

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



H5

Date:

MAY 13 2011

Office: ATLANTA, GEORGIA

FILE:



IN RE:

Applicant:



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:



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, Atlanta, Georgia, 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)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to seek admission into the United States through fraud or the willful misrepresentation of a material fact. The applicant is married to a lawful permanent resident of the United States and the mother of a United States citizen. Her husband is the beneficiary of an approved Petition for Alien Worker (Form I-140). The applicant 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 her spouse and child.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 5, 2008.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) erred in denying the applicant's waiver application. *Form I-290B*, filed September 5, 2008. Additionally, counsel claims that there will be an "extreme hardship to the spouse" and a separation of the applicant's son from his father. *Id.*

The record includes, but is not limited to, counsel's briefs, an affidavit from the applicant's husband, a birth certificate for the applicant's son, and the applicant's marriage certificate. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (i) In general.-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.
-
- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

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

In the present case, the record indicates that on July 31, 1998, the applicant presented an Indian passport in another individual's name. On the same day, she was allowed to withdraw her application for admission and she returned to India. In September 2000, the applicant entered the United States without inspection. Based on her misrepresentation, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO notes that counsel does not dispute this finding.

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 her son can be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband 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 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 of Immigration Appeals (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 a qualifying relative, 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 husband if he relocates to India. In counsel’s appeal brief filed October 3, 2008, counsel states the applicant’s husband and son would suffer in India. Counsel claims that the applicant and her husband would be limited to entry level jobs in India. He also claims that the applicant and her husband’s “earning capacity in the U.S. far exceeds the wages they would earn in India.” Additionally, counsel states the applicant’s husband has nerve damage in his leg which “causes him to slightly limp.” Counsel states the applicant’s husband “would be ostracized by the working class due to his inability to stand for lengthy periods of time and would be seen as a disadvantaged worker.” In an affidavit dated December 21, 2007, the applicant’s husband states that because of his medical condition, “it would be very difficult for [him] to find gainful employment.” The AAO notes the applicant’s husband’s concerns regarding relocating to India.

Counsel states the applicant “has assimilated into American life and culture,” she “has many friends in the United States who have become like her family,” and she “is deeply involved with her temple.” The applicant’s husband states the applicant would “have a hard time finding a job as she is also not educated.” Counsel claims that the applicant “would be returning to a country where the uneducated lower-class citizens are horribly treated and overwhelming under compensated [sic].” He claims that if the applicant is removed from the United States, she “would suffer extreme hardship, as she would not be

able to financially support herself and live independently.” The applicant’s husband states the applicant would become depressed if she was separated from him and their son. Additionally, he states the applicant would “suffer from social ostracism or stigma” if she returns to India without her family. The AAO notes the concerns for the applicant.

The AAO acknowledges the claims made regarding the difficulties the applicant’s husband would face in relocating to India. The AAO notes that the applicant’s husband has been residing in the United States for many years. However, the AAO observes that the applicant’s husband is a native of India and the record does not establish that he does not speak useful languages or that he has no family ties to India. In fact, the AAO notes that counsel states the applicant’s husband’s “parents and younger brother are residing in India.” Additionally, the AAO notes that no country conditions materials or documentation has been submitted to support that the applicant’s husband would be 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)). The AAO also notes that no medical documentation has been submitted establishing that the applicant’s husband suffers from any medical conditions or the severity of his medical conditions. Additionally, no documentation has been submitted establishing that the applicant’s husband cannot receive treatment for his alleged medical condition in India or that he has to remain in the United States to receive treatment. The AAO acknowledges that the applicant may suffer some hardship in returning to India; however, the AAO finds that the applicant has not shown that hardship to herself will elevate her husband’s challenges to an extreme level. Therefore, based on the record before it, the AAO finds that the applicant has failed to establish that her husband would suffer extreme hardship if he relocated to India.

In addition, the record does not establish extreme hardship to the applicant’s husband if he remains in the United States. Counsel states the applicant’s husband “would suffer extreme hardship both personally and economically.” Counsel claims that the applicant “is the primary caregiver to [their] child and attends to his daily needs.” However, counsel also claims that the applicant “works eight to ten hours a day [leaving] her child with her mother while both her and her spouse work.” The applicant’s husband states that because of his nerve damage in his leg, he “require[s] assistance in looking after [their] son.” He also states that he would suffer “great harm” if his son joined the applicant in India. Counsel states the applicant’s husband “would be unjustly deprived of his son and missing out on him growing up” and “the applicant’s son would be disadvantaged as he would be growing up without his father.” The AAO notes the applicant’s husband’s concerns.

Counsel states that the applicant’s husband’s nerve damage in his leg is untreatable. The applicant’s husband states the applicant’s husband depends on the applicant to help him with his “physical ailment.” Counsel claims the applicant’s husband “is unable to stand for lengthy periods of time and requires daily massages” which are provided by the applicant. Counsel claims that the applicant’s husband would have to pay someone to provide him with daily massages. The AAO notes that the record does not establish through documentary evidence that the applicant’s husband requires the assistance of the applicant in managing the pain in his legs. Additionally, as noted above, no medical documentation has been submitted establishing that the applicant’s husband suffers from any medical conditions or the severity of

his medical conditions. Counsel claims that the applicant's husband "would not be able to send money to [the applicant] in India as he would also be suffering financially trying to make ends meet." Counsel states the applicant is still breastfeeding her son and "baby formula is extremely expensive." The applicant's husband states the baby formula is also "not as beneficial for [their] son." Counsel states the applicant and her husband have "acquired some debt" in the United States. Additionally, counsel states the applicant and her husband send money to their family in India, and her "in-laws and her immediate family would suffer as she would be unable to continue working in the U.S. and supporting those who require her financial assistance." The AAO notes the concerns of the applicant and her husband.

The AAO notes that the applicant's husband may suffer some emotional hardship in being separated from the applicant. However, the record does not establish that his emotional hardships go beyond the typical effects of separation. The AAO acknowledges that the applicant may have been breastfeeding her son; however, the record establishes that her son is almost four (4) years old and no updated information has been submitted establishing that she still breastfeeds her son. Additionally, the AAO notes that the applicant's son may suffer some hardship in being separated from either the applicant or her husband. However, the applicant's son is not a qualifying relative, and his hardship is only considered to the extent that it has an impact on the applicant's husband. The AAO notes that other than the applicant's husband's unsupported statement that he suffered nerve damage in his leg and therefore cannot look after his son, there is no evidence in the record demonstrating that hardship to the applicant's son will impact her husband. Additionally, the AAO notes that the applicant's husband may experience some financial hardship in being separated from the applicant. However, the record offers no documentary evidence that the applicant's husband will be unable to support himself in the applicant's absence. Further, the record does not contain documentary evidence that demonstrates the applicant would be unable to obtain employment in India and, thereby, reduce the financial burden on her husband. Based on the record before it, the AAO finds that the applicant has failed to establish that her husband will suffer extreme hardship if her waiver application is denied and he remains in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's husband 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 she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C)(i) 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.