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U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: PHILADELPHIA Date: MAY 05 2010

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The Acting District Director's decision will be withdrawn and the appeal will be dismissed as the underlying application is moot. The matter will be returned to the acting district director for continued processing.

The applicant, a native and citizen of Colombia, was found inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed at least one crime involving moral turpitude. Specifically, the acting district director found that the applicant had falsely claimed to be a lawful permanent resident of the United States on the Form I-9, Employment Eligibility Verification (Form I-9) to obtain employment in 1992, thereby committing perjury. The applicant sought a waiver of inadmissibility in order to remain in the United States with his U.S. spouse and children.

The acting district director 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 Ground of Excludability (Form I-601) accordingly. *Decision of the Acting District Director,* dated August 11, 2006.

On appeal, counsel for the applicant submits a brief, dated October 5, 2006, and referenced exhibits. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act provides, in pertinent part:

> [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
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> . . .
>
> (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General (Secretary) that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

On appeal, counsel contends that the acting district director erred in characterizing the applicant as inadmissible under section 212(a)(2)(A)(i)(I), for having committed at least one crime involving moral turpitude. As noted by counsel on appeal,

> The Acting District Director incorrectly characterized the applicant as and (sic) alien who was inadmissible for criminal grounds. The alien did not admit to a crime involving moral turpitude, rather, the applicant admitted to falsely claiming in Form I-9 that he was a Lawful Permanent Resident of the United States. Therefore, INA §212(a)(2)(A)(i) does not apply to the present matter. More appropriately, the Acting District Director should have used INA §212(a)(6)(C)(i) because the applicant was not convicted of a crime and did not admit any of the elements that would amount to a criminal act....

Brief in Support of Appeal, dated October 11, 2006.

With respect to the acting district director's finding that the applicant is inadmissible under 212(a)(2)(A)(i)(I) of the Act, for having committed at least one crime of moral turpitude, specifically, perjury, the AAO notes that in order for the admission of acts which constitute the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met, including: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to making the admission, and; 3) the admission must have been voluntary. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957).

Upon review, the record does not reflect that the applicant was provided with the essential elements of the criminal law which he allegedly admitted to violating. The AAO has reviewed all evidence in the record. No references were made to the criminal code or statute with respect to the applicant's admitted perjury. The record does not show that the applicant was provided the essential elements of any criminal law prior to his admission that he had claimed, under penalty of perjury, to be a lawful permanent resident when completing the Form I-9.

The AAO recognizes the burden on an interviewing officer due to the requirement to cite the elements of specific criminal law in an adjustment interview, particularly given the great range of topics or criminal conduct that may arise in the course of the discussion. However, finding an applicant inadmissible based on criminal conduct in the absence of a conviction in a court of law is a very serious matter. Where an applicant has not been afforded a criminal trial with respect to his conduct, or where he may not have the opportunity to be represented by counsel experienced in criminal matters, the decision of the BIA in *Matter of K-* sets a minimum requirement that such applicant is informed of the elements of the criminal law or laws which he has allegedly transgressed prior to taking an admission and using that admission as a basis for inadmissibility. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). As the record does not reflect that any essential elements of a crime were discussed with the applicant prior to his purported admission of perjury, the record does not establish that his admission may be used as a basis for inadmissibility.

Based on the foregoing, the AAO concurs with counsel that the applicant's admission to having made a false claim to lawful permanent resident status when completing the Form I-9, under penalty of perjury, does not constitute the admission of committing acts which constitute the essential elements of a crime relating to perjury, as contemplated by section 212(a)(2)(i)(I) of the Act, due to the fact that the criteria for admissions provided by the BIA in *Matter of K-* were not met. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). The applicant is thus not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The AAO must next analyze whether the applicant's false claim to lawful permanent residency on the Form I-9, and the possible[1] presentation of fraudulent documents, make the applicant inadmissible under section 212(a)(6)(C) of the Act, for fraud or willful misrepresentation, as asserted by counsel on appeal.

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.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary 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 immigrant 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...

Upon a careful review of the record, the AAO finds that the applicant is *not* inadmissible. The legacy Immigration and Naturalization Service (INS) General Counsel's Office addressed in an April 30, 1991 published legal opinion the issue of whether an alien who presents counterfeit documents in completing an Employment Eligibility Verification Form (Form I-9) is subject to inadmissibility for

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[1] The copy of the Form I-9 submitted by counsel does not specifically detail what, if any, documents were presented by the applicant in support of his attestation, under penalty of perjury, that he was a lawful permanent resident of the United States. *Form I-9,* dated August 14, 1992. The certification at the bottom of the Form I-9, confirming that the employer's representative examined the documents presented by the applicant in support of his lawful permanent resident status, has been signed. However, the employer's representative failed to specifically identify the items that the applicant presented in support of his purported permanent residency status, under the Employer Review and Verification section of the form. As such, the issue raised by the acting district director in her decision to deny the Form I-601 with respect to the possible presentation of fraudulent documents by the applicant when completing the Form I-9, and its immigration implications, will not be reviewed or considered by the AAO.

misrepresentation under former section 212(a)(19) (now section 212(a)(6)(C)(i)) of the Act. The legal opinion provides:

> For two reasons, we conclude that an alien's false statements on Form I-9 do not render the alien subject to exclusion under Section 212(a)(19) of the Act. First, an alien who falsifies a Form I-9 does not make the false statements before a United States government official authorized to grant visas or other immigration benefits. Secondly, while the decision of the Service to grant an alien authority to accept employment is a benefit under the INA, an employer's decision to hire any particular individual involves a private employment contract. Thus, false statements on Form I-9 are not for the purpose of obtaining a benefit under the INA and, therefore, cannot form the basis for exclusion of an alien pursuant to Section 212(a)(19) of the Act.

Genco Op., Paul W. Virtue, Act. Gen. Co., *Penalties for misrepresentations by an unauthorized alien on an Employment Eligibility Verification Form (Form I-9),* No. 91-39, 2 (April 30, 1991).

Similarly, the Board of Immigration Appeals (BIA) concurring opinion in *Matter of Cervantes-Gonzalez* noted:

> The majority's language may be misinterpreted as suggesting that using the fraudulent passport to obtain employment is obtaining a benefit under the Act. Although the use or possession of such document is punishable under section 274C of the Act, 8 U.S.C. § 1324c (1994 & Supp. II 1996), working in the United States is not 'a benefit provided under this Act,' and we have specifically held that a violation of section 274C and fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act are not equivalent.

22 I&N Dec. 560, 571 (BIA 1999)(citations omitted).

Therefore, the applicant cannot be found inadmissible under section 212(a)(6)(C)(i) of the Act if he claimed lawful permanent residency status as evidence of his eligibility for employment. A review of the documentation in the record fails to establish that the applicant is inadmissible under 2212(a)(2)(A)(i)(I) of the Act, for admitting to having committed a crime involving moral turpitude, specifically, perjury, or under 212(a)(6)(C) of the Act, for fraud or willful misrepresentation, when completing and executing the Form I-9 in August 1992. Accordingly, the applicant is not inadmissible. The applicant's waiver application is thus moot and the appeal will be dismissed.

ORDER: The applicant's waiver application is declared moot and the appeal is dismissed. The director shall reopen the denial of the Form I-485 application and continue to process the adjustment application.