

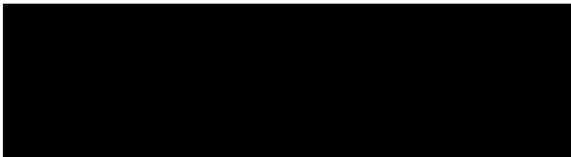
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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS2090
Washington, DC 20529-2090



U.S. Citizenship
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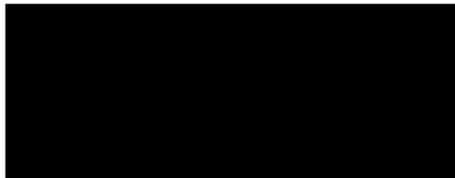
FILE: 

IN RE:

Applicant: 

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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.

Thank you,


fr

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of India who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation and under section 212(a)(9)(B)(i)(II) of 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 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 spouse and child.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 30, 2008.

On appeal, counsel for the applicant states that the applicant's qualifying relative would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief.*

In support of the appeal, counsel submits a brief. The record also includes, but is not limited to, a brief submitted by prior counsel; statements from the applicant's spouse; statements from the parents of the applicant's spouse; statements from family members and friends; psychological evaluations for the applicant's spouse; medical letters for the applicant's spouse; a statement from a physical therapist; medical letters and records for the parents of the applicant's spouse; a medical letter for a relative of the applicant's spouse; a statement from the applicant; medical records for the applicant's child and for the applicant; published country conditions reports; and tax returns, bank statement, and other financial documentation. The entire record was reviewed and considered in rendering this decision.

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.

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

(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.

The record reflects that the applicant admitted during his consular interview that on November 1, 2003 he gained admission to the United States at JFK Airport in New York by using false documents. *Consular Memorandum, American Embassy, New Delhi, India*, dated April 7, 2008. The applicant remained in the United States and was arrested by immigration authorities in January 2005. *Id.* The applicant was placed in removal proceedings and on March 8, 2007, an immigration judge granted the applicant voluntary departure until July 6, 2007. *Order of the Immigration Judge*, dated March 8, 2007. The applicant departed the United States on May 28, 2007. *Consular Memorandum, American Embassy, New Delhi, India*, dated April 7, 2008. As the applicant used false documentation to gain admission into the United States in November 2003, the AAO finds the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant accrued unlawful presence from November 1, 2003, the date he gained admission to the United States with false documentation, until March 8, 2007, the date an immigration judge granted him voluntary departure. As such, the applicant is also 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.

Section 212(i) of the Act provides, 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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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(i) and 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 or children 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 USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 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.

If the applicant’s spouse joins the applicant in India, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant’s spouse is a native of India. *Naturalization certificate*. The applicant’s spouse came to the United States in 1995 at age 16 and became a U.S. Citizen in May 2000. The applicant’s spouse states that her family and friends are in the United States. *Statement from the applicant’s spouse*, undated. The applicant’s spouse assists in the care of both of her parents who are ill and residing in the United States. *Id.* According to documentation from licensed healthcare professionals, the father of the applicant’s spouse has been diagnosed with multiple myeloma which is a very aggressive bone marrow cancer that involves his spine. *Statements from* [REDACTED], dated December 11, 2009 and May 7, 2010. He has also been treated for severe hypertension. *Id.* He has developed marked leg weakness due to the cancer and physically needs help. *Id.* His English language skills are also not sophisticated, and these skills almost compromised his medical care. *Id.* He has difficulty walking, has required a course of radiation therapy, and will require extensive chemotherapy which he has already started. *Statement from* [REDACTED], dated December 21, 2009. The myeloma problem is ongoing, is not generally considered cured, and will require a bone marrow transplant, chemotherapy, and other treatment for many months or longer. *Id.* The mother of the applicant’s spouse has recently been diagnosed with esophageal cancer and the applicant’s spouse is involved in her care as well. *Statement from* [REDACTED], dated June 21, 2010.

The applicant’s spouse states she cannot leave the United States because she helps her parents with their restaurant as well as taking care of them. *Statement from the applicant’s spouse*, undated. Although her two younger sisters help in the caretaking responsibilities of their father, the

applicant's spouse notes that they are in college and busy with their studies. *Id.* She also notes that her brother cannot run the restaurant alone. *Id.* She states that she cannot leave for India and just abandon her family. *Id.* Her mother notes that the applicant's spouse has played a huge role in taking care of her father. *Statement from the parents of the applicant's spouse*, dated December 28, 2009. She further states that the applicant's spouse has been with her parents at the hospital at all times as well as taking her father to doctor's appointments and to his treatment sessions. *Id.* Her mother asserts that if the applicant's spouse goes to India, their entire family will be affected, particularly the father of the applicant's spouse. *Id.* When looking at the aforementioned factors, particularly the family ties the applicant's spouse has in the United States, documented health conditions of the parents of the applicant's spouse, the applicant's spouse's care for her parents, and the her length of residence in the United States, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in India.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse is a native of India who has resided in the United States since the age of 16. *Prior attorney's brief.* The applicant's spouse states that her family and friends are in the United States. *Statement from the applicant's spouse*, undated. The applicant and his spouse have a United States citizen child who was born on August 18, 2009. Counsel notes that it has been extremely difficult for the applicant's spouse to care for the baby without the applicant. *Attorney's brief*, dated January 4, 2009. In addition to caring for her child, the applicant's spouse assists in the care of both of her parents who are ill and residing in the United States. *Statement from the applicant's spouse*, undated. As noted above the father of the applicant's spouse has been diagnosed with multiple myeloma which is a very aggressive cancer, her mother was diagnosed with esophageal cancer, and she is actively involved in their care. The applicant's spouse has been diagnosed as having Major Depressive Disorder with Postpartum Onset and receives regular counseling sessions. *Statement from [REDACTED] and [REDACTED] LCSW*, dated December 3, 2009. Her physician also notes that she suffers from depression with symptoms of crying spells, fatigue, irritability, anxiety, decreased appetite, decreased concentration and memory, decreased interest in usual activities, and insomnia. *Statement from [REDACTED] and [REDACTED]*, dated November 28, 2009. Her physician notes that while some of her depression may be due to the postpartum time period, she suffered from depression before her pregnancy due to severe stress that has to do with the applicant being in India for several years. *Id.* In addition to her psychological conditions, the applicant's spouse has been diagnosed with thoracic spine and cervical spine pain, and that her pain worsens when she bends forward to pick up her baby. *Id.* She also suffers from wrist, arm, and leg pain as well as generalized feelings of weakness. *Id.* When looking at the aforementioned factors, particularly the difficulties in being a single parent while having to care for two parents with documented health conditions, her documented psychological conditions, and her documented physical conditions, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain in the United States without the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of

equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

The adverse factors in the present case are the applicant's misrepresentation and periods of unlawful presence for which he now seeks a waiver as well as periods of unauthorized employment. The favorable and mitigating factors are his United States citizen spouse and child, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his spouse as documented in the record.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(6)(C)(i) and 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.