U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CALIFORNIA Date: OCT 07 2004

IN RE: Applicant: [redacted]

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

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn and the matter remanded for further action.

The applicant is a native and a citizen of India who was present in the United States without a lawful admission or parole on July 10, 1992. The applicant applied for asylum on September 8, 1992, with the Immigration and Naturalization Service (INS, now Citizenship and Immigration Services, (CIS)). An INS officer interviewed the applicant and he was referred to an Immigration Judge for a court hearing on his asylum claim. The record reflects that on October 29, 1993, an Immigration Judge ordered the applicant excluded and deported. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on March 8, 2000. On April 7, 2000 the applicant filed a Motion of Stay of Deportation with the United States Court of Appeals for the Ninth Circuit. The motion was denied on November 8, 2001. The applicant was found excludable under sections 212(a)(7)(A)(i)(I), 212(a)(7)(B)(i)(I) and 212(a)(7)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182 (a)(7)(A)(i)(I), (a)(7)(B)(i)(I) and (a)(7)(B)(i)(II), for being an immigrant not in possession of a valid immigrant visa or lieu document, and a nonimmigrant without a valid passport or a valid nonimmigrant visa or border crossing card. The District Director found the applicant 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), based on his preconceived intention to remain in the United States permanently. The applicant is married to a U.S. citizen and he is the beneficiary of an approved Petition for Alien Relative. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his U.S. citizen spouse, children and Lawful Permanent Resident (LPR) parents.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon his U.S. citizen spouse or LPR parents and denied the application accordingly. *See District Director's Decision* dated June 21, 203.

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.

On appeal counsel spouse asserts that CIS erred in finding the applicant inadmissible under section 212(a)(6)(C)(i) of the Act and that he is not inadmissible under that section of the Act.

Before the AAO can make a decision on the appeal, the grounds of inadmissibility must be established. It is not clear from the record of proceedings that the applicant is inadmissible under 212(a)(6)(C)(i) of the Act. The principal elements of the ground of inadmissibility contained in section 212(a)(6)(C)(i) of the Act, are (1) fraud or misrepresentation, (2) willfulness and (3) materiality. The Department of State Foreign Affairs Manual (FAM) offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act. Stated in part; (1) a misrepresentation can be made orally or in writing, (2) silence or the failure to volunteer information does not in itself constitute a misrepresentation, (3) the misrepresentation must have been practiced on an official of the U.S. government, generally a consular or immigration officer and (4) a timely retraction will avoid the penalty of the statute.

The record is unclear as to exactly what happened when the applicant arrived at J.F.K. on July 10, 1992, the record does contain a copy of a Form I-122, Notice to Appear for Hearing Before an Immigration Judge. The Form I-122 specifically did not charge the applicant with misrepresentation. The applicant was referred to an Immigration Judge and was found excludable under sections 212(a)(7)(A)(i)(I), 212(a)(7)(B)(i)(I) and 212(a)(7)(B)(i)(II) of the Act. At no time was he found inadmissible under section 212(a)(6)(C)(i) of the Act.

A finding regarding a preconceived intent to remain in the United States permanently relates only to an application for discretionary relief and can be an adverse factor. *Soo Yuen v. INS*, 456 F.2d 1107 (9 Cir.1972); *Ameeriar v. INS*, 438 F.2d 1028 (3 Cir.1971), cert. dismissed, 404 U.S. 801 (1971); *Chen v. Foley*, 385 F.2d 929 (6 Cir.1967), cert. denied, 393 U.S. 838 (1968); *Cubillos- Gonzalez v. INS*, 352 F.2d 782 (9 Cir.1965); *Castillo v. INS*, 350 F.2d 1 (9 Cir.1965). A preconceived intent is only one factor to be considered in exercising discretion on an adjustment application. See *Matter of Ibrahim*, 18 I&N Dec. 55 (BIA 1981); *Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980). It does not constitute fraud or misrepresentation under section 212(a)(6)(C) of the Act.

In the present case, a review of the record does not reflect any documentation to substantiate the District Director's finding of the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act. There is nothing in the applicant's alien file to support a finding of fraud or willful misrepresentation of a material fact in order to obtain a benefit provided under the Act. Absent supporting documentation, the AAO is unable to confirm the director's conclusion that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

The AAO thus finds that the District Director was not clear in his reasoning that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. As such, the matter will be remanded for a new decision, which if adverse to the applicant is to be certified to the AAO.

ORDER: The District Director's decision is withdrawn, and remanded for further action as stated above.