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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

[redacted]

H5

FILE: [redacted] Office: TAMPA, FL Date:

SEP 21 2010

IN RE: [redacted]

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

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 $585. 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

ACTION COMPLETED
APPROVED FOR FILING
Initials: JT Date: 6/22/11
FCO/Unit CW

DISCUSSION: The waiver application was denied by the District Director, Tampa, Florida. The matter 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)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having entered the United States through fraud or willful misrepresentation. The record reflects that the applicant is married to a U.S. citizen and the father of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his family.

The District Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *District Director's Decision*, dated January 12, 2009.

On appeal, counsel for the applicant contends that the District Director erred as a matter of fact and law in denying the applicant's waiver application in failing to consider the entire record. *Form I-290B, Notice of Appeal or Motion*, dated February 5, 2009.

In support of the appeal, the record includes, but is not limited to, counsel's brief and addendum to the Form I-290B; proof of health insurance; medical documentation relating to the applicant's spouse; an employment letter for the applicant's spouse; 2006 W-2 forms and a tax return for the applicant's spouse; country conditions materials on India; online materials on marriage; and documentation relating to the applicant's arrests and conviction. The entire record was reviewed and considered in arriving at a decision in this matter.

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

> (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.

The record reflects that, on August 22, 2001, the applicant entered the United States under the Visa Waiver Program using a British passport. Accordingly, he is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having sought an immigration benefit by the willful misrepresentation of a material fact and must seek a waiver of inadmissibility under section 212(i) of the Act.

The AAO notes that the District Director also appears to have found the applicant to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude. The record, however, does not support such a finding. It indicates that the applicant has a single conviction for selling, giving, or serving alcoholic beverages to a minor under Florida Statues § 562.11(1), a second degree misdemeanor. Even were this a crime involving moral turpitude, the applicant would not be inadmissible to the United States as he would benefit from the petty offense exception found in section 212(a)(2)(ii)(II) of the Act, which states that section 212(a)(2)(A)(i)(I) of the Act shall not apply to an alien convicted of a single crime for which the maximum penalty does not exceed one year of imprisonment and he or she is not sentenced to more than six months of imprisonment. In the present case, the maximum period of incarceration for a second degree misdemeanor in Florida may not exceed 60 days and the applicant was sentenced to no time in jail.[1]

The AAO now turns to a consideration of the applicant's eligibility for a waiver under section 212(i) of the Act, which states in pertinent part:

> (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.

A waiver of inadmissibility under section 212(i) 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 or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative 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 Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez*, 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

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[1] The applicant was also arrested for distribution/sale of pornographic material to a minor under Florida Statutes § 847.012(2)(b) on April 29, 2007. Prosecution of the applicant was deferred to allow him to enter a Pre-Trial Intervention Program. The applicant's successful completion of this program resulted in the dismissal of the charge against him.

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 of Immigration Appeals (BIA) 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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.

On appeal, counsel states that the applicant's spouse, who was born in Tanzania, has no ties to India. He contends that the applicant's spouse does not speak Hindi and is not familiar with India as she has visited there only once. Counsel further states that the applicant's spouse has lived in the United States since she was three years of age and that all her family live in the United States, including her parents and siblings. Counsel asserts that it would be extremely difficult for the applicant's spouse to settle in India because she has adjusted to the U.S. lifestyle and India has a different culture and values. He also states that the Indian government's tedious procedures for registering foreign nationals visiting India for more than 180 days and the penalties for those who do not comply with its visa requirements will result in extreme hardship for the applicant's spouse.

If the applicant's spouse relocates to India, counsel contends that having to quit her job in the United States will "uproot her completely." He further asserts that she will not have any right to work in India, nor will she be able to make a comparable living in India. Counsel states that the family's standard of living would decline considerably upon relocation, resulting in a severe financial hardship for the applicant's spouse and child.

Counsel also points to the applicant's spouse's health as a hardship factor upon relocation. He states that the applicant's spouse was diagnosed with tuberculosis when she was 17 years old and that she continues to require treatment from time to time. Counsel also reports that the applicant has been diagnosed with asthma and has chronic bronchitis, a common condition in individuals with a history of tuberculosis. Counsel also indicates that the applicant's spouse suffers from chronic anemia and that when she suffers severe attacks, she loses consciousness without any warning. Should the applicant's spouse relocate to India, counsel asserts, she will run the risk of becoming reinfected with tuberculosis and that there is a significant chance that her child will also contract tuberculosis. Counsel also states that the applicant's asthma is likely to be aggravated by a move to India because of its poor air quality and by the stress created by relocation. Counsel states that based on the applicant's spouse's health concerns, she will likely require medical attention in the future and that, in India, she will be deprived of proper medical attention as a result of the lack of quality medical care facilities. Counsel also contends that it is unlikely that the applicant's spouse will be unable to obtain medical insurance in India and, therefore, it will be difficult to afford health care.

The AAO finds the record to contain a statement from the Department of Health, Erie County, New York, dated January 25, 2008 and signed by a representative of the Erie County TB Control Program, that establishes the applicant's spouse was treated for tuberculosis in 1995-1996, although she does not have active tuberculosis. A copy of a January 21, 2008 medical chart,

signed by [redacted] states that the applicant's spouse had asthma as a child; tested positive for tuberculosis in 1995; suffers from chronic bronchitis; is having trouble breathing; and is wheezing. Other notations on the chart are generally illegible. The record also contains medical notes and tests from St. Joseph's Women's Hospital where the applicant's spouse was treated following a motor vehicle accident on October 14, 2007. The notes appear to relate to the state of the applicant's spouse's pregnancy as a result of the accident.

While the record does not support all of counsel's claims regarding the hardship that the applicant's spouse would encounter as a result of relocation to India, the AAO notes the applicant's spouse's history of tuberculosis and that she currently suffers from chronic bronchitis. It also acknowledges the uneven quality of medical care in India as reported by the Department of State in its publication, Country Specific Information – India, issued on May 29, 2008. When the applicant's spouse's health, her lack of ties to and unfamiliarity with India, the presence of her family in the United States and the common difficulties and dislocations created by relocation are considered in the aggregate, the AAO finds the applicant to have established that relocation to India would result in extreme hardship for his spouse.

The record does not, however, demonstrate that the applicant's spouse would experience extreme hardship if his waiver request is denied and she remains in the United States. On appeal, counsel states that the applicant's spouse depends on her husband for many day-to-day things and that it will be "unconscionable" for her to live without him, particularly as they have a child. He contends that she will suffer mentally and economically in his absence.

Counsel states that the applicant's spouse, as she requires constant medical attention, needs the assistance of the applicant. He also asserts that if the applicant is removed from the United States, it will be extremely hard for his spouse to live on her own and raise their child. Counsel states that in the applicant's absence, his spouse will be required to find employment with a reduced work schedule as the applicant will not be available to assist her in caring for their child. Such employment, counsel asserts, will result in reduced income as the applicant's spouse will be working fewer hours. Counsel also contends that a job with reduced hours may mean a loss of health insurance for the applicant's spouse. He further states that, without the applicant, his spouse will lose the benefits provided by a healthy marriage, as will their child.

While the AAO finds the record to indicate that the applicant's spouse has a history of tuberculosis and currently suffers from chronic bronchitis, it does not find it to demonstrate that she requires constant medical attention as counsel asserts. The record does not include sufficient medical documentation for the AAO to determine the frequency with which the applicant's spouse must seek medical care or the type of medical care she requires. Neither does the record establish that, in the applicant's absence, his spouse will have to give up her current employment to care for their child. Although counsel indicates that the applicant's spouse needs the applicant to provide childcare, the record fails to demonstrate that she would be unable to afford professional childcare in his absence or that her family members in the United States would be unable or unwilling to provide her with this type of support. The AAO notes that the applicant's spouse resides in

Buffalo, New York and that her Form G-325A, Biographic Information, indicates that her parents also live in Buffalo.

The AAO acknowledges the articles on the benefits of healthy marriages for women and children that have been submitted for the record. We note that among these benefits are better emotional and physical health. However, the general conclusions reached in the articles are not predictive of the impact of the applicant's removal on his spouse or child in the present case and the record contains no documentation from licensed medical professionals to establish how the applicant's removal would affect his spouse's and/or his child's emotional or physical health. The AAO further notes that the applicant's child is not a qualifying relative for the purposes of a section 212(i) waiver proceeding and that any hardships he might suffer as a result of his father's inadmissibility can be considered only to the extent that they would affect his mother.

In that the record fails to establish that the applicant's spouse would experience extreme hardship whether she relocates to India or remains in the United States, the applicant has not established eligibility for a waiver 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(a)(6)(C) 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.