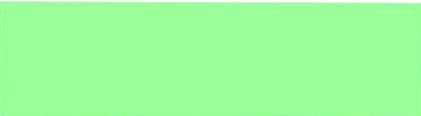




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 07 2013** OFFICE: LAS VEGAS, NV

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of India who has resided in the United States since May 28, 2002, when he was admitted pursuant to a nonimmigrant visa. He 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 a visa, other documentation, admission to the United States, or another benefit under the Act through fraud or misrepresentation. The applicant is the spouse of a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his U.S. Citizen spouse and children.

The Field Office Director concluded that the applicant failed to demonstrate the existence of extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of Field Office Director* dated June 18, 2012.

On appeal, counsel submits a brief in support, evidence of birth and citizenship, a letter from the applicant's spouse, a Wikipedia article, and medical records. In the brief, counsel contends the applicant's spouse cannot relocate to India because she is under medical care in the United States, her children would have difficulty adapting to life in India, and she would be unable to pay for private school for them.

The record includes, but is not limited to, the documents listed above, other applications and petitions, evidence of birth, marriage, divorce, residence, and citizenship, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

- (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(i) of the Act provides:

- (1) The [Secretary] may, in the discretion of the [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 [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 reflects that the applicant obtained L-1 nonimmigrant status by asserting that the I-129 Petitioner, [REDACTED] was the subsidiary of the foreign employer, [REDACTED], when in fact the applicant, not [REDACTED] owned the I-129 Petitioner. The AAO therefore finds that the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for having procured a benefit under the Act through fraud or misrepresentation.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In addition to inadmissibility under section 212(a)(6)(C) of the Act, the applicant is also inadmissible for unlawful presence. Section 212(a)(9) 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

....

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant was admitted to the United States as a nonimmigrant in 1989, remained past the six months of his authorized stay, and departed the United States in May 1998. The applicant therefore accrued over one year of unlawful presence, from April 1, 1997 to May 1998, and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Counsel's contention that the applicant's re-admission on a valid visa invalidates this inadmissibility for unlawful presence

is incorrect, as relief from inadmissibility for unlawful presence requires a waiver under section 212(a)(9)(B)(v) of the Act. Furthermore, the AAO notes that the applicant was in unlawful status from the denial of his L-1 extension, November 23, 2004, until he filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on April 17, 2011. Although the applicant's departure occurred in May 2001, more than ten years ago, because the last ten years have included periods of unlawful presence in the United States, the applicant's ten years of inadmissibility have not "run" and he remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The AAO finds that to read the statute as providing an exception to the ten-year bar by virtue of subsequent periods of unlawful presence in the United States would be to allow one to avoid the punitive effects of a law by violating the law anew, an absurd result contrary to well-established principles of statutory construction. *See Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where...the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."); *U.S. v. McKeithen*, 822 F.2d 310, 315 (2nd Cir. 1987) (quoting *United States v. About 151.682 Acres of Land*, 99 F.2d 716, 721 (7th Cir.1938)) ("[A]ll laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."). The AAO therefore holds that inadmissibility under section 212(a)(9)(B)(i) of the Act, which is triggered upon departure, remains in force until the applicant has been absent from the United States for three years under section 212(a)(9)(B)(i)(I) or ten years under section 212(a)(9)(B)(i)(II). Accordingly, in addition to inadmissibility under section 212(a)(6)(C) of the Act, the applicant is also inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant's qualifying relative for a waiver in this case is his U.S. Citizen spouse.

Sections 212(i) and 212(a)(9)(B)(v) of the Act provide that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible 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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under sections 212(i) and 212(a)(9)(B)(v) of

the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

The applicant's spouse claims the applicant is her only source of income, and she and their two children cannot survive financially without the applicant. She explains that she cannot work because of physical and medical ailments, but instead, she takes care of the children and the house while the applicant works long hours. The spouse adds that the applicant supports her and the children morally, and that the children need their father in their lives. The spouse's physician indicates in a letter that the spouse suffers from hypothyroidism, hyperhidrosis, and thoracic spine pain, opining that she might find it difficult to raise the children on her own without assistance. A patient plan is submitted on appeal, indicating that the spouse may have cataracts and uses eye drops.

The spouse asserts that relocating to India will be difficult because she has no housing and no financial support. She adds that the children will also experience hardship relocating because they lack Hindi language skills, and the education system in India is difficult. An article from www.wikipedia.com on languages by the number of native speakers in India is submitted. Counsel contends that the family does not have enough money to pay for private school in India, and the spouse would be unable to access medical care in India because of a lack of income and the fact that she is not an Indian citizen.

The record establishes that the applicant's spouse has been diagnosed with hypothyroidism, hyperhidrosis, and thoracic spine pain. However, there is no explanation from the spouse's treating physician of the severity of these conditions, how they affect the spouse's life, whether the applicant can assist with these issues, or why her condition makes her unable to work as she claims. Absent such an explanation in plain language from the treating physician, the AAO is not in the position to reach conclusions concerning the severity of a medical condition or the hardship the spouse will suffer due to her medical conditions upon separation from her spouse.

The record does not contain sufficient evidence of the spouse's or the applicant's household expenses to support assertions of financial hardship. The record does not reflect the level of financial support the applicant himself provides. In fact, the record contains a Form I-864, Affidavit of Support, which indicates that the spouse's individual annual income in 2011 was \$40,330. *See Form I-864*, April 4, 2011. Without supporting documentation of the applicant's financial contributions, such as paystubs, 1099 or W-2 forms, and evidence of household expenses, the AAO is unable to assess the nature and extent of financial hardship, if any, the applicant's spouse will face.

While the AAO acknowledges that the applicant's spouse would face difficulties as a result of the applicant's inadmissibility, such as family-related hardship, we do not find evidence of record to demonstrate that her hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record fails to provide sufficient evidence to establish the financial, medical, emotional or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, the

AAO cannot conclude that she would suffer extreme hardship if the waiver application is denied and the applicant returns to India without his spouse.

The record moreover contains no evidence to support claims that the spouse would have difficulty finding a job in India, the country of her birth, or that she would have difficulty accessing medical care in that country. Although the spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, in support of assertions that the children will have difficulty due to their lack of Hindi language skills, counsel submits an article from www.wikipedia.com on languages in India by the number of native speakers. Online content from *Wikipedia* is subject to the following general disclaimer:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY. *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on February 21, 2013. Even if the AAO took the article's content as reliable, the article does not support the spouse's assertions of hardship, as it indicates that English is the second language of India besides Hindi.

The AAO notes that relocation to India would entail separation from family members who live in the United States as well as other difficulties. However, we do not find evidence of record to show that the spouse's difficulties would rise above the hardship commonly created when families relocate as a result of inadmissibility or removal. In that the record lacks sufficient evidence to demonstrate the financial, medical, or other impacts of relocation on the applicant's spouse are in the aggregate above and beyond the hardships normally experienced, the AAO cannot conclude that she would experience extreme hardship if the waiver application is denied and the applicant's spouse relocates to India.

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In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. Citizen spouse as required under sections 212(i) and 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for a waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.