period. Therefore, the appeal will be reviewed based on the current record of proceeding.

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 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 [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.

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

- (i) 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.

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 Attorney General [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.

Section 212(a)(9)(B)(v) and 212(i) of the Act waivers of the bar to admission, resulting from the respective violations of sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act, are 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 alien herself experiences upon refusal of admission is irrelevant to section 212(a)(9)(B)(v) and 212(i) waiver proceedings. 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).

Regarding the applicant's grounds of inadmissibility, the record reflects that on February 28, 1994, the applicant attempted to enter the United States by presenting a tampered British passport. The applicant identified herself as [REDACTED], a citizen and resident of the United Kingdom. On March 1, 1994, the applicant was placed in exclusion proceedings and charged with the following grounds of inadmissibility: seeking to procure entry into the United States by fraud or by willfully misrepresenting a material fact under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i); not being in possession of a valid, unexpired non-immigrant visa under section 212(a)(7)(B)(i)(II), 8 U.S.C. § 1182(a)(7)(B)(i)(II); not being in possession of a valid, unexpired travel document under section 212(a)(7)(B)(i)(I), 8 U.S.C. § 1182(a)(7)(B)(i)(I); and not

being in possession of a valid, unexpired immigrant visa under section 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I). On June 30, 1995, the applicant filed a Form I-589, Application for Asylum and Withholding of Deportation, with the San Francisco Immigration Court as relief from exclusion and deportation. The Immigration Judge scheduled the applicant's merits hearing on June 2, 1997; however the applicant failed to appear for this hearing. Consequently, the Immigration Judge ordered the applicant excluded and deported from the United States. The San Francisco District Director scheduled the applicant to appear for deportation to India on December 15, 1997. The record reveals that the applicant failed to appear for deportation on this date.

The record reflects that on April 3, 2001, the applicant issued a sworn statement before a consular officer at the United States Consulate General in Mumbai, India. The applicant testified in her sworn statement that she departed the United States in September 1998 and traveled to India. On July 5, 2002, the applicant was again interviewed at the Consulate General in Mumbai, India. The consular officer's interview notes state that the applicant testified she returned to India in October 1998. Pursuant to 8 C.F.R. § 241.7, any alien who has departed from the United States while an order of deportation is outstanding shall be considered to have been deported. 8 C.F.R. § 241.7. Accordingly, the applicant self deported in September or October 1998 when she departed the United States while under an order of deportation.

In denying the application, the OIC noted that the applicant failed to file a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. The director stated that pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), aliens who have been otherwise ordered removed or deported under former sections 242 or 217 of the Act, 8 U.S.C. § 1252 or 1187, or ordered excluded under former section 236 of the Act, 8 U.S.C. § 1226, and who have actually been removed (or departed after such and order) are inadmissible for 10 years unless the Attorney General [Secretary] has consented to the alien's reapplying for admission.

It has now been more than 10 years since the applicant's deportation from the United States. Therefore, the applicant is no longer inadmissible under section 212(a)(9)(A)(ii) of the Act for having departed the United States while under an outstanding order of deportation and seeking admission within 10 years after her departure from the United States. Furthermore, the applicant is no longer inadmissible under section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of her departure from the United States. Nevertheless, the applicant remains inadmissible under section 212(a)(6)(C)(i) of the Act, for seeking to procure admission into the United States by fraud, and must establish that she is eligible for a section 212(i) waiver of this ground of inadmissibility.

As stated above, a waiver of inadmissibility under section 212(i) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the United States citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or to her children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Morales*, 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*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (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 United States 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. 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).

United States 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.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record of proceeding shows that in June 2002, the applicant filed a waiver application with the United States Consulate General in Mumbai, India. The Acting OIC at the United States Embassy in New Delhi, India concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the application accordingly. On November 10, 2005, the applicant filed a second waiver application with the United States Consulate General in Mumbai. The OIC’s denial of that application is now before the AAO on appeal. In reviewing the record, the AAO will consider the evidence filed with both waiver applications.

The applicant married [REDACTED] a naturalized United States Citizen, on April 15, 1996. The applicant’s husband is a qualifying family member for section 212(i) of the Act extreme hardship purposes. The following documentation has been submitted as evidence of extreme hardship to the applicant’s husband:

- A letter from [REDACTED], M.D., dated August 1, 2005, stating that [REDACTED] is currently undergoing medical treatment for depression. Dr. [REDACTED] states that [REDACTED] is on Effexor XR and is currently seeing [REDACTED] for counseling.

- A notarized letter from [REDACTED], dated November 1, 2005, stating that he and the applicant have a eight year old child named [REDACTED]. He indicates that their son is lonely without the applicant. Mr. [REDACTED] states that there is no one in his family to take daily care of their child. He maintains that for this reason he is unable to concentrate on his business. Mr. [REDACTED] further states that he suffers from Diabetes, which contributes to his fatigue. He states that he is not able to concentrate on his business and it is adversely affected. Mr. [REDACTED] maintains that he cannot stay in India because he does not have property there.
- A letter addressed to [REDACTED] from [REDACTED] of ServiceMaster Clean, dated December 1, 2005. The letter, in pertinent part, provides, "in the last six months you have shown very little interest in your work, I have spoken to you many times about your tardiness and absences, and your poor work habits and general attitude. Your reply has always been the same 'family problems[.]' Neil you must improve your work performance or you will be asked immediately to submit your resignation."
- A notarized letter from [REDACTED] dated December 28, 2005, which states that his son is not sleeping due to missing his mother and he is not doing well in school. He states that he cannot help his son with school work because he is working long hours. Mr. [REDACTED] indicates that his father lives with him and has many medical problems and operations on his knee. He states that his father needs constant help with bathroom visits, clothing and feeding. Mr. [REDACTED] indicates that he has taken a lot of time off from his job and is worried that he may lose the job. He maintains that if the applicant were in the United States, she would make sure their son eats well, does not miss school, and she would take care of his father's needs. He contends that this would allow him to be more productive at work and financially stable.
- Two undated letters from [REDACTED] indicating that he misses his mother (the applicant).
- [REDACTED] elementary school report cards, respectively dated May 26, 2004 and May 27, 2005, and a student withdrawal form indicating that [REDACTED] withdrew from elementary school on January 2, 2006 to "return to home country."

Under a review of the record, the AAO finds that the applicant failed to establish extreme hardship to her husband if she were denied admission to the United States. The facts in the present case are analogous to the facts in *Matter of Cervantes-Gonzalez, supra*. In *Matter of Cervantes-Gonzalez*, the BIA took into consideration the qualifying family member's expectations at the time that she married the respondent (applicant), and stated that:

The respondent's wife knew that the respondent was in deportation proceedings at the time they were married. In contrast to the respondent's assertions on appeal, this factor is not irrelevant. Rather, it goes to the respondent's wife's expectations at the time they were wed. Indeed, she was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. In the latter scenario, the respondent's wife was also aware that a move to Mexico would separate her from her family

in California. We find this to undermine the respondent's argument that his wife will suffer extreme hardship if he is deported.

22 I&N Dec. 560, 566-567 (BIA 1999).

In the present case, the applicant was in exclusion proceedings at the time that she married Neil Lala. The applicant had retained an attorney to represent her request for asylum and withholding of deportation as relief from exclusion and deportation. The applicant failed to appear for her merits hearing on June 2, 1997, and was ordered deported in absentia. It is reasonable to expect that the applicant's husband knew that she was in exclusion proceedings at the time they wed, and he has not indicated otherwise. This factor is relevant to the applicant's husband's expectations at the time that he married her. The applicant's husband was aware that he may have to face the decision of parting from her or following her to India in the event that she was ordered deported. Pursuant to *Matter of Cervantes-Gonzalez, supra*, this factor undermines the applicant's claim that her husband would suffer extreme hardship if she were denied admission to the United States.

Furthermore, the applicant has not established the hardship her husband would suffer if he moved with her to India. In *Matter of Cervantes-Gonzalez*, the BIA noted that the respondent's wife spoke Spanish and the majority of her family is originally from the respondent's country citizenship, Mexico. The BIA stated that based on these factors the respondent's wife "should have less difficulty adjusting to live in a foreign country." The record in the present case shows that the applicant's husband is a former national and citizen of India. He became a permanent resident of the United States on May 5, 1993, when he was almost 20 years old. Therefore, he should have less difficulty in adjusting to culture and residence in India. The applicant's husband indicated in his November 1, 2005 letter that he could not stay in India because he does not have property there. However, he did not indicate the reasons he could not purchase or rent a home in India. Neither of his statements fully address the possibility of moving to India to avoid the hardship of separation from the applicant. Additionally, the applicant has not presented any evidence to indicate that her husband would suffer extreme hardship if he moved to India.

In addition, the applicant failed to show that her husband has suffered extreme hardship during their 10 year period of separation. The applicant furnished a letter addressed to her husband from [REDACTED] of ServiceMaster Clean, dated December 1, 2005, which states that in the past six months he has performed poorly in his position with the company. However, the applicant departed the United States 7 years prior to the date of this letter. Therefore, the link between the applicant's departure from the United States and her husband's poor performance at work can only be given minimal weight. The applicant also furnished a letter from [REDACTED] M.D., dated August 1, 2005, stating that her husband is currently undergoing medical treatment for depression. Dr. [REDACTED]'s letter states that the applicant's husband is on Effexor XR and is currently seeing [REDACTED] for counseling. However, the applicant did not submit an evaluation from [REDACTED] to establish that her husband's depression is related to her absence from the United States.

As discussed, factors in analyzing hardship to a qualifying relative include the presence of family ties to United States citizens or lawful permanent residents in the United States. The applicant's husband indicated in his December 28, 2005 letter that their child, [REDACTED], is not sleeping well and doing well in school because he misses the applicant. The applicant's husband stated that his father lives with him and has had many medical problems and operations on his knee. He stated that his father needs constant help with

bathroom visits, clothing and feeding. He indicated that if the applicant were in the United States, she would make sure their son eats well, does not miss school, and she would take care of his father's needs. However, the applicant has not furnished [REDACTED] birth certificate or any other documentation to establish his identity and United States citizenship or permanent residence. Nor has she furnished any documentation to establish her father-in-law's United States citizenship or permanent residence, place of residence, and chronic medical condition. The applicant's husband indicated in his November 1, 2005 letter that he is solely responsible for the care of their son, [REDACTED], and is fatigued because he is suffering from Diabetes. However, the applicant has not furnished a medical report or any other medical documentation to corroborate her husband's diagnosis and treatment for Diabetes. Although [REDACTED]'s statements are relevant and are taken into consideration, little weight can be afforded them in the absence of supporting evidence. Going on record without supporting documentary evidence is not sufficient for purposes 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)).

The record, reviewed in its entirety and in light of the *Matter of Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's husband, Neil Lala, faces extreme hardship if the applicant is refused admission. The AAO recognizes that the applicant's husband will suffer emotionally as a result of separation from the applicant. His situation, however, is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. United States court decisions 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). In addition, *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.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to her United States citizen spouse as required under section 212(i) of the Act. 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(i) 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.