

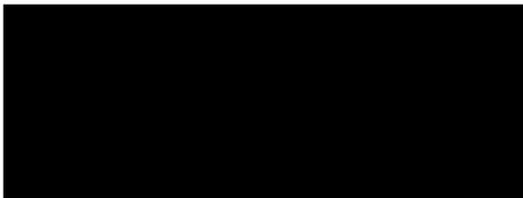
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



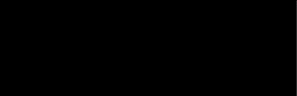
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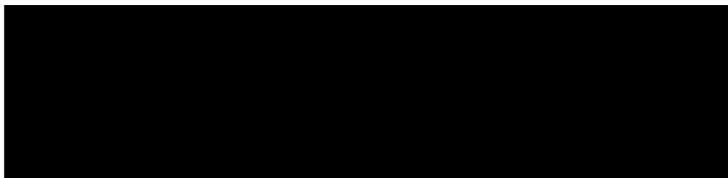
Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of India who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The record indicates that the applicant is married to a United States citizen and is the father of a United States citizen. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his United States citizen wife and child.

The Acting District Director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated August 8, 2006.

On appeal, the applicant, through counsel, asserts that the Acting District Director's "decision is arbitrary, capricious, and [an] abuse of discretion, outside of and inconsistent with the record." *Appeal Brief*, filed September 1, 2006.

The record includes, but is not limited to, counsel's appeal brief, a letter from the applicant's wife, medical documents for the applicant's wife, a psychological evaluation on the applicant and his family, and media articles on India. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

(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.
  - ....
- (v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is

established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present application, the record indicates that the applicant entered the United States on July 24, 1997, on a B-2 nonimmigrant visa, with authorization to remain in the United States until January 23, 1998. The applicant's visa was subsequently extended until July 22, 1998. The applicant failed to depart the United States by the date on which his visa expired. On September 9, 1999, the applicant's United States citizen wife filed a Form I-130 on behalf of the applicant. On the same date, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On December 10, 1999, the applicant's Form I-130 was approved. On January 10, 2001, the applicant filed an Application for Travel Document (Form I-131), which was approved on January 16, 2001. Thereafter, the applicant departed the United States. He was paroled back into the United States on March 7, 2001. On December 22, 2004, the applicant filed a Form I-601. On August 8, 2006, the Acting District Director denied the applicant's Form I-485 and Form I-601, finding that the applicant had accrued more than a year of unlawful presence and had failed to demonstrate extreme hardship to his United States citizen spouse.

The record establishes that the applicant's authorization to remain in the United States expired on July 22, 1998. Accordingly, the applicant accrued unlawful presence from July 23, 1998, the day after his nonimmigrant visa expired, until September 9, 1999, the date he filed the Form I-485. In that the applicant is seeking admission to the United States within ten years of his 2001 departure from the United States, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for more than one year.

On appeal, counsel states that at "the time when advance parole was issued [to the applicant], its issuance was specifically prohibited by US government policy." In support of this claim, counsel submits an AILA-published copy of a legacy Immigration and Naturalization Service memorandum dated November 16, 1997, regarding advance parole for aliens unlawfully present in the United States for more than 180 days. Counsel claims that the immigration officers who granted the applicant advance parole "were in direct violation of the November 26, 1997" memorandum and that, in consequence the "quantity of hardship to grant [the applicant's] waiver should be minimal." The memorandum states that "advance parole *generally* should not be granted, unless it appears that the alien would, *in the exercise of discretion*, be likely to receive a waiver of inadmissibility." (emphasis added).

While the AAO notes the concerns expressed by counsel, they do not alter the facts in the present case, which are that the applicant departed the United States on advance parole after accruing more than one year of unlawful presence, thereby triggering the bar to admission in section 212(a)(9)(B)(i)(II) of the Act. To qualify for a waiver, he, like any other waiver applicant, must satisfy the extreme hardship requirement set forth in section 212(a)(9)(B)(v).

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon removal is not directly relevant to a section 212(a)(9)(B)(v) waiver proceeding. The AAO also notes that the record contains references to the hardship that the applicant's child would suffer if the applicant were to be denied admission into the United States. Section 212(a)(9)(B)(i) of the Act provides that a waiver, under section 212(a)(9)(B)(v) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. Therefore, hardship to the applicant's child is not considered in section 212(a)(9)(B) waiver proceedings except to the extent that it creates hardship for a qualifying relative. 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).

The concept of extreme hardship to a qualifying relative "is not...fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has also held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

*Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). Only “in cases of great actual or prospective injury...will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

Counsel states that the applicant’s wife and daughter would suffer extreme hardship if they joined the applicant in India, in that education, sanitation, and health care in India are substandard. Counsel also states that it is obvious that the applicant is not wealthy or well-educated and that “[t]he life that [the applicant], his wife and daughter would face in India would be one of desperation and poverty.” In a psychological evaluation of the applicant’s wife, [REDACTED] states “that the chances for the family to find proper medical care, decent jobs, and a good education for [the applicant’s daughter] would all be near impossible in India.” The record includes numerous articles regarding the lack of access that the “poor” in India have to health care, education, and jobs.

While the AAO acknowledges the claims made by counsel and [REDACTED] it does not find the record to support them. The articles submitted by the applicant describe the circumstances of those who are poor in India, but the record does not demonstrate that the applicant and his family would fall within this demographic. The Form G-325A, Biographic Information, for the applicant indicates that he was employed as a facilitation executive for a New Delhi travel agency prior to coming to the United States. The AAO finds no evidence in the record that establishes he would not be able to obtain such employment if he returned to India or that the skills he has gained in the United States would not help him obtain other employment that would allow him to support his family. The AAO also notes that the applicant’s parents reside in New Delhi and that nothing in the record indicates that they are unwilling or unable to assist their son upon his return.

The record establishes that the applicant’s wife suffers from back pain. However, the submitted medical documentation does not clearly indicate to what extent her medical condition currently limits her ability to function or her medical prognosis. Neither does the record establish that she would be unable to obtain medical treatment in India or that she has to remain in the United States to continue the medical treatment she is currently receiving. The AAO notes that one of the submitted articles reports that India’s “private health care is booming, and the country’s state-of-the-art hospitals and highly-skilled doctors even attract patients from countries where health care costs are much higher.” *India offers both best, worst of health care*, <http://www.voanews.com>, dated May 3, 2006. 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)).

In her psychological evaluation, [REDACTED] finds that if the applicant's wife and child were to relocate to India, it would result in psychological and emotional damage. She does not, however, relate this finding to the applicant's spouse. Instead, [REDACTED] concludes that the applicant's child would experience intense psychological and emotional damage if she were to move to India. While the AAO acknowledges that the applicant's child may experience hardship in relocating to India, it notes that she is not a qualifying relative for a waiver under section 212(a)(9)(B)(v) of the Act and the record does not document how any hardship she might experience would affect her mother, the only qualifying relative.

The AAO acknowledges that the applicant's wife is a native and citizen of the United States and that she may experience hardship in relocating to India. However, the record does not distinguish her hardship from that commonly associated with relocation and therefore does not demonstrate that she would experience extreme hardship if she relocated to India with the applicant.

The record also fails to demonstrate extreme hardship to the applicant's wife if she remains in the United States. As a United States citizen, the applicant's wife is not required to reside outside the United States as a result of denial of the applicant's waiver request. Counsel asserts that the separation of the applicant from his wife qualifies as extreme hardship. The applicant's wife states that the applicant is the only one in the United States on whom she "can rely on for support, financial or otherwise."

[REDACTED] states in her evaluation that the applicant's removal would result in "undue psychological, emotional, and possibly physical damage" to the applicant's wife and daughter. She further concludes that the stress created by the applicant's removal would cause a worsening of the applicant's wife's medical condition and that she would be unable to care for herself and her child. The applicant's wife's anxiety, [REDACTED] asserts, would be likely to worsen in the applicant's absence and would put her at risk for developing more acute psychological problems, such as severe depression and panic disorder.

[REDACTED] notes that financial and medical ramifications have an impact on emotional well-being and that the applicant has been the primary source of income for his family and that his wife's medical insurance is provided through his employment. [REDACTED] asserts that, in the applicant's absence, his wife would be unable to support herself and their child as a result of her chronic back problems. [REDACTED]

[REDACTED] indicates that these back problems make it difficult for the applicant's wife to perform many normal activities and that full-time employment would result in the significant deterioration of her health. [REDACTED] also reports that the applicant's spouse has asthma.

While the AAO finds the record to establish that the applicant's wife has been diagnosed with back problems for which she requires medication and physical therapy, the submitted medical documentation does not demonstrate that she is unable to work at a full-time job that would provide her with health insurance. As previously noted, this medical documentation does not establish the extent to which the

applicant's wife's back problems limit her activities, including her ability to work. The record contains no medical evidence that demonstrates the applicant's wife suffers from asthma. Neither, as previously discussed, does it establish that the applicant would be unable to obtain employment in India and thereby provide financial assistance to his family from outside the United States. Moreover, the AAO notes that [REDACTED] assessment of the impact of the applicant's removal on his wife's mental health does not reach a diagnosis concerning her emotional/mental status. Neither does it include any discussion of the means [REDACTED] relied upon to reach her conclusions concerning the applicant's wife. Accordingly, the AAO finds the evaluation to lack the insight and detailed analysis normally associated with a mental health assessment, thereby diminishing its value to a determination of extreme hardship.

Counsel states that "[s]eparating the [applicant's] daughter from [the applicant] would constitute extreme hardship." The applicant's wife states the applicant is "very involved in the care and upbringing of [their] daughter." [REDACTED] states "[t]he trauma of losing [the applicant] from her home at this age and under these circumstances could cause [the applicant's daughter] severe psychological damage." However, the AAO again observes that the applicant's child is not a qualifying relative for the purposes of this proceeding and that the record fails to document how any hardship she might suffer in the applicant's absence would affect her mother. Accordingly, the AAO finds that the applicant has failed to establish that his wife would suffer extreme hardship if his waiver application is denied and she 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 spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.