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U.S. Citizenship
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Services

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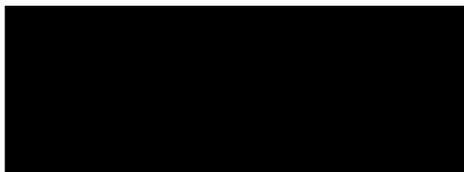


FILE: [REDACTED] Office: NEWARK, NEW JERSEY Date: **OCT 18 2007**

IN RE: [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)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Newark, New Jersey, 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. He was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud and misrepresentation; section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled; section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant not possessing valid documentation; and sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(i)(II) and 1182(a)(9)(C)(i)(I), for having been unlawfully present in the United States for one year or more. The applicant seeks a waiver of inadmissibility¹ in order to remain in the United States with his U.S. citizen spouse.

The record reflects that the applicant first entered the United States at Los Angeles on November 5, 1990. The record contains an Order to Appear-Deferred Inspection (Form I-546) instructing the applicant to report to Los Angeles Office of the legacy Immigration and Naturalization Service (INS) on November 6, 1990 and stating as follows:

During secondary inspections investigations revealed [sic] that the U.S. visa in the subject's passport number [REDACTED] is counterfeit. Notice the visa on page number 29, all indications of a counterfeit visa are shown. The visa is not genuine and is fraudulent. Subject admitted that the visa was placed in the passport by an unknown friend of his father. Subject stated this under oath with a quick translation from one of his passenger friend [sic].

The record contains a Record of Sworn Statement bearing the applicant's name and dated November 5, 1990, but the statement section reads only "[u]nable to take a sworn statement due to no interpreter for translation." The record also contains a Notice to Applicant for Admission Detained for Hearing Before Immigration Judge served on the applicant on November 6, 1990 instructing the applicant that he would be scheduled for a hearing before an immigration judge and notified of the time and place of this hearing. The record contains a record of action form and memoranda indicating that no hearing was scheduled because the INS lacked an address for the applicant.

The applicant filed a Request for Asylum in the United States (Form I-589) on September 1, 1993. The record reflects that the applicant then married [REDACTED] a native of the United States, in the United States on April 25, 1996. [REDACTED] filed a Petition for Alien Relative (Form I-130) on the applicant's behalf, accompanied by the applicant's Application to Register Permanent Resident or Adjust Status (Form I-485), on May 13, 1996. The applicant submitted letters dated May 2, 1996 and June 10, 1996 requesting that

¹ On his Form I-601, the applicant indicates that he was declared inadmissible because of "illegal entry in the U.S." but provides no additional details. The AAO notes that a waiver of inadmissibility for section 212(a)(6)(C)(i) of the Act is authorized by section 212(i), 8 U.S.C. § 1182(i); for section 212(a)(9)(B)(i)(II) of the Act by section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v); and for section 212(a)(7)(A)(i)(I) of the Act by section 212(k), 8 U.S.C. § 1182(k). There is no provision authorizing waiver of inadmissibility under section 212(a)(6)(A)(i) of the Act. A waiver is available for inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, but not through submission of a Form I-601.

his asylum application be withdrawn. Adjudication of the I-130 petition and the I-485 application was terminated on December 17, 1997 when the applicant and [REDACTED] failed to appear for their scheduled interviews. However, [REDACTED] had filed another Form I-130 petition, accompanied by another Form I-485 application from the applicant, on October 13, 1997. The record indicates that that petition and application were denied on May 12, 2001 on the representation from the applicant's counsel that the applicant and [REDACTED] intended to divorce. On April 4, 2002, the applicant and [REDACTED] were officially divorced.

The applicant and his spouse [REDACTED] were married in the United States on June 14, 2002. The applicant's spouse, a native of the United States, filed a Petition for Alien Relative (Form I-130) on the applicant's behalf, accompanied by the applicant's Application to Register Permanent Resident or Adjust Status (Form I-485), on July 1, 2002. The I-130 petition was approved on December 3, 2002. On December 17, 2002, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601).

In a Notice of Intent to Deny (NOID) issued to the applicant on February 4, 2005, the district director observed:

On November 5, 1990, you were found to be excludable under 212(a)(14) – alien seeking to enter the U.S. for the purpose of performing skilled or unskilled labor, 212(a)(19) – fraud and misrepresentation, and 212(a)(20) – immigrant without immigration documents. On November 6, 1990, you were issued Form I-122, Notice to Applicant for Admission Detained for Hearing Before an Immigration Judge. *To date, you have failed to appear before an Immigration Judge to establish your admissibility to the United States.*

The district director determined that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) as an alien present without admission or parole.

The district director also determined that because the applicant answered "No" to question 10 on his adjustment applications², and also indicated that he first entered the United States without inspection on different dates, the applicant had sought to procure an immigration benefit by fraud and willful misrepresentation of a material fact and was therefore inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

The district director also determined that the applicant was inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act for having been unlawfully present in the United States for a period in excess of one year. The district director stated that the applicant began to accumulate unlawful presence on April 1, 1997, and "triggered the bar for unlawful presence five times with . . . re-entries to the United States on July 29, 1998, June 7, 2000, October 5, 2000, May 5, 2001 and January 18, 2002. The district director concluded that the applicant was also inadmissible pursuant to section 212(a)(9)(C)(i) of the Act as an alien who had been

² The question reads: "Are you under a final order of civil penalty for violating section 274C of the Immigration and Nationality Act for use of fraudulent documents or have you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the U.S. or any immigration benefit?"

unlawfully present in the United States for an aggregate period of more than one year after previous immigration violations.

Finally, based on information submitted by the applicant concerning his employment history in the United States, the district director also determined that the applicant had been employed without authorization and was therefore inadmissible pursuant to section 212(a)(7)(A)(i)(I) as an immigrant without valid immigrant documents at the time of application for admission.

The district director concluded that the applicant had failed to establish that the bar to admission would impose extreme hardship on a qualifying relative, the applicant's U.S. citizen spouse, and stated that the waiver application would be denied unless the applicant submitted evidence to overcome the stated reasons for denial within 30 days.

In response to the NOID, counsel submitted a brief asserting that as no finding of excludability was ever made against the applicant, whose failure to appear before an immigration judge was the result of failure on the part of the INS to served the charging document (Form I122) on the immigration court, and the district director therefore erred in concluding that unproven allegations against the applicant constituted a finding of fraud that the applicant should have listed on his adjustment applications. Counsel contended that the district director erred in finding that the applicant had been unlawfully present since April 1, 1997 as the record shows that any period of unlawful presence has been tolled because of pending applications and the applicant has always departed and reentered the United States with advance parole. Counsel also stated that the district director erred in finding that the applicant had worked without authorization as the record shows that the applicant was granted work authorization pursuant to his pending asylum and adjustment applications.

In the decision to deny the waiver application, the district director repeated the findings set forth previously in the NOID and denied the application accordingly. *Decision of District Director*, dated July 23, 2005.

On appeal, counsel contends that the director misapplied the law in finding that the applicant had not established extreme hardship to his U.S. citizen spouse. Counsel reasserts that the applicant was never found excludable by an immigration judge, and did not appear for exclusion proceedings because the charging document (Form I-122) was never properly served on the immigration court. Counsel maintains that in the absence of prosecution and a finding of misrepresentation or fraud by an immigration judge, the director erred in finding the applicant inadmissible under section 212(a)(6)(A)(i) of the Act. Counsel also contends that the applicant is not inadmissible as a result of of unlawful presence pursuant to section 212(a)(9)(B)(iv), which allows time of unlawful presence to be tolled for an alien paroled into the United States if the alien has filed a nonfrivolous application for adjustment of status and has not been employed without authorization. Counsel asserts that the applicant "was legally admitted each time after he requested admission with his advance parole" and has been employed in the United States only as authorized.

The AAO first considers the district director's finding that the applicant is inadmissible pursuant to sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Act.

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

(i) In general.—An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General [Secretary of Homeland Security], is inadmissible.

Section 212(a)(7) of the Act provides, in pertinent part:

(A) *Immigrants*.—

(i) In general.—Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required . . . is inadmissible.

The record shows that the applicant was paroled into the United States on January 18, 2002 to resume his application for adjustment of status. There is no evidence in the record showing that the applicant has since departed and reentered the United States without being admitted or paroled. An application for admission or adjustment is a “continuing” application, adjudicated on the basis of the law and facts in effect on the date of decision. *Matter of Alarcon*, 20 I. & N. Dec. 557 (BIA 1992). Consequently, the applicant is not inadmissible under sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Act and the district director’s findings to that effect are withdrawn.

The AAO now considers the district director’s finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act.

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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien’s departure of removal, or

(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 does not show that the applicant has been unlawfully present in the United States for period of more than one year after April 1, 1997 and the applicant is not therefore inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. The record reflects that on April 1, 1997, the applicant had a pending adjustment application, his first such application. The applicant filed his second adjustment application on September 26, 1997, prior to the termination of his first application on December 17, 1997. The record shows that the second adjustment application was denied on May 12, 2001 on the representation by the applicant's counsel that the applicant and his then wife intended to divorce. The applicant departed from the United States prior to January 18, 2002 and returned on that date with advance parole. The applicant filed his present adjustment application on July 1, 2002, 164 days later. Therefore, the applicant was unlawfully present in the United States from the date he withdrew his second adjustment application on May 12, 2001 to his departure prior to January 18, 2002, a period likely in excess of 180 days but less than one year. Accordingly, the record does not show that the applicant has been unlawfully present in the United States for a period in excess of one year subsequent to the April 1, 1997 effective date and the district director's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) is withdrawn.

The record does show that the applicant was unlawfully present in the United States for a period likely in excess of 180 days but less than one year, from the date he withdrew his second adjustment application on May 12, 2001 to his departure prior to January 18, 2002. However, it has now been more than three years since the applicant's departure prior to January 18, 2002. As stated previously, an application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of decision. *Matter of Alarcon*, 20 I. & N. Dec. 557 (BIA 1992). Therefore, the applicant is no longer inadmissible pursuant to section 212(a)(B)(i)(I) of the Act.

The AAO now considers the district director's finding that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act.

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

(C) Aliens unlawfully present after previous immigration violations.—

(i) In general.—Any alien who—

(I) has been unlawfully present in the United States for an aggregate period of more than one year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

By its terms, section 212(a)(9) applies to individuals who enter or attempt to reenter the United States without being admitted after having been unlawfully present in the United States. The evidence in the record shows that the applicant, subsequent his entry in 1990, has departed and entered the United States with advance parole. The evidence does not show that the applicant has entered or attempted to reenter the United States

without being admitted after having been unlawfully present. Accordingly, the applicant is not inadmissible pursuant to section 212(a)(9)(C)(i) of the act and the district director's finding to the contrary is withdrawn.

Finally, The AAO considers the district director's finding that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

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.

Generally, a misrepresentation is considered material either if the record establishes that the alien is inadmissible on the true facts, or if the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility. *Matter of S-- and B--C--*, 9 I. & N. Dec. 436, 448 (BIA 1960); *see also Mwongera v. INS*, 187 F.3d 323, 330 (3rd Cir. 1999).

The AAO concurs with counsel that the applicant was not placed in exclusion proceedings at the time of or subsequent to his entry in 1990. The applicant was never ordered to appear at a scheduled hearing and the record contains no evidence showing that immigration court proceedings were initiated. Nevertheless, the finding made by the inspecting immigration officer, as recorded on the Form I-546 Order to Appear, that the visa presented by applicant was patently fraudulent is sufficient to support a finding of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act. There is no need for a judicial finding of inadmissibility under this section.

In addition to the circumstances surrounding his initial entry, the district director noted the following as evidence of misrepresentation by the applicant:

On your first application for adjustment you noted that you entered without inspection on November 6, 1990, at Los Angeles, California. *You wrote on your second application for adjustment that you entered without inspection on December 25, 1992, at New York, New York. You also indicated that you filed an application for adjustment previously at New Jersey on May of 1996, and that no interview date was received. On your third application for adjustment you annotated that you entered without inspection at JFK International Airport in New York City, but you willfully omitted the date of your entry without inspection.*

The AAO notes that Part 1 of the Form I-485 Application to Register Permanent Resident or Adjust Status requires an applicant to list the "Date of Last Arrival" to the United States. The applicant filed his first adjustment application on May 13, 1996 and his second adjustment application on September 26, 1997. The discrepancy between the two applications concerning the applicant's date of last arrival constitutes evidence of willful misrepresentation. On the other hand, the mere omission of a date of last arrival on the applicant's third adjustment application filed on July 18, 2002 does not, as the record shows that the applicant departed from and returned to the United States prior to filing this application. Likewise, there is insufficient evidence showing that the applicant's representation on his second adjustment application that he had received no

interview date for his first adjustment application was a willful misrepresentation. The record shows that the applicant failed to appear at the interviews scheduled, but there is insufficient evidence demonstrating that the applicant received notice of these interviews and thus *willfully* misrepresented that he had not on his second adjustment application.

Although the applicant appears to have misrepresented the date of his last arrival on his second adjustment application, the AAO finds that this misrepresentation is not material. Even if the applicant had disclosed the date of his initial entry in 1990 on his second adjustment application, it is unlikely that the misrepresentation in the applicant's second adjustment application would have had the effect of "shutting off a line of inquiry" concerning his 1990 entry, as the correct information was included in the applicant's first adjustment application still pending at the time he filed the second application, and evidence regarding his 1990 entry is located in the applicant's administrative record. Nevertheless, as stated above, there is sufficient evidence showing that the applicant, by fraud or willfully misrepresenting a material fact, sought to procure admission into the United States in 1990. Accordingly, the applicant is inadmissible pursuant to section 212(a)(6)(C) of the Act.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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.

A waiver of inadmissibility under section 212(a)(6)(C) of the Act 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 or parent of the applicant. Hardship to the applicant is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See 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).

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.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or 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 record includes a statement from the applicant; a statement from the applicant’s spouse; employment, tax and financial records for the applicant and his spouse; copies of utility and other bills; and a copy of the lease agreement and other documents related to the apartment rented by the applicant and his spouse. The entire record was considered in rendering a decision on the appeal.

In her statement, the applicant’s spouse indicates that she “cannot see spending [her] life” without the applicant. She states that they live in a “comfortable” apartment that she would not be able to afford without him. She contends that it would be “hard to make ends meet” without the applicant. She also asserts that the applicant helps her ailing parents and has become an important person in the life of her son. The applicant reiterates these assertions in his statement.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant’s spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

The AAO recognizes that the applicant’s spouse will suffer emotionally as a result of separation from the applicant if she chooses to remain in the United States. However, the applicant has submitted insufficient evidence showing that any psychological or emotional consequences would constitute extreme hardship when considered with other hardship factors. The hardship described by the applicant is the typical result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. U.S. court decisions 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). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

Likewise, the record shows that the applicant's spouse is employed and there is insufficient evidence demonstrating that she will suffer financial hardship if the applicant is removed to India. Although the statements by the applicant's spouse are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *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)).

Finally, the applicant has failed to submit any evidence showing that his spouse would experience extreme hardship if she returned to India with him.

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 section 212(i) of the Act. 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(i) 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.