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212(K) WAIVER VICTORY TEACHES THAT IT'S NOT WORTH MANIPULATING THE IMMIGRATION SYSTEM TO SETTLE PERSONAL DISPUTES

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When two parties are in a personal dispute, and one of them is not a US citizen, it is often tempting to use the immigration system to seek a remedy. For instance, the desire to see someone you are feuding with get deported from the United States may be tempting. However, the immigration system may not be the best forum to settle personal scores. If two spouses are in marital discord, the spouse who wishes to seek a remedy can resort to a family court to seek a separation rather than manipulate the immigration system to dump the foreign national spouse. The complaining spouse may also press criminal charges against the other spouse in the event that there are allegations of physical abuse. But relying on the immigration system, when there are clearly other avenues to seek redress, may likely backfire, especially if the claim is not found to be credible, and the non-citizen you wish to see deported may still end up with a green card.

This is what happened in a case our firm handled on behalf of a foreign national spouse who was in removal proceedings. The unpublished decision of Immigration Judge McManus in New York Immigration Court where he was ultimately vindicated and victorious, *Matter of X* (November 2012), can be found here.

The foreign national spouse, the Respondent in the removal proceeding, had married a US citizen in India through an arranged marriage in late 2006, which based on the record and voluminous evidence was undoubtedly bona fide and celebrated with much pomp. After the Respondent received an immigrant visa at the US Embassy, based on the US citizen spouse filing an I-130 petition, they travelled back to the United States in July 2007. The Respondent was refused

admission at the airport when his wife alerted Customs and Border Protection officials that he married her solely for the green card, and that he had physically abused her. After being detained by the CBP for one day in the airport, he was denied admission as a lawful permanent resident and further paroled into the country for deferred inspection. Three days later, his spouse withdrew the I-130 petition she had filed on behalf of the respondent. After over two years, Respondent was served with a Notice to Appear in 2009 charging him with removability under INA § 212(a)(7)(A)(I)(i) as an alien not in possession of a valid entry document.

The first issue in this case was whether the Respondent who was issued an immigrant visa could be admitted even though his US citizen spouse indicated at the airport that she wished to withdraw the I-130 petition, which she did three days later. Alternatively, could the Respondent be eligible for a waiver under INA section 212(k)?

With respect to the first issue, the IJ denied our motion to terminate removal proceedings. Even though former INA § 205 required the revocation of the petition to be communicated to the beneficiary before he commenced his journey to the US, it was amended in 2004, and new §205 did not contain this limitation. Under new § INA 205, an I-130 petition can be revoked at any time for good and sufficient cause, and the revocation shall be effective as of the date of the approval of the petition. While we were aware of the change in the statute, we pointed out that the government had not amended the regulation at 8 CFR § 205.1, which still contained the limiting language of the old statute. We argued that by not rescinding the regulation, the government still intended to interpret new § 205 in accordance with the way it was interpreted prior to the amendment. The Court held that when there is a conflict between a statute and a regulation, the amended statute trumps the regulation by citing *K Mart Corp v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The Court also rejected our related argument that the Respondent should have been found to be admissible, notwithstanding the withdrawal of the I-130 petition, as he still had a valid immigrant visa issued by the State Department, which had not been revoked.

With respect to seeking a waiver under INA §212(k), the IJ found the Respondent to be eligible for the waiver as he was unaware of the ground of inadmissibility before he embarked upon his journey to the US.

INA §212(k) provides, as follows:

Attorney General's discretion to admit otherwise inadmissible aliens who possess immigrant visas – Any alien, inadmissible from the United States under paragraph (5)(A) or (&)(A)(i) of subsection (a), who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

This case should be contrasted with *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987), which is controlling. In *Aurelio*, the petitioner's death resulting in the revocation of the I-130 petition did not entitle the respondent in that case to a 212(k) waiver as the respondent should have known about the inadmissibility arising out of the death of her father one year prior to her departure The IJ found in this case, unlike in *Aurelio*, that Respondent could not have possibly known that his spouse would revoke the I-130 petition three days after his arrival in the US. Respondent was eager to embark on a new life in the US with his spouse and could not have known of the steps she was planning to take to withdraw the I-130 petition.

Although the DHS attorney vigorously sought to pretermit Respondent's motion to seek a 212(k) waiver on the ground that he was not in possession of an immigrant visa, the IJ agreed with our contention that "the invalidity of the visa..is the reason a waiver is required, not a reason the waiver cannot be granted." *See also Kyong Ho Shin v. Holder,* 607 F.3d 1213 (9th Cir. 2010) ("By definition, §212(k) refers to visas that are invalid in nature – otherwise, the applicant would not be seeking a waiver of inadmissibility in the first place"). The IJ also soundly rejected the government's claim that Respondent ought to have foreseen his potential inadmissibility as he was experiencing difficulties in the marriage and could have expected his wife to level allegations against him upon his arrival in the US. The Court held, "imply because there were some problems in the marriage, which is typical of most couples, does not mean that Respondent should have known that his wife would withdraw her support for Respondent's visa application immediately upon arrival in the United States."

Moreover, Respondent also merited a favorable exercise of discretion as the IJ

credited Respondent's detailed testimony, along with the testimony of his sister and uncle, that he did not abuse his spouse in India, and agreed that several allegations made against Respondent at the airport and elsewhere may not have been truthful. For instance, one of the allegations by the spouse was that Respondent beat her up on the plane, which the Court thought found "unlikely that such a physical altercation would have gone unnoticed, especially in light of evidence in the record indicating that such behavior is taken extremely seriously by airlines." We provided evidence of how in a post September 11 world, such incidents could not possibly go unnoticed. Another allegation that Respondent was carrying drugs on his person while entering the country was also proved to be false as there was no indication, especially since he had been searched by the CBP, upon his arrival in the country. The allegation that the wife was kept captive in India was also disproved with credible accounts that she went out to Bollywood movies, visited relatives (including relatives in other Indian cities), and religious places on a regular basis.

The decision concludes as follows, "While the Court cannot know why Ms. took such dramatic steps to withdraw the I-130 petition that she filed on Respondent's behalf, the Court is troubled by the seemingly false statements made by Ms. to various immigration officials, and agrees with Respondent's counsel that it was improper for her to attempt to manipulate the immigration process in the manner that she did."

The government doggedly pursued the case for over five years. Responded was denied admission in 2007 upon his arrival in the US and paroled for two years. After unsuccessfully convincing the government to admit him, in 2009, the government instead initiated removal proceedings against Respondent, and the case dragged on for another three and a half years in Immigration Court, which included several hearings and motions. After the IJ issued the decision granting the Respondent a waiver under §212(k) and admitting him as a lawful permanent resident in late November 2012, the government did not appeal the decision within the 30 day period. To top up the hard fought victory in Immigration Court, Respondent very recently received his actual green card in the mail!