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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LONDON, ENGLAND Date: JAN - 2 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) 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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, London, England, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), and the relevant waiver application is, therefore, moot.

The applicant is a citizen of Nigeria and the United Kingdom who 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 seeking to procure a visa to the United States by fraud or willful misrepresentation. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The officer-in-charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Officer-in-Charge*, at 4, dated July 7, 2006.

On appeal, counsel states that the officer-in-charge abused his discretion, failed to consider the totality of the evidence, failed to consider the materiality of the underlying fraud, and failed to formally notify the applicant of the underlying fraud and give him an opportunity to explain the presence of two resumes in his application. *Form I-290B*, received August 4, 2006.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, the applicant's statements, letters of support, documents from the applicant's H-1B visa application and the applicant's spouse's medical records. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was denied an H-1B non-immigrant visa on December 17, 2003 due to misrepresentation under section 212(a)(6)(C) of the Act.

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.

The record reflects that at the time of his H-1B visa interview the applicant asserted that he taught at two non-existent schools. *Department of State Case Remarks Summary*, dated November 30, 2005. Counsel states that the applicant inadvertently gave his H-1B employer a resume with incorrect information on it and the applicant tried to defend it at the interview, stating that he had worked as a teacher at St. Andrew's High School and St. Gregory Anglican School. *Brief in Support of Appeal*, at 6, undated. Counsel asserts that the applicant immediately retracted the information before the end of the interview and he explained to the officer why he made the statement. *Id.* However, there is no evidence of a timely retraction in the record. Rather, the record reflects that the applicant

continued to say that he taught at the schools upon being confronted, but finally admitted that he had not taught at either school. *Case Remarks Summary.*

Counsel also asserts that the applicant's past employment was not the qualifying factor of his employment, his misrepresentation did not cut off a line of inquiry and the misrepresentation was not material. *Brief in Support of Appeal*, at 7.

The AAO notes that the Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were "material" was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now USCIS) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

> A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:
>
> a. the alien is excludable on the true facts, or
> b. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961).

An H-1B or specialty occupation is defined as an occupation requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty or its equivalent. See 8 C.F.R. § 214.2(h)(4)(ii). To be found qualified to perform the duties of an H-1B occupation, a beneficiary must hold a U.S. baccalaureate or higher degree required by the specialty occupation from an accredited college or university; hold a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree required by the specialty occupation from an accredited college or university; hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C).

In the present case, the record reflects that the requirement for the applicant's H-1B position was a U.S. bachelor's degree in education. *Letter from Citipoint Investment LLC*, at 2, dated May 5, 2003. The record also reflects that the applicant was found to hold the equivalent of a U.S. bachelor's degree in education and that his work experience was not considered in the equivalency evaluation. *Applicant's Degree Evaluation,* [redacted], dated October 29, 2002. Therefore, based on the true facts, i.e. that the applicant held the equivalent of a U.S. bachelor's degree in education, but

had no teaching experience, he would still have been eligible for H-1B admission to the United States. In addition, his misrepresentation did not shut off a line of inquiry that was relevant to his eligibility and that might well have resulted in a proper determination that he be found inadmissible. The applicant's work experience was not material to whether he qualified for the H-1B position, as his degree equivalency alone established his eligibility.

Based on the record, the AAO finds that the applicant did not misrepresent a material fact and is not inadmissible under section 212(a)(6)(C)(i) of the Act. The waiver filed pursuant to section 212(i) of the Act is therefore moot.

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 is not required to file the waiver. Accordingly, the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot.