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U.S. Citizenship  
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Services

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H3

FILE:

Office: NEW DELHI, INDIA

Date: FEB 25 2009

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:

SELF-REPRESENTED

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, and 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 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.

The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to join his U.S. citizen spouse in the United States. The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated July 25, 2006. The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility for unlawful presence under section 212(a)(9) of the Act, which 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.<sup>1</sup> For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup> A properly filed affirmative application for adjustment of status under section 245 of the Act, including section 245(i), is considered a period of stay authorized by the Attorney General, and tolls unlawful presence.<sup>3</sup>

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 a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would 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 reflects that the applicant was admitted to the United States as a crewman in transit on November 6, 1999 and was granted until December 4, 1999 to join his ship. The applicant did not report for duty, instead, he began employment at a restaurant in November 1999. The applicant accrued unlawful presence from December 4, 1999 to September 11, 2002, the date of the filing of the adjustment of status application. When the applicant departed to India on May 25, 2005, he triggered the ten-year-bar, which renders him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is 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 of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a 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 an 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,

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<sup>1</sup> 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).

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

<sup>3</sup> Memo, Williams, Executive Assoc. Comm., Office of Field Operations, Unlawful Presence, HQADN 70/21.1.24-P.

who in this case is the applicant's 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).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship 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 considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors, which relate to the applicant's qualifying relative, 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 factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[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). The trier of fact considers the entire range of hardship factors in their totality and then determines "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* factors here, extreme hardship to the applicant's spouse must be established in the event that if she joins the applicant to live in India, and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In support of the waiver application, in addition to other documentation, the record contains letters, affidavits, birth certificates, a marriage certificate, divorce decrees, a psychological evaluation of the applicant's spouse, a World Bank document, and prescriptions for medicine.

In rendering this decision, the AAO has carefully considered all of the documentation in the record.

describes the applicants' wife as "a quite, shy, and generally withdrawn individual who grew up lacking in self-confidence," and he indicates that she will not adapt well to a totally new culture, and would lose her home and job, and would be separated from her children and grandchild if she lived in India. In his affidavit, the applicant indicates that his wife takes care of her elderly parents. The applicant's wife indicates in her affidavit that in India it would be difficult for her to have the health care that she now has, and she is concerned about being able to support herself in India. The applicant's wife takes medication for her arthritis, blood pressure, cholesterol, and triglyceride levels. Although outdated, the World Bank document shows the gross national income per capita in India for 2002 was \$470 USD and it ranked 161 out of 206 countries.

In considering the evidence in the totality, the AAO finds that the applicant's wife would experience extreme hardship if she were to join the applicant to live in India in light of her medical problems, India's low gross national income per capita and its vastly different culture, and her having to separate from her children, grandchildren and parents.

In her letter submitted on appeal, the applicant's wife states that "[l]ife without my husband is getting more and more difficult, my anxiety level is high, I need medication to control uneasiness and heart palpitations; my arthritis is more severe; daily I must get to a therapeutic tub for water treatments." The psychological evaluation by [REDACTED] indicates that the applicant's wife will experience "a great deal of emotional suffering," if separated from her husband, and he conveys that the applicant's wife, prior to meeting her husband, struggled with poverty, abuse, a loveless marriage, and the death of a child. The applicant's wife's first husband admits in a letter that during his marriage to his wife he abused her physically, verbally, and mentally. The letters by the applicant's wife's children also state that their mother had a difficult life, but now has the applicant to share her life with.

Family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) ("the most important single hardship factor may be the separation of the alien from family living in the United States").

However, courts have found that family separation does not conclusively establish extreme hardship. *See, e.g., Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991) (separation of the applicant from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission") (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship); *Shooshtary v. INS*, 39 F.3d 1049 (9<sup>th</sup> Cir. 1994) (finding separation of respondent from his lawful permanent resident wife and two U.S. citizen children is not extreme hardship); and *Sullivan v. INS*, 772 F.2d 609, 611 (9<sup>th</sup> Cir. 1985) (deportation is not without personal distress and emotional hurt).

As shown in letters, affidavits, and the psychological evaluation, the applicant's spouse is concerned about separation from the applicant. After a careful and thoughtful consideration of the record, the AAO finds that the situation of the applicant's spouse, if she remains in the United States without her husband, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship that will be endured by the applicant's spouse is unusual or beyond that which is normally to be expected upon removal. *See Hassan, Patel, Shooshtary, Sullivan, supra*.

The applicant makes no claim of extreme financial hardship to his wife if she were to remain in the United States without him. The AAO notes that the applicant's spouse indicates in her affidavit that she works as a certified nursing assistant, earning \$28,726 in 2002, and that she owns a house.

Extreme hardship has been established in the event the applicant's wife joined the applicant to live in India; however, it has not been established if the applicant's wife were to remain in the United States without the applicant. Thus, extreme hardship to a qualifying family member for purposes of relief under 212(i) the Act, 8 U.S.C. § 1182(i), has not been established.

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)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed. The application will be denied.

**ORDER:** The appeal is dismissed. The application is denied.