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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

H6

[redacted]

FILE: [redacted] Office: NEW DELHI, INDIA Date: MAR 04 2011

IN RE: Applicant: [redacted]

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:

[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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that 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 his last departure from the United States. The applicant is married to a United States citizen and is the son of a lawful permanent resident of the United States. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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), in order to reside in the United States with his wife.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relatives and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 7, 2007.

On appeal, the applicant, through counsel, claims that his wife and father are suffering extreme hardship in India. *Motion to Reconsider Denial of I-601 and I-212*, attached to Form I-290B, dated August 31, 2007.

The AAO notes that the applicant also filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212); however, the Field Office Director denied the applicant's Form I-212 on August 7, 2007. The AAO only received one Form I-290B with a filing fee; therefore, it will only adjudicate one appeal (Form I-601 appeal).[1]

The record includes, but is not limited to, counsel's appeal brief; a motion to reconsider denial of I-601 and I-212; statements from the applicant, his wife, and his father; letters of support for the applicant and his wife; medical documents for the applicant and his wife; tax documents, banks statements, mortgage documents, and the applicant's business license; articles on reproductive health issues in India, medical care in India, fibroid tumors, and infertility; a country profile of India; and documents from the applicant's removal proceeding. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

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[1] The Adjudicator's Field Manual provides guidance on adjudicating Forms I-601 and I-212 that are filed together.

43.2 Adjudication Processes.

> (c) Of course, an alien might be applying for both consent to reapply and a waiver of inadmissibility, provided the particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose.

(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.

. . . .

(iii) Exceptions.-

. . . .

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

. . . .

(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.

In the present case, the record indicates that the applicant entered the United States on August 16, 1994 without inspection. On December 28, 1994, the applicant filed a Request for Asylum in the United States (Form I-589). On December 11, 2000, an immigration judge granted the applicant voluntary departure to depart the United States within 30 days of the order. On January 10, 2001, the applicant filed an appeal of the immigration judge's decision to the Board of Immigration Appeals (Board). On November 21, 2002, the Board dismissed the applicant's appeal. The applicant filed a motion to reconsider the Board's decision, which the Board denied on July 21, 2003. The applicant filed a petition for writ of habeas corpus with the United States District Court for the Northern District of California, which was denied on August 13, 2004. The applicant filed an appeal of the United States District Court's decision and a motion for stay of removal with the Ninth Circuit Court of Appeals (Ninth Circuit). On October 18, 2004, the Ninth Circuit granted the applicant's motion for stay of removal. On October 27, 2005, the applicant filed a motion to reopen with the Board, which the Board denied. On September 12, 2005, the Ninth Circuit dismissed the applicant's appeal. On February 21, 2006, the applicant was removed from the United States.

Under section 212(a)(9)(B)(iii)(II) of the Act, no period of time in which the applicant has a bona fide asylum application pending shall be taken into account in determining the period of unlawful presence in the United States, unless the applicant was employed without authorization. The AAO notes that the record establishes that the applicant was operating his trucking business without employment authorization while his asylum application was pending. Therefore, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until February 21, 2006, the date the applicant was removed from the United States. The applicant is seeking admission into the United States within ten years of his February 21, 2006 departure. 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 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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and father are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Service (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 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.

The first prong of the analysis addresses hardship to the applicant's wife and father if they remain in India. In counsel's supplemental brief dated September 28, 2007, counsel states that the applicant's wife has joined the applicant in India; however, because she lives in fear of her ex-husband's family, she "lives 'like a prisoner'." Counsel claims that the applicant's wife "was previously in an arranged marriage to an abusive man," and "[a]s a result of this [abuse], [the applicant's wife's] self-esteem was 'virtually non-existent' and she was left 'emotionally scarred.'" Counsel states that when the applicant's wife left her first marriage, she was disowned by her family, and she now "does not communicate with her family in India, and cannot rely on them for support." Counsel claims that the family of the applicant's wife's ex-husband "is quite powerful in her hometown and she fears retribution from them for divorcing [their] son." Counsel states since the applicant's wife joined the applicant in India, she has been very depressed. Counsel states that the applicant "is unable to find work in India and has no way of supporting himself or his family, which compounds his wife's depression." In an undated statement, the applicant's father states the applicant and his wife are suffering from depression. In a letter dated July 11, 2006, [redacted] states the applicant's wife has been getting ill and is suffering from

depression. The AAO notes that statement does not describe the severity of the applicant's wife's depression and does not describe the specific treatment that she is receiving. In a statement dated September 5, 2006, the applicant states since he returned to India, he has been sick. The applicant claims that he and his wife "have had difficulty adjusting to the climate, the food, and the water supply." The applicant's father claims that the applicant and his wife "are finding [it] very difficult to get the two meals in a day due to financial hardship," and the applicant had to borrow money from family and friends. Counsel states that since the applicant's removal, "his family has suffered financial ruin. His wife's ongoing medical problems have worsened and increased upon her arrival in India. [The applicant's wife] has no ties to India and lives in hiding for fear of retaliation from her ex-husband or members of his family. Additionally, [the applicant's father] has also returned to India despite his health problems." The AAO notes the applicant's and his wife's concerns.

Counsel states the applicant's removal has caused his father and wife "to relocate to India where they are unable to access the quality of health care they would have in the United States, which has caused substantial hardship for the family." Counsel states the applicant's wife suffers from migraine headaches, abdominal pain, infertility, chicken pox, nausea, thyroid dysfunction, and fibroid tumors. In a letter dated July 8, 2006, states the applicant's wife is being treated for infertility. Counsel claims that even though the applicant's wife is being treated in India for her medical conditions, "the quality of health care is much higher in the United States." The AAO notes the applicant's wife's medical issues.

Counsel states the applicant's father "returned to India due to the extreme financial and emotional pressure the family was experiencing as a result of [the applicant's] deportation, as well as concern for [the applicant's] health in India, which has suffered due to pollution and unsanitary conditions." Counsel states the applicant's father "underwent triple-bypass surgery, and his stress levels, blood pressure, and diet must be closely managed at all times," and he is being monitored by a cardiologist in India. The AAO notes the applicant's father's medical issues.

The AAO acknowledges that the applicant's wife and father have resided in the United States for many years; however, they are natives of India and it is presumed that they would not face difficulty in adapting to the culture and languages. Additionally, the AAO notes that it has not been established that the applicant's father lacks family ties to India. The AAO notes that other than a country profile of India, the record does not establish that the applicant's wife is unable to obtain employment in India. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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)). Additionally, the AAO notes that no documentary evidence has been submitted to establish that the applicant's wife and father are experiencing financial hardship in India. Regarding the applicant's wife's fear of her ex-husband's family, the AAO notes that no explanation was provided explaining why the applicant and his wife must reside where her ex-husband's family is influential. Additionally, the applicant has not established that he and his wife cannot reside elsewhere away from his wife's ex-husband's family. Regarding the medical conditions suffered by the applicant's wife and father, the AAO notes that the applicant submitted copies of medication packets; however, there is no indication of what these medications are for or for whom they

have been prescribed. Additionally, the record does not contain any documentary evidence establishing that the applicant's father is suffering from any medical conditions, how serious those medical conditions are, or what treatment he is receiving or may require. Further, other than the submitted articles on health care in India, there is no evidence in the record that the applicant's wife cannot receive treatment for her medical conditions in India or has to remain in the United States to receive treatment. In fact, the AAO notes that medical documentation in the record establishes that the applicant's wife is being treated for her medical conditions in India. Therefore, based on the record before it, the AAO finds that the applicant has failed to establish that his wife and father would suffer extreme hardship upon remaining in India.

The second prong addresses hardship to the applicant's wife and father upon returning to the United States without the applicant. As noted above, counsel claims the applicant's wife's ex-husband was abusive to her, and when she left him, she was disowned by her family. Counsel also claims that the applicant's wife fears that she will be attacked by her ex-husband's family because they are "powerful in her hometown," and since joining the applicant in India, she has been very depressed. Counsel states that now that the applicant's wife is with the applicant, she is doing better. However, counsel claims that the applicant's wife's "prior abusive relationship left her emotionally scarred, making her susceptible to depression." In an undated statement, the applicant's wife states the applicant "has been a rock of support for [her], emotionally and financially." She claims that she needs "his presence for [her] emotional well-being."

Counsel claims that since the applicant's removal to India, his wife "suffered financial ruin, medical illness, and immeasurable emotional trauma." Counsel states that when the applicant was removed from the United States, the applicant's wife "was left with the responsibility to manage the finances of the couple's home and business alone." Counsel also states the applicant's wife was unable to run the business and she had to return to India with the applicant. The applicant states the "income through the trucking business provided [the applicant's wife] and [him] with [their] only income." The applicant's wife states she depends on the applicant financially. She states that in the United States she was unemployed, and "[t]here are very few jobs that [she] [is] qualified to do, as a result of [her] lack of education and poor English skills." Counsel states that in the United States the applicant's wife "was receiving treatment for migraine headaches, abdominal pain, and infertility." However, when the applicant was removed from the United States, she "was unable to get treatment because [the applicant] provided her with health insurance." Counsel states the applicant's wife also suffers from chicken pox, nausea, thyroid dysfunction, and fibroid tumors, and if she returns to the United States, she can be treated for her fibroid tumors. The applicant states his "wife would not be able to return and live in the United States if [he] was not there to help provide for her." The AAO notes the applicant's wife's concerns.

The applicant states that he and his brother take care of their father "and shared the financial responsibility of providing for him." The applicant states his father "has depended on [him] both financially and emotionally." The AAO notes that the applicant's father may have suffered some hardship in being separated from the applicant. However, the AAO notes that the applicant has not submitted any documentary evidence establishing that his father's emotional problems were significantly exacerbated through a separation from the applicant. Additionally, while the AAO notes the applicant's

father's claim of financial hardship, the record contains no documentation that establishes his income or expenses in the applicant's absence. Based on the record, the AAO does not find the applicant to have established that his father will suffer extreme hardship upon returning to the United States.

However, the AAO finds that when the applicant's wife's emotional, financial and medical issues are considered in combination with the normal hardships that result from separation of a spouse, the applicant has established that his wife would experience extreme hardship if she returned to the United States without him.

However, in that the record does not also establish that the applicant's wife or father would suffer extreme hardship if they remained in India, the applicant has failed to establish extreme hardship to his wife or father under section 212(a)(9)(B)(v) 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.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's wife or father caused by the applicant's inadmissibility to the United States. 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.