U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: HOUSTON Date: JUN 05 2007

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under SEDction 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

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 District Director, Houston, Texas, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed as the applicant is not inadmissible under sections 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i), and 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), of the Immigration and Nationality Act (the Act). Thus, the relevant waiver application is moot.

The applicant [redacted] is a native and citizen of El Salvador who was found inadmissible to the United States pursuant to section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law; and to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for misrepresentation. The applicant seeks a waiver of inadmissibility under sections 212(d)(11), 8 U.S.C. § 1182(d)(11), and 212(i) of the Act, 8 U.S.C. § 1182(i).

The District Director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative, and accordingly denied the Application for Waiver of Excludability (Form I-601). *Decision of the District Director*, dated April 25, 2005.

On appeal, counsel states that the applicant is entitled to appeal the director's unfavorable decision pursuant to 8 C.F.R. § 212.7(a)(3). Counsel states that the alleged misrepresentation is the applicant's statement on the Form I-601 that the "only problem was to go pick up my mother in the border of McAllen, Texas, on [sic] 1994." Counsel asserts that the applicant's statement is ambiguous as to whether the applicant actually assisted or encouraged his mother to enter this country without inspection. Counsel claims that the applicant merely states that he met his mother at the border. Counsel states that a misrepresentation pursuant to 8 U.S.C. § 1182(a)(6)(C)(i) is an assertion or manifestation not in accordance with the facts. He states that misrepresentation requires an affirmative act. Counsel cites to the Foreign Affairs Manual, 9 FAM 40.63 N4.6, and states that a timely retraction will purge a misrepresentation and remove it from further consideration as a ground for ineligibility. Counsel states that the although the district director indicated that service records showed that the applicant assisted other aliens in their attempt to enter the United States without inspection, the district director did not specify or provide a copy of any documents, including the FBI Fingerprint Search, establishing that the applicant had attempted to smuggle an alien into the country. Counsel also states that the regulations provide that if the decision is adverse to the applicant and is based on derogatory information of which the applicant is unaware, the applicant shall be advised of this fact and offered an opportunity to rebut the information and present information on his own behalf before the decision is rendered. According to counsel, the director's decision and the record of proceeding establishes that the applicant was not advised of the derogatory information. Counsel states that assuming that misrepresentation occurred here, the applicant is eligible for relief under section 212(i) of the Act.

The AAO will first address the director's finding that the applicant is inadmissible pursuant to section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § (a)(6)(E)(i).

Section 212(a)(6)(E) of the Act provides that:

(i) Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is inadmissible.

(ii) Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative . . .

The district director stated that service records show that the applicant assisted other aliens in their attempt to enter the United States without inspection. The record of proceeding contains documents entitled "Alien Smuggler Data Input Sheet," "Report of Investigation," and "Criminal Complaint." The document "Alien Smuggler Data Input Sheet" stated the following:

> "Subject was apprehended while walking around the Falfurrias, TX Border Patrol Checkpoint. He was accompanied by three other illegal aliens for El Salvador. Subject initially gave a false name and data but documents were later found in a second vehicle. Subject and illegal aliens were enroute to Houston, TX. Subject left his car parked at a motel south of the Checkpoint in Rachal, TX, and was to be picked up by the van once they crossed the checkpoint."

The document "Report of Investigation" indicated that the applicant "acted as a guide for his mother and the others." It stated that the applicant and [redacted] had borrowed an I-551 belonging to a person other than his mother and had intentions of maybe letting the applicant's mother use it in case they drove up to the checkpoint.

The Report of Investigation also stated that [redacted] and the applicant "came down from Houston to pick up [the applicant's] mother and the two other persons." The report indicated that they:

> [C]ame down in two vehicles, picked them up at the bus station in Brownsville and then traveled north to the Rachal, Texas, area. There they rented a room at Delicias Motel and rested until it was darker. They traveled north to check the area out and located the road side park south of the checkpoint. They decided that it would be the drop off point and returned to the room. They finally left the room leaving the car belonging to [the applicant] there in the parking lot until they could come back for it once north of the checkpoint. The persons were dropped off at the park to walk around. They returned to the room for a few hours until [the applicant's companion] stated that they would pick the aliens up north of the checkpoint maybe near the Wal-Mart. He stated that [the applicant's mother] was the wife of a co-pastor of the church he and others attended.

The Criminal Complaint stated the following the applicant:

> [W]illfully, knowingly, and unlawfully conspire and agree together and with each other to receive, relieve, comfort, and assist [aliens] not entitled to enter or reside in the United States, in order to hinder or prevent said aliens' apprehension, did transport such aliens from a point near Brownsville, TX, to a point near Falfurrias, TX, after having reason to believe that said aliens' last entry into the United States had been an illegal entry;

Counsel asserts that the applicant had not been made aware of the derogatory information that was relied upon by the District Director to base a finding of inadmissibility under section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law. The AAO disagrees. It finds that the applicant was aware of the derogatory information based on his court appearance and the finding of guilty in case number [redacted] in the United States District Court, Southern District of Texas, McAllen Division.

However, the AAO finds that the record of proceeding failed to establish that the applicant knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law. As described in the Criminal Complaint, the Alien Smuggler Data Input Sheet, and the Report of Investigation the applicant had assisted the illegal aliens; however, his assistance was rendered after they had already entered the United States. Thus, there is no evidence that the applicant had knowingly encouraged, induced, assisted, abetted, or aided the aliens to *enter* or *try to enter* the United States in violation of law.

Furthermore, the Criminal Complaint indicates that the applicant was found guilty under 8 U.S.C. § 1325; this statutory code relates to transporting aliens not entitled to enter or reside in the United States from a location within the United States to different location in the United States, after having reason to believe that the aliens' last entry into the United States had been an illegal entry. The applicant was not convicted under 8 U.S.C. § 1324(A)(1)(ii), which relates to bringing to or attempting to bring to the United States an alien in violation of the law. Thus, based on the evidence in the record, the finding of inadmissibility pursuant to section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law, is without merit.

The director also found the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for misrepresentation.

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.

Counsel states that the record does not contain information pertaining to the misrepresentation charge pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

The AAO notes that the director does not specify the facts or evidence establishing the grounds for misrepresentation. Although the Alien Smuggler Data Input Sheet indicates that the applicant gave a false name and data to immigration control, the record indicates that the applicant made these admissions after his entry into the United States. Thus, he did not willfully misrepresent a material fact so as to seek admission into the United States or any other benefit under the Act.

Based on the record, the AAO finds that the applicant is not inadmissible to the United States pursuant to section 212(a)(6)(E)(i) or 212(a)(6)(C)(i) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden.

ORDER: The April 25, 2005 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.