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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 20 2008**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the waiver application will be denied.

The record reflects that the applicant is a native and citizen of Cuba. The applicant was found 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 having sought admission into the United States by fraud or willfully misrepresenting a material fact. The applicant presently seeks a waiver of her grounds of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i).

The director concluded the applicant had failed to establish that she had a qualifying relative for purposes of section 212(i) of the Act. The applicant's Form I-601 was denied accordingly.

Through counsel, the applicant acknowledges that she does not have a qualifying family member. The applicant also concedes that she traveled from Spain to the United States with a photo-switched fraudulent Nicaraguan passport. The applicant indicates, however, that she did not sign a Transit Without Visa (TWOV) document with the Spanish Airline, Iberia, and she indicates that she did not have a TWOV-related contract or agreement when she traveled from Spain to the United States. The applicant asserts that she immediately informed a U.S. Immigration and Naturalization Service (INS) officer of her true identity upon arrival in the United States, and she asserts that because she did not attempt to gain admission into the United States by misrepresenting herself or making fraudulent claims to a U.S. government official, she is not inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that:

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.

TWOV documentation provided by Iberia Airlines, and contained in the record, reflects that the applicant presented a fraudulent, photo-substituted Nicaraguan identity card and passport to the airline, and that she represented to the airline that she was traveling to Nicaragua. The evidence in the record reflects that the applicant completed a Form I-94T, TWOV arrival and departure record on July 9, 2002, when she traveled from Spain to the United States. In addition to the above TWOV-related documentation, the record contains a July 10, 2002, Record of Sworn Statement in Administrative Proceeding, signed by the applicant, as well as a July 10, 2002, INS memorandum. Both reflect that the applicant traveled to the United States from Spain, and that she was presented for U.S. immigration inspection by Iberia Airline agents as a passenger without visa who arrived on board an Iberian flight from Madrid, in transit to Managua. The documents reflect that the applicant presented herself to Iberia Airline agents in Madrid as a Nicaraguan national, using false identification documents with her picture on it. The documents reflect further that the applicant did not intend to travel to Nicaragua, and that her plan was to request asylum once she arrived in the United States. Upon presentation for U.S. immigration inspection, the applicant stated her true identity and nationality to the INS inspector, and requested asylum in the United States.

Through counsel, the applicant refers to the Board of Immigration Appeals (Board) decisions, *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994), *Matter of D-L-&A-M*, 20 I&N Dec. 409 (BIA 1991), *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961), *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), and *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984), to support the assertion that she is not inadmissible under section 212(a)(6)(C)(i) of the Act, because she did not attempt to gain admission into the United States by misrepresenting herself or making fraudulent claims to a U.S. government official. The AAO finds that the Board decisions referred to by the applicant fail to establish that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

It is noted that the TWOV program was designed to facilitate international travel, and permitted:

[A]liens traveling from one foreign country to another, which route entails a stopover in the United States, to proceed “in immediate and continuous transit” through this country without a passport or visa. 8 U.S.C. § 1182(d)(4)(C) (1970). An individual desiring to use the transit without visa privilege must establish, inter alia, that 1) he is admissible under the immigration laws, 2) he has confirmed means of transportation to at least the next country, and 3) he will accomplish his departure within eight hours after his arrival or on the next available transport. 8 C.F.R. § 214.2(c) (1980)<sup>1</sup>

The Board cases cited by counsel all held that a section 212(a)(6)(C)(i) of the Act, (formerly section 212(a)(19) of the Act of 1952) charge of inadmissibility cannot be upheld unless the fraud or material misrepresentation was practiced upon an authorized U.S. Government official. The AAO notes, however, that *Matter of L-L-*, *Matter of Areguillin*, and *Matter of Y-G-*, *supra*, were not TWOV-related cases. The AAO notes further that *Matter of Y-G-* and *Matter of D-L- & A-M-*, *supra*, clearly state that their holdings do not apply in a TWOV-related context.

*Matter of Y-G-* at 797, refers to and concurs with *Matter of D-L & A-M-*'s holding regarding TWOV-related cases. *Matter of D-L- & A-M-* states at 412 that:

[W]e hold that, outside of the TRWOV [TWOV] context addressed in *Shirdel*, an alien is not excludable under section 212(a)(19) of the Act [now section 212(a)(6)(C)(i) of the amended Act] for seeking entry by fraud or willful misrepresentation of a material fact where there is no evidence that the alien presented or intended to present fraudulent documents or documents containing material misrepresentations to an authorized official of the United States Government in an attempt to enter on those documents.

The Board emphasized that its holding applied only outside of the TWOV context, and the Board specifically distinguished its holding from a decision made in the TWOV-related case, *Matter of Shirdel*, *supra*.

*Matter of Shirdel* held that two Afghani citizens who posed as Turkish nationals were excludable under the second clause of section 212(a)(19) of the former Act, for seeking to enter the United States by fraud or a material misrepresentation. The decision specifically states that, “[t]he fraud was their flying to the United States posing as TRWOV aliens in order to submit applications for asylum.” *Matter of Shirdel*, *supra* at 36.

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<sup>1</sup> The TWOV program was suspended on August 2, 2003.

The AAO notes that the U.S. First Circuit Court of Appeals held in *Ymeri v. Ashcroft*, 387 F.3d 12, FN 4 (1<sup>st</sup> Cir. 2004) that:

The transit without visa privilege is a benefit provided under the Immigration laws. An alien who transits through this country as a transit without visa participant has attained one of the benefits listed in section 1182 [212] (a)(6)(C)(i) [of the Act], regardless of whether the alien effects an “entry.”

*U.S. v. Kavazanjian*, 623 F.2d 730, 732 (1<sup>st</sup> Cir. 1980) held that:

[T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country’s border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.

[W]e think an alien’s assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United States before again departing. *See Reyes v. Neely*, 228 F.2d 609, 611 (5<sup>th</sup> Cir. 1956), (“A misrepresentation may be made as effectively by conduct as by words”) . . . . *Id.* at FN15.

In the present matter, the record clearly reflects that the applicant traveled to the United States posing as a TWOV alien under the TWOV program. The record reflects further that the applicant intended to remain in the United States and apply for asylum. Based on the above rulings, the AAO finds that the applicant thereby committed a fraud on the United States, and that she is inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides in pertinent part that:

(1) The Attorney General [now Secretary, Department of Homeland Security, “Secretary”] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 Attorney General [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.

The applicant does not have a qualifying relative for purposes of section 212(i) of the Act,. Although the record contains a birth certificate reflecting that the applicant has a U.S. citizen child, the applicant’s child is not a qualifying family member under section 212(i) of the Act. Accordingly, any asserted hardship to the applicant’s child may not be considered. The record contains no evidence to establish that the applicant is married to a U.S. citizen or lawful permanent resident. The record also lacks evidence to establish that the applicant has a U.S. citizen or lawful permanent resident parent. Accordingly, the applicant has failed to establish that she has a qualifying relative as required by section 212(i) of the Act. The applicant is therefore statutorily ineligible for relief under section 212(i) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to meet her burden of proof in the present matter. The appeal will therefore be dismissed and the application denied.

**ORDER:** The appeal is dismissed. The application is denied.