

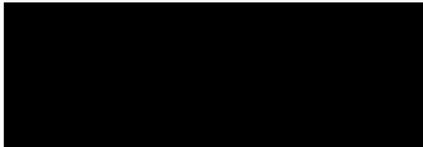
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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DATE: **OCT 25 2011** Office: NEW DELHI, INDIA File: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, New Delhi, India. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of India. He was found to be inadmissible to the United States pursuant to 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 one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen. He 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).

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 29, 2010.

On appeal, the applicant states that his spouse is suffering physically, financially and emotionally due to his absence, and asks that United States Citizenship and Immigration Services (USCIS) grant his appeal. *Statement in Support of Appeal*, dated April 21, 2010.

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

(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 indicates that the applicant entered the United States without inspection on May 27, 1997. He filed an asylum application on August 20, 1997, which was denied on March 1, 1999. The applicant was paled in removal proceedings and removed from the United States on October 24, 2005. Therefore, the applicant was unlawfully present in the United States for over a year from the date his asylum application was denied until October 24, 2005, and is now seeking admission within ten years of his last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

The record includes, but is not limited to, statements from the applicant; a statement from the office of Jeff Denham, United States Representative, dated September 2, 2011; a statement from [REDACTED]

██████████ MD, of Community Medical Centers, undated, pertaining to the applicant's spouse; medical records pertaining to the applicant's spouse; tax returns for the applicant's spouse; copies of monthly phone bills and other utility statements; a worker's compensation evaluation from Community Medical Centers pertaining to the applicant's spouse; statements from the Property Supervisor of the apartment complex rented by the applicant's spouse; a medical record from the office of ██████████ orthopedic surgeon, dated June 20, 2006; copies of bank account statements; copies of employee status reports pertaining to the applicant's spouse; copies of receipts and prepaid phone cards; statements from friends and associates of the applicant and her spouse; and documents related to the applicant's prior removal proceedings.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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(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 his 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).

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*, 138 F.3d at 1293 (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.

On appeal the applicant asserts that his spouse is suffering physical, emotional and financial hardship due to his inadmissibility. He explains that his spouse suffered a significant work related injury in 2006 and is now partially disabled in her right arm. *Statement in Support of Appeal*, dated April 21, 2010. Subsequent to the applicant's appeal statement additional evidence was submitted from the office of U.S. Representative Jeff Dunham. The evidence is a hand-written letter from Dr. [REDACTED] stating that the applicant's spouse has been diagnosed with uterine cancer and will have to undergo chemotherapy treatment for the next six months. The record also contains

substantial evidence of the applicant's spouse's previous work related injury. The evidence in the record is sufficient to establish that the applicant's spouse is experiencing significant medical hardship related to her recent diagnosis of uterine cancer and work related injury. These medical hardships will be given substantial weight when examining the overall hardship impact to the applicant's spouse due to the applicant's inadmissibility.

The applicant asserts that his spouse would experience significant hardship if she were to relocate to India with him because of the lack of infrastructure, economic conditions and available medical facilities. He also notes that it has been difficult for her to get permission to visit or reside in India and it would cost a lot of money to do so. He states that, despite the fact that she previously visited him and resided in India with him for a period after his return, getting permission to return and remain in India would be difficult due to Indian government filing procedures and fees. He also asserts that the health system, employment system, educational system, water and sewage systems and road transportation systems in their area are insufficient and would impose a hardship on both he and his spouse.

An examination of the record does not reveal any evidence to support the applicant's assertions of the conditions in India. However, as noted above, the record shows that the applicant's spouse is suffering from significant medical conditions. The AAO notes that, particularly with respect to her recent diagnosis of uterine cancer, having to relocate to India would disrupt the applicant's spouse's continuity of medical care from the doctors who are familiar with her condition and her medical history. When these factors are considered in addition to the normal hardships associated with relocation, the AAO finds that the applicant's spouse would experience uncommon impacts upon relocation which would rise to the level of extreme hardship.

With regard to hardship upon separation, the applicant asserts that his spouse needs his support emotionally, physically and financially. *Statement in Support of Appeal*, dated April 21, 2010. As noted above, the record contains substantial evidence that the applicant's spouse suffered a work related injury in 2006 and received worker's compensation for a period. Medical records indicate that she had a significant reduction in mobility in her right arm and is now only working light duty at her employment. Tax returns submitted into the record indicate the applicant's spouse earns an annual wage below the minimum federal poverty guideline for a single person. When the applicant's recent diagnosis of uterine cancer is considered it becomes clear that the applicant's spouse will experience a significant financial and physical impact due to the applicant's inadmissibility.

The applicant has also asserted that his spouse is suffering emotionally and that they should be able to reside together as a family. The AAO acknowledges the sentiments of the applicant, but the record does not contain any evidence which indicates that the applicant's spouse will specifically experience any uncommon emotional hardship. The applicant has also asserted that he and his spouse wish to have children and start a family, however there is no evidence that this represents an uncommon hardship factor.

When the hardships established by the record are considered in the aggregate they establish that the applicant's spouse will experience an uncommon hardship impact upon separation that rises to the level of extreme hardship. In light of the fact that the applicant's spouse suffered a previous work related injury and has now been diagnosed with uterine cancer it can be determined that the physical and financial impacts which are incumbent to these conditions would constitute an extreme hardship to the applicant's spouse if the applicant were not present in the United States to assist her.

As the applicant has established extreme hardship to a qualifying relative upon relocation and separation, the AAO may now move to consider whether he warrants a waiver 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).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (Citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's unlawful presence and unauthorized employment during his residence in the United States. The favorable factors in this case include the presence of the applicant's spouse, the physical and financial hardship she would experience due to his inadmissibility, and the lack of any criminal record during his residence in the United States. Although the applicant's violations of immigration law are serious and cannot be condoned, the AAO finds that the favorable factors in this case outweigh the negative factors,

therefore favorable discretion will be exercised. The director's decision will be withdrawn and the appeal will be sustained.

The AAO notes that the Field Office Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the alien's reapplying for admission.

On March 1, 1999, the applicant was ordered removed from the United States. As such, he is inadmissible under section 212(a)(9)(A) of the Act for a period of 10 years and was required to

request permission to reapply for admission. The applicant departed the United States on October 24, 2005.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of positive and negative factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests 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. The applications for a Waiver of Inadmissibility (Form I-601) and Permission to Reapply for Admission (Form I-212) are Approved.