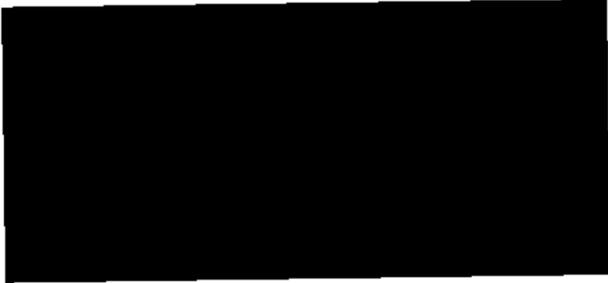




U.S. Citizenship
and Immigration
Services



H6

DATE: DEC 20 2012

OFFICE: NEW DELHI, INDIA

FILE: 

IN RE: 

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

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Acting Field Office Director, New Delhi, India, 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 seeking to procure admission into the United States through willful misrepresentation of a material fact, and 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 for more than one year and seeking readmission within 10 years of his removal from the United States. The applicant is married to a U.S. citizen and he is the beneficiary of an approved Form I-130, Petition for Alien Relative. He seeks a waiver of inadmissibility pursuant to sections 212(i) of the Act, 8 U.S.C. § 1182(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so that he may live in the United States with his wife and stepson.

The applicant is also inadmissible under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for having been ordered removed, and seeking admission within ten years of removal. There is no waiver available for inadmissibility under section 212(a)(9)(A) of the Act. The applicant properly has applied for permission to reapply for admission by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).

In a decision dated August 10, 2011, the director determined the applicant had failed to establish that a qualifying family member would experience extreme hardship if he were denied admission into the United States. The Form I-601 waiver application was denied accordingly.¹

The applicant asserts on appeal that his U.S. citizen wife will suffer extreme emotional, physical, and financial hardship if he is denied admission into the United States. In support of these assertions the applicant submits letters from his wife, medical evidence, psychological evaluation information, and financial documentation. 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 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.

The record reflects that the applicant willfully misrepresented a material fact to U.S. Citizenship and Immigration Services when he stated on his Form I-589, Application for Asylum or Withholding of Removal (Form I-589) filed on August 23, 1999, that he entered the United States without inspection

¹ The Form I-212 was denied in the same decision denying the Form I-601, on the basis that no purpose would be served in granting the application since the applicant failed to establish he was eligible for a waiver of inadmissibility.

on November 30, 1998. The applicant indicated on his Form I-485, Application to Register Permanent Resident or Adjust Status (Form I-485), filed in October 2002, however, that he was admitted into the United States with a nonimmigrant visa in February 1997. The record contains a copy of the applicant's passport, reflecting that he was admitted into the United States on February 15, 1997, with a P3 nonimmigrant visa. Accordingly, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, for attempting to procure an immigration benefit by willfully misrepresenting a material fact on his asylum application. The applicant does not contest his inadmissibility under section 212(a)(6)(C)(i) of the Act.

Under section 212(i) of the Act:

- 1) The Attorney General [now Secretary, Department 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 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.

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

- (i) [A]ny 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.

It is noted that section 212(a)(9)(B) was added to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208, September 30, 1996) (IIRIRA). IIRIRA became effective on April 1, 1997, and only periods of unlawful presence spent in the United States after its effective date count towards unlawful presence for sections 212(a)(9)(B)(i) of the Act purposes. In addition, an alien whose bona fide application for asylum is pending does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act, unless the alien is employed without authorization while the application is pending. An asylum application is considered to be pending during any administrative or judicial review period. Furthermore, accrual of unlawful presence stops on the date a Form I-485 adjustment of status application is properly filed, until the date the application is denied. *See Memorandum from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," dated May 6, 2009.*

The record reflects that the applicant was admitted into the United States on February 15, 1997, with a P3 nonimmigrant visa valid for 60 days. He did not depart the country and began accruing

unlawful presence on August 15, 1997 until August 23, 1999, when he filed an application for asylum. An immigration judge denied the applicant's asylum application on January 16, 2001, and the applicant filed subsequent appeals and motions with the Board of Immigration Appeals and the U.S. Third and Second Circuit Courts of Appeal. A final dismissal of his asylum claim was issued by the U.S. Second Circuit Court of Appeals on June 14, 2006.² His Form I-485 application, filed on October 1, 2002, was administratively closed on April 7, 2007, and the applicant was removed from the United States on August 1, 2008. Accordingly, the applicant accrued unlawful presence in the United States from August 15, 1997 until August 22, 1999, and from April 8, 2007 until July 31, 2008.

Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for ten years. The applicant was unlawfully present in the United States for over one year and he has remained outside of the country for less than 10 years. He is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

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

Waiver.-The [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.

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-Morales*, 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*, 22 I.&N. Dec. 560, 565 (BIA 1999), the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

² The record indicates the applicant's attorney prepared a motion following the Second Circuit's June 2006 decision. The record contains no evidence that this motion actually was filed, however.

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, supra* 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, 1293 (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 applicant's U.S. citizen spouse is his qualifying relative under section 212(i) and section 212(a)(9)(B)(v) of the Act. The applicant refers to hardship his U.S. citizen stepson will experience if the waiver application is denied. Congress did not include hardship to an alien's child as a factor to be considered in assessing extreme hardship under section 212(a)(9)(B)(v) of the Act. Hardship to the applicant's stepson will therefore not be considered, except as it may affect the applicant's qualifying family member.

The applicant's wife states that she and the applicant married in 2002. The applicant supported her financially while she attended school to become a medical assistant in 2001. In October 2007 she

left a medical assistant job in order to start a trucking company with the applicant. She indicates that their business was successful, but their drivers left the company after the applicant was removed from the country in August 2008. She subsequently declared bankruptcy and liquidated their business assets. She also lost their house because she could not pay the mortgage, and she moved with their son to her mother's house. She and their son were emotionally "devastated" when the applicant was removed from the country. She is unable to give their son the sense of security he received from the applicant; their son now has an eating disorder and is seeing a psychiatrist due to several episodes of cutting himself with scissors. In addition, she recently was diagnosed with ulcerative colitis, which she believes developed due to separation-related stress. Her condition causes frequent diarrhea and bleeding, and it requires medical monitoring and a high-fiber, low-fat diet. Traveling to India is expensive and difficult due to her medical condition, and although she considered moving to India to be with the applicant, after visiting him there, she feels relocation is not an option. The applicant lives with his family in a farming village, and she fears she would be unable to find medical and psychological help for herself and their son in India. It would also be difficult to follow her dietary restrictions, and she does not believe she would be able to obtain or afford medical insurance in India. In addition, she was born and raised in the United States; she does not believe her son's father would allow him to leave the United States; she does not speak the language in India; she feels unsafe there after being stared at and surrounded by men, even when with the applicant; and she does not believe she would be able to find work or adjust to life in India.

Passport evidence confirms the applicant's wife's travel to India in September 2008. The record also contains evidence that the applicant and his wife owned and operated a trucking business in 2007 and 2008, and that they declared bankruptcy and liquidated their business assets in 2009.

Medical documents confirm the applicant's wife's ulcerative colitis diagnosis in January 2011, reflecting that she had cystic lesions, rectal bleeding, stomachaches, nausea, and diarrhea. She was treated with medication in 2011 and 2012, and her treatment was covered by medical insurance. Additionally, she was unable to work for a week in July 2012 due to her condition, and she requires follow-up visits every four months.

Their son's doctor reflects in a letter dated September 2008, a month after the applicant's removal, that their son lost twenty pounds within a four-month period. He was believed to be anorexic and "appeared to be severely depressed," and he was referred for mental-health care.

An October 2009 psychological evaluation of the applicant's wife diagnoses her with a major depressive episode and generalized anxiety disorder with clinically significant symptoms of post-traumatic stress disorder due to emotional and financial stress related to her separation from the applicant. The therapist indicates that her symptoms are "likely to have a direct impact" on her physical and mental health. The therapist indicates further that continued separation will likely aggravate the applicant's wife's depression, given "her coping style and the significant stress she is experiencing."

Upon review, the AAO finds that the evidence in the record, when considered in the aggregate, establishes the applicant's wife would experience hardship that rises beyond the common results of removal or inadmissibility if the applicant is denied admission into the United States, and she resides in the United States. The applicant's wife declared bankruptcy after the applicant's removal from

the United States, and she lost their business and home. In addition, their son has experienced serious physical and psychological conditions since the applicant's removal, which cause the applicant's wife emotional hardship. She has been diagnosed with depression and anxiety due to her separation from the applicant, and a therapist predicts her symptoms will likely become worse if she remains separated from the applicant. Moreover, visiting the applicant in India is physically difficult due to her medical condition. The combined factors establish that the hardship the applicant's wife would suffer if she remains in the United States goes beyond the common results of inadmissibility, and rises to the level of extreme hardship.

The cumulative evidence also establishes the applicant's wife would experience hardship beyond that normally experienced upon removal or inadmissibility if she resides with the applicant in India. The applicant's wife was born and raised in the United States and she has no ties to India. She worries that her son would suffer physically and psychologically in India. She also has a medical condition that requires medication, a special diet and medical monitoring, and she would not have medical insurance to pay for her family's medical needs in India. In addition, the applicant's wife's safety concerns in India are confirmed by reports reflecting that women are cautioned not to travel alone in India; incidents of verbal and physical harassment by groups of men have been reported; and that "[w]omen should observe stringent security precautions, including avoiding use of public transport after dark without the company of known and trustworthy companions, restricting evening entertainment to well-known venues, and avoiding isolated areas when alone at any time of day." See http://travel.state.gov/travel/cis_pa_tw/cis/cis_1139.html. The AAO finds that these factors, when considered in the aggregate, establish that the hardship the applicant's wife would suffer if she relocated to India go beyond the common results of inadmissibility, and rise to the level of extreme hardship.

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). In evaluating whether section 212(i) and 212(a)(9)(B)(v) of the Act relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the inadmissibility 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 s/he is excluded and/or 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-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must:

[B]alance 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 unfavorable factors in this matter are the applicant's attempt to procure an immigration benefit in the United States through misrepresentation of a material fact, and his accrual of unlawful presence in the United States from August 15, 1997 to August 22, 1999, and April 8, 2007 to July 31, 2008.

The favorable factors are the hardship the applicant's wife and son would experience if the applicant is denied admission into the United States. Favorable factors additionally include letters attesting to the applicant's good moral character, and the applicant's lack of a criminal record. The immigration violations committed by the applicant are very serious in nature and cannot be condoned. Taken together, however, the AAO finds that the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

Upon review of the totality of the evidence, the AAO finds that the applicant has established extreme hardship to his U.S. citizen spouse, as required under sections 212(i) and 212(a)(9)(B)(v) of the Act. It has also been established that the applicant merits a favorable exercise of discretion. The applicant has therefore met his burden of proving eligibility for a waiver of his ground of inadmissibility pursuant to sections 212(i) and 212(a)(9)(B)(v) of the Act. Accordingly, the Form I-601 appeal will be sustained.

The AAO notes that the director denied the applicant's 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 found the applicant eligible for a waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, it will withdraw the director's decision on the Form I-212 and render a new decision.

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

Aliens previously removed.-

(A) Certain aliens previously removed.-

.....

(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 who 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the [Secretary] has consented to the aliens' reapplying for admission.

The record reflects the applicant was removed from the United States on August 1, 2008. As such, he is inadmissible under section 212(a)(9)(A)(ii)(I) of the Act, and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive 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.

ORDER: The appeal is sustained.