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U.S. Citizenship
and Immigration
Services

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FILE:

Office: CHICAGO

Date: AUG 03 2009

IN RE:

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of India, the spouse of a U.S. lawful permanent resident (LPR), the father of two U.S. citizen children, and a derivative beneficiary of an approved Form I-140 petition of which his wife is the principal beneficiary. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his wife and children.

The field office director found that the applicant had sought to enter the United States by fraud or by misrepresenting a material fact, and is therefore inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The director also found that the applicant had been unlawfully present in the United States for more than a year, then subsequently departed, and is therefore inadmissible pursuant section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The director found, yet further, that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I) for having illegally entered the United States after having been unlawfully present in the United States for a period of more than one year. Finally, the field office director found that the applicant had not established that failure to approve the waiver application would cause extreme hardship to the applicant's U.S. citizen spouse, and denied the application.

On appeal counsel submitted additional evidence and contended that waiver is available to the applicant and that the evidence demonstrates that waiver should be granted.

Section 212(a)(6)(C)(i) of the Act provides:

In general.—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.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or 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.

Section 212(a)(9)(C) of the Act provides:

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 1 year

* * * *

and who enters or attempts to reenter the United States without being admitted is inadmissible.

As was noted above, the field office director found the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation for having “used an advance parole document, to which [he was] not entitled and which [he] obtained using false information.”

On appeal, counsel did not dispute that the applicant’s application for advance parole contained false information, but asserted that the applicant signed the application without reviewing the information it contained and did not, therefore, make a willful misrepresentation.

The record contains a Notice to Applicant for Admission Detained for Hearing Before Immigration Judge (Form I-122), dated September 22, 1994. It states that the applicant applied for admission by presenting a Form I-512 that was obtained fraudulently. The record also contains a Form I-110, dated March 10, 1994, that states that, on that date, the applicant sought to procure or procured an immigration benefit by fraud. Although those conclusory statements are insufficient, absent supporting evidence, to show that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, they do show when the entry or attempted entry pursuant to the alleged fraud or misrepresentation occurred.

A memorandum from an officer of the Immigration and Naturalization Service (INS), dated March 10, 1995, states that the applicant purchased a Form I-688B from undercover agents through an intermediary, and characterizes this as bribery of a public official. Form I-688B was issued to aliens whose legalization applications were granted. Possession of a valid Form I-688B would entitle an alien to employment authorization and freedom to travel. The memorandum provides no reason to believe that the applicant was aware of the illegal activity.

A Memorandum of Investigation (Form G-166C), dated September 21, 1994, also completed by an INS officer, states that during September 1993 the applicant paid \$2,800 to [REDACTED] and arranged to receive an Employment Authorization Document. It further states that in August 1994 [REDACTED] contacted the applicant and told him that for \$8,000 [REDACTED] could arrange for him to receive LPR status. Finally, it states that the applicant paid \$2,000 to [REDACTED] and arranged future payments on the \$8,000 balance.

The record contains an Authorization for Advance Parole (Form I-512) issued on November 15, 1993 and authorized for use in returning to the United States before March 14, 1994. The record contains a Departure Record (Form I-94) showing that the applicant presented himself for inspection at New York City on March 10, 1994 and was paroled in to complete his inspection prior to March 25, 1994. The record contains an Application for Employment Authorization (Form I-765) that the applicant signed on October 5, 1993, and an Application for Travel Document (Form I-131) submitted by the applicant and approved on November 15, 1993. These applications are apparently the documents that are alleged to have been fraudulently submitted. The information given on those applications, however, appears to be correct, other than the applicant providing a Seattle, Washington address rather than his then current New York address.

Inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act, which is set out above, requires fraud or misrepresentation of a material fact. The applicant's address was immaterial to his eligibility for any benefit available to him under the Act, and cannot form the basis of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act.

The record does not support that the applicant was eligible for legalization or for LPR status. Immigration benefits appear to have been illegally obtained on the applicant's behalf through bribery. The finding that the applicant is inadmissible for fraud or misrepresentation, however, appears to be based on the assumption that the applicant was aware of the illegal activity, rather than merely paying money to a representative to file applications and obtain various immigration benefits for him. The record does not indicate that the applicant was ever charged with a criminal offense in relation to the bribery, but was only considered as a potential witness against [REDACTED]. The record contains no evidence to support the assumption that the applicant had guilty knowledge, notwithstanding that he may have. Under these circumstances, the AAO cannot find the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation. As to the applicant's inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act, the decision of the field office director is withdrawn.

As was noted above, the decision of denial was also based on other grounds. The field office director also found the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for one year or more.

In a brief filed with the Form I-601, and in a brief filed on appeal, counsel stated that the applicant first entered the United States "on or about June 25, 1990." Counsel further stated that "during that period of time [the applicant] remained in illegal status."

The Form I-601 waiver application submitted shows that the applicant lived in New York from January 1991 to April 1994, in Indiana from May 1994 to February 2002, in Virginia from February 2002 to June 2006, and in Indiana from June 2006 until he signed that application on October 18, 2006. The waiver application contains spaces for the applicant to enter his immigration status during each of those periods. "N/A" was entered in each of those spaces.

On a Form I-765 application that he signed on October 5, 1993, the applicant stated that his last entry into the United States was on January 26, 1991, when he entered without inspection near El Paso, Texas. On that Form I-765 application, the applicant stated that he then lived in Fife, Washington. A Form I-213, Record of Deportable Alien, dated June 28, 2004, also states that the applicant entered the United States on January 26, 1991 at El Paso by entering without inspection.

On the Form I-131 Application for Travel Document, the applicant indicated that he intended to depart from the United States on November 17, 1993, and to return four months later. The applicant, who signed that application on November 15, 1993, indicated that he was then living in Washington State.

Various documents in the record show that the applicant was charged, on March 30, 1996, with assault in Battle Creek, Michigan, for allegedly grabbing the hair of a female customer at a store in which he was working and licking her face. At that time the applicant gave his address as [REDACTED] in Portage, Michigan.¹ On April 2, 1996, after the applicant had failed to appear in court to answer to that charge, a warrant was issued for the arrest of the applicant. A handwritten note from a Criminal Lead Worker at the 10th District Court in Battle Creek, which was written in response to a June 1, 1998 inquiry by the INS, indicates that the applicant's arrest warrant remained open. Whether that charge was subsequently resolved is unknown to the AAO.

As was noted above, the record contains a Form I-512 parole authorization permitting the applicant to be paroled into the United States at Seattle, Washington before March 14, 1994. The record also contains, as was noted above, a Form I-94 Departure Record that indicates that the applicant was paroled into the United States, on March 10, 1994, at New York, New York,² for completion of inspection at Seattle, Washington, for which he was to present himself by March 25, 1994. A letter from an INS investigations officer, dated April 16, 1996, to an Assistant U.S. Attorney indicates that the applicant never presented himself for inspection in Seattle and was therefore in an illegal status.

The record contains notes from a September 21, 1994 interview of the applicant by an officer of the INS. At that interview the applicant stated that he first entered the United States during January of 1991 at Los Angeles, California, pursuant to a B-2 visa. The officer also noted that the applicant stated that he paid [REDACTED] \$2,800 for an Employment Authorization, which was issued to

¹ The Form G-325A that the applicant signed on February 12, 2002 makes no reference to either living or working in Michigan, but states, instead, that at that time he was living and working in Wantah, Indiana at the time of that incident.

² Although the parole authorization was valid only for entry at Seattle, Washington, the applicant entered at New York.

him on October 5, 1993. The record contains an employment authorization issued to the applicant on October 6, 1993, and another employment authorization issued to him on October 21, 1994. In his September 21, 1994 interview, the applicant also stated that he paid [REDACTED] a \$2,000 installment, to be applied to a total price of \$8,000, for which [REDACTED] was to acquire a Green Card for the applicant.

The record contains an Applicant to Adjust Status (Form I-485), which the applicant signed on February 12, 2002. On it, the applicant indicated that his last entry into the United States was on April 30 or April 31 of 2001.

On a G-325A Biographic Information form the applicant stated that he lived in New York from January 1990 to April 1997, in Indiana from May 1994 to February 2002, and in Virginia from February 2002 until he signed that form on February 12, 2002.

The applicant's assertion, on the Form G-325, that he began living in New York during January 1990 conflicts with counsel's assertion that he first entered the United States "on or about June 25, 1990." Further, the applicant's assertion, on the Form I-601, that he first lived in New York during January of 1991 does not explain where he lived from June 25, 1990, which counsel stated is the approximate date of the applicant's first entry, or from January 1990, when the applicant indicated that he initially entered the United States, until January 1991.

The applicant's assertion, on October 5, 1993 on the Form I-765, and his assertion, on November 15, 1993 on the Form I-131, that he then lived in Washington State, conflicts with his assertions, on the Forms I-601 and G-325, that he was living in New York at that time.³ On March 30, 1996, in the criminal matter noted above, the applicant gave his address as [REDACTED] in Portage, Michigan, which conflicts with his assertions, on the Form I-601 and the Form G-325A, that he lived in Indiana on that date.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The credibility of all of the applicant's evidence is diminished by the contradictions described above.

Because of the contradictory information provided by the applicant, when he first entered the United States is unclear. Where he first entered is unclear. Whether it was pursuant to a visa is unclear, but the AAO notes that the record contains no evidence of the visa that the applicant claimed at his September 21, 1994 interview to have used to enter.

³ The AAO also observes that the dates when the applicant stated, on the Form G-325A, that he lived in New York, overlap the dates during which he claimed, on that same form, to have lived in Indiana, but attributes this discrepancy to a typographical error.

The record makes clear, however, that the applicant returned to the United States from a trip to India, that he was paroled into the United States on March 10, 1994, and that his parole expired on March 25, 1994 when he failed to honor the conditions of his parole, that is; he failed to report to the INS in Seattle, Washington for completion of inspection.

The applicant's residential history as shown on the Form G-325A and the Form I-601 further makes clear that he continued to live in the United States through February 19, 2002, when he filed his Form I-485 waiver application. The record contains a Canadian Record of Landing that indicates that the applicant entered Canada by land on March 25, 2001. The AAO notes that such an entry would be from the United States, and would constitute a departure from the United States.

Pub. L. 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides at section 309,

(a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

At section 301(b)(3), the IIRIRA provides,

TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

The IIRIRA was passed by the 104th United States Congress on Sept. 30, 1996. Therefore, for the purpose of this inadmissibility provision, the applicant's illegal presence began on April 1, 1997 and continued until March 25, 2001, a period of more than one year.

Counsel asserted, in the appeal brief, that this departure was casual and innocent, and therefore, pursuant to 8 U.S.C. § 1254(b)(2), did not interrupt his continuous physical presence, apparently implying that it did not, therefore, constitute a departure. The statute cited by counsel, however, is irrelevant to whether a departure occurred for the purposes of inadmissibility pursuant to section 212(a)(9)(B)(i) of the Act. The AAO finds, therefore, that the applicant departed the United States on March 25, 2001, thus triggering a ten-year period of inadmissibility, which period of inadmissibility has not ended. The applicant therefore remains inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Finally, as was noted above, the field office director found the applicant inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act for his alleged reentry into the United States without inspection after having accrued more than one year of unlawful presence in the United States. The entry into

the United States to which the field office director apparently referred is the applicant's entry on April 30 or April 31 of 2001, to which he admitted on the Form I-485.

Counsel asserted, on appeal, that the applicant "was inspected and waived into the United States based on his permanent resident status in Canada," by which counsel likely meant Canadian Landed Immigrant status. However, counsel provided no evidence to support that assertion.

USCIS computer records pertinent to the applicant note that on March 28, 2001, the applicant attempted to enter the United States. Those records also note that the applicant was then informed that he was inadmissible to the United States for the next ten years.

That entry demonstrates that the Border Patrol and the applicant were both aware that he was then inadmissible. The applicant's presence in the United States indicates that he reentered since his departure on March 25, 2001. The record does not demonstrate that the applicant entered pursuant to inspection and admission and suggests, in fact, that he entered without inspection. The burden is on the applicant to demonstrate that his reentry into the United States was pursuant to inspection and admission. The applicant has not sustained that burden and is, therefore, also inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, in addition to his previously detailed inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act..

Because the applicant has been found inadmissible, the balance of this decision will pertain to whether waiver of his inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

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

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 to the satisfaction of the Attorney General 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.

Waiver may, therefore, be currently available to the applicant for his inadmissibility pursuant to the applicant for his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act. Waiver under that section hinges upon the applicant demonstrating that failure to approve the waiver application would result in extreme hardship to his U.S. LPR spouse.

Section 212(a)(9)(C)(ii) of the Act contains an exception to inadmissibility pursuant to section 212(a)(9)(C)(i)(I) of the Act. That exception, however, is unavailable until the applicant has been outside of the United States for ten years. The record shows that the applicant is still in the United States. That exception will be unavailable to the applicant until ten years after he departs.

Section 212(a)(9)(C)(ii) of the Act also contains a waiver provision. The Attorney General may waive that inadmissibility, under some circumstances, for an applicant whose immigration violations

were occasioned by having been battered or subjected to extreme cruelty by a spouse or family member. The applicant has made no claim to such battering or cruelty, and waiver is unavailable pursuant to that section.

Because relief from the applicant's inadmissibility is statutorily unavailable to him until he has departed the United States and been absent for ten years, no purpose would be served by a discussion of the extreme hardship that the applicant has asserted would be occasioned to his wife if the waiver application is not approved, or whether the applicant merits waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.