



U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: SACRAMENTO, CA Date: JUN 02 2008

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[REDACTED]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Sacramento, California. 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 Fiji who was found to be inadmissible to the United States pursuant to section 212(a)(2)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(B), for having been convicted of multiple crimes for which the aggregate sentences to confinement totaled five or more years. The record indicates that the applicant has a U.S. citizen spouse and lawful permanent resident parents. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his family in the United States.

The field office 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 Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated December 17, 2007.

On appeal, counsel asserts the applicant's spouse and parents would suffer extreme hardship as a result of the applicant's inadmissibility. Counsel states that the applicant's parents were granted asylum from Fiji on account of their race. He further states that the applicant will face persecution if he is removed to Fiji, causing extreme hardship to his parents and his spouse. *Counsel's Brief*, dated February 14, 2008.

The record shows that the applicant was convicted of Driving Under the Influence and Driving with an Alcohol Percentage or .08 of more under California Vehicular Code 23153(a) and (b) on September 21, 2000 in the Superior Court of California, County of Sacramento and was sentenced to six years in prison.

Section 212(a)(2)(B) of the Act states in pertinent part:

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (B) . . . of subsection (a)(2) . . . if –

(1) (A) . . . it is established to the satisfaction of the Attorney General that –

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The record indicates that the applicant was convicted of offenses that were committed in December 1999. As he is applying for adjustment of status less than 15 years after those activities, he is statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. He is, however, eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of inadmissibility is dependent upon a showing that the bar to admission imposes an extreme hardship on a "qualifying relative," *i.e.*, the U.S. citizen or lawfully resident spouse, parent or son or daughter of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings and will be considered only insofar as it results in hardship to a qualifying relative in the application. If extreme hardship to a qualifying relative is established, in this case the applicant's U.S. citizen spouse or his lawful permanent resident parents, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act; *see also Matter of Mendez-Morales*, 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 *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals 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.

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).

This matter arises in the Sacramento field office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has 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 that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant to Fiji and in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse or parents in the event that they relocate with him to Fiji. A review of Citizenship and Immigration Service records shows that the applicant’s parents were granted asylum on October 16, 2002. In statements submitted by the applicant’s father and mother they describe the persecution they experienced in Fiji by the Fijian military because of their Indian descent. *Mother and Father’s Statements*, dated February 7, 2008. The applicant’s father describes how the members of the Fijian military beat his wife in front of their children, including the applicant. He states that after forcing their children into a separate room, the soldiers forced him to watch as they raped his wife. The applicant’s father was also detained in a camp, beaten and tortured. *Id.* The applicant’s spouse states that she was born in Fiji and is also of Indian descent. She states she fears returning to Fiji because of the persecution she may face. *Spouse’s Statement*, dated February 7, 2008. The AAO finds that because the applicant’s parents previously faced persecution in Fiji, it would be extreme hardship for them to relocate to Fiji with the applicant.

The second part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event that he or she remains in the United States separated from the applicant. The applicant’s mother states that she and her husband will suffer if the applicant is returned to Fiji because his life will be in grave danger and they will worry constantly about his safety. *Mother’s Statement*, dated February 7, 2008. The applicant’s father states that the applicant’s spouse will also suffer if the applicant is removed to Fiji because she will worry about his safety and well-being. *Father’s Statement*, dated February 7, 2008. Counsel submits eighteen news reports describing racist policies and violence against Indo-Fijians in Fiji. Counsel also submits the 2006 State Department Human Rights Report for Fiji which states that abuse and discrimination occurred against Indo-Fijians, including attacks against Hindu temples and tensions over land disputes.

The AAO notes that the record also includes statements from the applicant’s spouse and a second statement from the applicant’s mother concerning their relationships to the applicant. The applicant’s spouse states that she and the applicant have been together since she was 16 years old. *Spouse’s Statement*, dated October 15, 2007. She states that they were scheduled to be married in April of 2000 when the automobile accident that resulted in the applicant’s incarceration occurred. The applicant’s spouse was in the car and badly injured on December 10, 1999 when the applicant drove while intoxicated. The applicant’s spouse states that she spent weeks in intensive care, had to have one of her kidneys removed and suffered body fractures from the accident. She states that the applicant was always by her bedside during her recovery and that she attended all of the applicant’s court dates. She states that she was heart broken when he was sentenced to six years in prison, but they were able to maintain their relationship through weekend visits, letters and talking on the phone. The applicant’s spouse states that the day the applicant was released from jail was one of the happiest days of her life and eight months later they were married. *Id.* The applicant’s spouse asserts in a separate

statement that she is not working because of chronic pain. *Spouse's Statement*, dated May 29, 2007. The spouse submitted medical records showing that as a result of the accident she suffered from a kidney hematoma, a liver laceration, head injury and numerous fractures. *Medical Report*, dated December 21, 1999. These same records indicate that one of her kidneys was removed. *Id.* The applicant's mother states that the applicant's spouse still suffers from body pain. *Mother's Statement*, dated October 15, 2007. The applicant's mother also states that she has struggled with her son's prison time, but decided to stay strong and supportive. She states that she worked very hard to be able to support her son and pay his attorney fees. *Id.* The applicant states that his mother worked three different jobs to pay for his attorney and suffered a gunshot wound while working as a manager at McDonald's. *Applicant's Statement*, dated October 15, 2007. The applicant's mother states that if her son is allowed to remain in the United States she will give him a house and a clean environment to live in. *Mother's Statement*, dated October 15, 2007

The applicant's parents suffered severe persecution while in Fiji and brought the applicant to the United States at the age of eleven. The current country conditions show that Fiji is still experiencing racial tensions between Fijians and Indo-Fijians. The applicant's mother has expressed her concern for the applicant's well-being in Fiji and states that she will worry constantly about his safety.

In light of the record's documentation of continuing violence against Indo-Fijians in Fiji and the persecution previously experienced by the applicant's parents on this basis, the AAO finds the situation of the applicant's parents to be distinguishable from that of other individuals separated from their children by removal. These factors, when considered in combination, support a finding that the applicant's return to Fiji would result in extreme emotional hardship for his parents in the United States. Furthermore, because the applicant's parents cannot return to Fiji, the applicant's removal would mean their permanent separation from the applicant. Taking into account the totality of the circumstances surrounding the applicant's case, the AAO finds that his inadmissibility would cause his parents and spouse to suffer extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[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 adverse factors in the present case are the applicant’s convictions for the offenses of driving under the influence, committed on or about December 11, 1999, for which he was found guilty and was sentenced to six years in prison.

The favorable factors in the present case are the applicant’s family ties to the United States; his U.S. citizen spouse and lawful permanent resident parents, the extreme hardship to his parents were he to be denied a waiver of inadmissibility; and the Form I-130, Petition for Alien Relative, approved on his behalf. The applicant states that while in prison he completed training to be an Electric Assembler and currently works for an electric company. As a prisoner the applicant also volunteered for “fire camp” and worked with the California Fire Department putting out fires across California. *Applicant’s Statement*, dated October 15, 2007. In his statement he expresses remorse for his acts in 1999 and states that he will make every effort to be a good American resident. *Id.*

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.