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WOULD THE RELIGIOUS FREEDOM GROUND OF INADMISSIBILITY STILL APPLY TO INDIAN PRIME MINISTER NARENDRA MODI?

Posted on September 29, 2014 by Cyrus Mehta

Indian Prime Minister Narendra Modi has been welcomed by the Indian diaspora without reservations in the United States. This is his first trip to the United States after his tourist/business was revoked on May 18, 2005 under Section 212(a)(2)(G) of the Immigration and Nationality Act (INA). Under INA Section 212(a)(2)(G), any alien who while serving as a foreign government official and who was responsible for or directly carried out particular violations of religious freedom is inadmissible. At that time, Mr. Modi was the Chief Minister of Gujarat state and was not eligible for the A-1 diplomatic visa. In May 2014, Mr. Modi's Bharatiya Janata Party won an outright majority in the Indian Parliament, and as the party's leader, he became India's Prime Minister.

Mr. Modi, as India's Prime Minister, has presently come to the United States under the A-1 visa, which is granted to diplomats, including heads of state. The A-1 visa overcomes grounds of inadmissibility pursuant to INA Section 102, including the religious freedom ground, but that is only when a person is admitted on the A-1 visa. If Mr. Modi ceases to be a head of state, and does not qualify for an A-1 visa as a diplomatic official under any other capacity, the Section 212(a)(2)(G) ground of inadmissibility may still apply with respect to a new tourist/business visa application that he may apply for, unless it is determined that the factual basis for the prior finding of inadmissibility have changed. The U.S. State Department may also reconsider a prior revocation of a visa, which it has not done so until now with respect to Mr. Modi's revocation.

The article that I co-wrote with Elizabeth Reichard on March 25, 2005, appended below, discusses how the religious freedom ground of inadmissibility was applied to Mr. Modi. Following the publication of this 2005 article, however,

in December 2010, a special investigative team (SIT) appointed by the Supreme Court of India found "no substantial incriminating evidence" that Chief Minister Modi had let the rioters rampage against the Muslims in February 2002. A local court in India subsequently upheld the closure of the SIT in December 2013, although appeals from victims to reopen proceedings remain pending. The Gujarat High Court has continued to criticize Chief Minister Modi for "inaction and negligence" during the violence. House Resolution 417 passed in the US Congress in 2013 continues to support the visa ban. Questions still linger about Mr. Modi's passive role during the riots.

So long as Mr. Modi enters on an A-1 visa, all grounds of inadmissibility will remain inapplicable. The President still has authority under INA Section 212(f) of any foreign national whom the President deems will be detrimental to the national interest, but it is readily obvious that this provision was not considered with respect to Mr. Modi's present visit to the United States. Indeed, Mr. Modi is scheduled to have meetings with President Obama and other top US officials, and has also met with leading US industry executives. Mr. Modi also enjoys broad based support from many in the Indian-American community. The question is whether Section 212(a)(2)(G) will trigger if Mr. Modi applied for another nonimmigrant visa in the future? The United States has not officially declared that this inadmissibility ground will not be applied and has never reconsidered the prior revocation. A new visa application would have to be considered in light of the set of facts that apply at that time. The fact that Mr. Modi has been admitted on an A-1 visa to the United States does not in any way mean that the prior visa ban has been rescinded or will not apply in the future.

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RELIGIOUS FREEDOM INADMISSIBILITY GROUND INVOKED FOR THE FIRST TIME AGAINST NARENDRA MODI

by

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On March 18, 2005, the U.S. Department of State issued a decision to deny a visa to the democratically elected Chief Minister of Gujarat, India, Narendra Modi. Mr. Modi, an important figure in the Hindu nationalist Bharatiya Janata

Party (BJP), is one of the most divisive politicians in India – loved by Hindu nationalists and despised by others who uphold India's secular ideals. The decision to deny his visa was largely based on his alleged role in the riots that occurred in Gujarat between February and May of 2002. The riots were spawned after an attack by Muslims on a train in Godhra that resulted in the deaths of 58 Hindus.[1] Hindu mobs responded to this attack through violent riots, resulting in the deaths of some 2,000 Muslims and the displacement of some 100,000 Muslims.2

It has been alleged that the riots were supported and possibly encouraged by Mr. Modi, his government and the police in Gujarat. Many have asserted that Mr. Modi personally instructed police officers to allow "peaceful" reactions to the train attack.[3] As a result of this instruction, police officials told victims of the riots that they had not been instructed to help them.[4] In spite of these allegations, however, Mr. Modi has never been indicted or convicted for his involvement or encouragement in the Gujarat riots. India's National Human Rights Commission implicated Mr. Modi's government, but not him specifically, holding that there "there was a comprehensive failure on the part of the State Government to control the persistent violation of the rights to life, liberty, equality and dignity of the State.[5] It further indicated that the government's response to the violence was "often abysmal or even non-existent, pointing to the gross negligence in certain instances or, worse still, as was widely believed, a complicity that was tacit if not explicit."[6] The Indian Supreme Court has also implicated Mr. Modi's government by transferring criminal prosecutions of persons connected to the riots out of courts in Gujarat.

Still, even with these findings, Mr. Modi has never been officially charged for his role in the riots. The closest documents assigning him blame are the U.S. Department of State's 2002 *Report on Human Rights Practices* and *International Religious Freedom Report.*[7] Both reports specifically mention the allegations brought against Mr. Modi in the Gujarat riots, and it was these reports that could have served as the basis for the denial of Mr. Modi's admission to the United States.

I. Analysis of Section 212(a)(2)(G) of the Immigration and Nationality Act (INA)

Mr. Modi sought admission to the United States after having received an invitation as the keynote speaker for an event organized by the Asian-American Hotel Owners' Association (AAHOA) as well as other meetings organized by the Indian-American community in the U.S. He hoped to enter the country on either a diplomatic visa or his already issued B1/B2 tourist/business visa. The diplomatic visa was denied because according to INA §101(a)(15)(A), such visas are granted to those coming to the U.S. for official government business. A speech for the AAHOA does not qualify as official government business. This decision has not been met with controversy. The decision to deny his B1/B2 visa is actually what has attracted so much publicity in recent days. This denial was based on §212(a)(2)(G) of the Immigration and Nationality Act (INA).

Section §212(a)(2)(G) of the INA, which was first enacted in 1998, has never been invoked against a public official prior to the decision to revoke Mr. Modi's visa. It maintains that an individual is inadmissible to the United States if "while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedoms." Violations of religious freedoms are defined by the International Religious Freedom Act, as any of the following acts committed on account of an individual's religious belief or practice: "detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder and execution."[8]

Prior to December 17, 2004, there was a two year statute of limitations attached to this ground of inadmissibility. So, for example, had Narendra Modi sought admission to the U.S. in November 2004, he would not have been denied a visa under §212(a)(2)(G) because the alleged violations of religious freedom were committed more than two years prior to admission. The Office of Senator Patrick Leahy (D-Vermont), who introduced the amendment to remove the statute of limitation, prepared a section-by-section analysis of law.[9] The analysis rationalized the removal of the statute of limitations because it was "not consistent with the strong stance of the United States to promote religious freedom throughout the world. Individuals who have commit[] particularly severe violations of religious freedom should be held accountable for their actions and should not be admissible to the United States regardless of when the conduct occurred."10

Under this new broader statute, Mr. Modi was found inadmissible for being a government official responsible for violations of religious freedom. It is likely that the violations referred to are the murders, beatings and mass relocations of Muslims in Gujarat during the riots. The decision has been met with a tremendous amount backlash. Critics claim that the decision is baseless because Mr. Modi was never officially charged for violations of religious freedom. While it is true that Mr. Modi has never been officially charged for these acts; in the view of the authors, it was reasonable for the State Department to deny the visa because it was based on ample evidence against Mr. Modi. U.S. law allows the State Department to make a finding of inadmissibility based on a reasonable belief and without there being an actual conviction on the individual's record. For example, a person can be found inadmissible if the consular officer knows or has reason to believe that the individual was a trafficker of controlled substances.[11]The consulate has no duty to provide due process for a visa applicant who desires entry to the U.S. It also is not required to conduct a "pseudo" hearing to determine if the act was actually committed. U.S. consulates all over the world deny thousands of visas every day, without giving the applicants due process rights or opportunities to contest the denials.

II. Factual Basis for Inadmissibility Finding

Critics of the decision should note that any finding of inadmissibility under this ground cannot be made in haste. According to the Foreign Affairs Manual, consular officers must seek an advisory opinion if they "reasonably believe" the applicant was responsible for severe violations of religious freedom.[12] The advisory opinion will be drafted by the country desk and any relevant offices at the State Department, assessing whether the individual in question was responsible for the violations. In other words, a visa denial on this basis involves a great deal of research and takes into account multiple factors. It is not based upon an actual conviction or admission, but rather an in depth assessment of the situation, resulting in a reasonable belief that the action was committed.

In this case, such a reasonable belief existed. According to Len Scensy, Deputy Director, Office of Public Diplomacy, State Department Bureau of South Asian Affairs, the decision was made after looking at the law, the findings of the Indian Human Rights Commission, and the U.S. State Department Reports. Mr.

Scensy in an interview with News India Times, indicated that these reports "say the same thing." They are consistent with each other and take into consideration the overwhelming number of allegations against Modi. Therefore, it is safe to assume that it was reasonable to believe that Mr. Modi was responsible for the violations of religious freedom against Muslims in Gujarat. Mr. Modi was explicitly implicated in U.S. reports on the riots and while the Indian Human Rights Commission never explicitly named him, it did indicate that his government had tacit complicity if not explicit involvement in the violence.13

III. Consequences of the Decision

The decision to deny Mr. Modi a visa is not without its consequences. This was the first time §212(a)(2)(G) has been invoked by the State Department, and it is likely that it will use it again against other government officials, former and present, who seek entry to the U.S. So, for example, in the case of India, former Congress party officials implicated in the killings of Sikhs after Indira Gandhi's assassination in 1984 may find themselves inadmissible to the United States on this ground.

A decision under §212(a)(2)(G) is final and there is no room for appeal in a U.S. Court. Government officials found subject to this ground may find themselves permanently inadmissible to the U.S. The only possibility they have for admission is a discretionary waiver, granted by the Secretary of the Department of Homeland Security, under §212(d)(3). Such a waiver, however, may cause these officials further difficulties as the Secretary can prescribe conditions to the admission. For example, he/she may require an admission to the crimes committed. Such an admission is clearly deadly as it would open the floodgates to both criminal and civil liability under domestic and international law.

Cyrus D. Mehta's current profile can be found at http://blog.cyrusmehta.com/Sub.aspx?MainIdx=ocyrus200591701543&SubIdx=ocyrus200591721646) and

Elizabeth T. Reichard's current profile can be found at http://www.fragomen.com/ourprofessionals/reichard-elizabeth/. (The old profiles as existed in the original article have been deleted).

1U.S. DEPT. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: INDIA (2002); U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDIA (2002).

2 *Id.*

3 *Id*

4 *Id*.

5 National Human Rights Commission, Order on Gujarat, *64 (31 May 2002).

6 *Id.* at 24.

7 *Supra* note 1.

8 22 USC §6402.

9 Office of Sen. Patrick Leahy, *Anti-Atrocity Alien Deportation Act of 2003: Section-By-Section Analysis, available at* http://leahy.senate.gov/press/200303/032603b.html.

10The December 17, 2004 amendment also removed a provision which made the spouse and children of a government official inadmissible under this ground.

11 INA §212(a)(2)(C)(ii).

12 9 FAM 40.26 N2.1.

13 *Supra* note 5, at 24.