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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090

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U.S. Citizenship  
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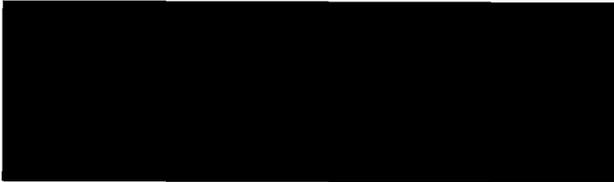
DATE: JUL 28 2011 OFFICE: NEW YORK, NY  
(GARDEN CITY)

FILE:

IN RE:

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

ON BEHALF OF APPLICANT:



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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DICUSSION:** The waiver application was denied by the District Director, New York, New York and 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 who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within ten years of his last departure from the United States. The applicant is the beneficiary of an approved Petition for Alien Worker (Form I-140). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to remain in the United States.

The District Director concluded that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility, (Form I-601) accordingly. *Decision of the District Director*, dated January 9, 2009.

On appeal, counsel asserts that the Director erred in denying the applicant's Form I-601 and the underlying Form I-485 because the applicant is not inadmissible under section 212(a)(9)(B) of the Act. *Form I-290B, Notice of Appeal or Motion*, dated February 4, 2009.

The evidence of record includes, but is not limited to: counsel's brief in support of the appeal; statements from the applicant; tax, employment and employment-related documents concerning the applicant and his employer; documents relating to the applicant's asylum application and the employment-based petition benefitting the applicant; and copies of the applicant's passports. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

(B) Aliens Unlawfully Present -

(i) In general

Any 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.

....

(iii) Exceptions -

(II) Asylees. No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining

the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

....

In a February 23, 2007 statement, the applicant asserts that he initially entered the United States in December 1990, through the Los Angeles Port of Entry and that in January 1991, he departed the United States for Mexico, returning the following day without inspection. The record reflects that on October 3, 1994, the applicant filed a Request for Asylum in the United States (Form I-589). While the asylum application was pending, an Immigrant Petition for Alien Worker (Form I-140), was filed on the applicant's behalf by his employer, [REDACTED]. The petition was approved on May 9, 2002. The applicant then withdrew his asylum application, which was terminated on June 29, 2002.<sup>1</sup> On June 20, 2002, the applicant filed an Application to Register Permanent Resident or Adjust Status [Form I-485]. On or about November 8, 2003, the applicant departed the United States under a grant of Advance Parole, returning on January 15, 2004. The record also reflects that the applicant traveled outside the United States and re-entered on June 4, 2004, March 24, 2005, and May 16, 2006, pursuant to Advance Parole.

On January 9, 2009, the District Director denied the applicant's Form I-485 application finding that the applicant had accrued unlawful presence of more than one year in the United States and that he did not have a qualifying relative on which to base a waiver request. However, the AAO's review of the record does not find the applicant to be subject to section 212(a)(9)(B) of the Act.

We note that the applicant filed a Form I-589 on October 3, 1994, which remained pending until it was terminated. Pursuant to section 212(a)(9)(iii)(II) of the Act, no time during which a bona fide asylum is pending may be taken into account in determining unlawful presence, unless the asylum applicant was employed without authorization during this period. In the present case, the record reflects that the applicant obtained employment authorization while his asylum application was pending, and does not show that he engaged in unauthorized employment that would render him ineligible for an exception under section 212(a)(9)(iii)(II) of the Act.

The AAO also notes that the applicant had an approved Form I-140 as of May 9, 2002, and that he properly filed a Form I-485 based on this petition on June 20, 2002. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by [REDACTED] Acting Associate Director, Domestic Operations Directorate; [REDACTED] Refugee, Asylum and International Operations Directorate; [REDACTED] Chief, [REDACTED]*

<sup>1</sup> See letter written by [REDACTED] dated June 12, 2002, and signed by [REDACTED] on June 20, 2002, stating that the applicant withdraws his political asylum application because the applicant is the beneficiary of an approved I-140 petition and that he has filed an application for adjustment of status. See also a copy of "Administrative Termination" from New York Asylum Office, dated June 29, 2002.

In this case, the applicant was under the bona fide asylum exception at the time he properly filed a Form I-485, which remained pending until it was denied on January 9, 2009. The applicant did not accrue unlawful presence prior to his 2003 departure from the United States under a grant of Advance Parole. He is therefore not inadmissible under section 212(a)(9)(B)(i)(II) of the Act and is not in need of a waiver under section 212(a)(9)(B)(v) of the Act. The AAO will withdraw the Director's decision as it relates to this ground of inadmissibility.

The AAO does, however, find the applicant to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for procuring entry into the United States through fraud or the willful misrepresentation of a material fact.<sup>2</sup>

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.

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 [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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....

During an adjustment of status interview on February 15, 2007, the applicant testified under oath that he had entered the United States using his own valid passport and a visa for which he paid an agent \$3,000. In a February 23, 2007 statement, the applicant claims that he traveled to the United States using his own passport, but that an agent assisted him in entering the United States "without any visa and inspection from Los Angeles airport in December, 1990." *See Personal Statement by [REDACTED]* dated February 23, 2007. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice without competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See id.*

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<sup>2</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The AAO notes that the record contains no evidence that would establish that the applicant's testimony regarding his use of a fraudulent visa to enter the United States in December 1990 was inaccurate or untruthful. Accordingly, the AAO finds that the applicant procured entry into the United States using a fraudulent document and is, therefore, inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Although a waiver of this inadmissibility is available under section 212(i) of the Act, the waiver is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. In the present case, the record reflects that the applicant is single and that his parents reside in India. The applicant has claimed hardship to his employer, the petitioner on the Form I-140 benefitting him. As the record fails to establish that the applicant has a qualifying relative on which to base a waiver application, he is not eligible to apply for a section 212(i) waiver. The appeal will therefore be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(I) of the Act, the burden of proving eligibility remains entirely 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.