U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security

#5

[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CALIFORNIA Date: JAN 27 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is moot.

The applicant is a native and a citizen of Honduras 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 having sought a benefit under the Act through fraud or willful misrepresentation. He is the spouse of a U.S. citizen. The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. The Field Office Director also found that a favorable exercise of discretion was not warranted in the applicant's case. *Field Office Director's Decision,* dated November 15, 2007.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible, that United States Citizenship and Immigration Services (USCIS) has violated the applicant's procedural rights, and that the Field Office Director failed to properly evaluate hardship to the applicant's qualifying relatives.

The record of proceeding contains, but is not limited to, the following evidence: counsels' briefs and statements; declaration by [redacted] relating to the applicant's signature; country conditions materials for Honduras and El Salvador; employment records for the applicant's spouse; medical documentation relating to the applicant's spouse, including a psychological evaluation; and copies of court records relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in rendering this decision.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

> (i) **In general.** 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 chapter is inadmissible.

In her decision, the Field Office Director indicated that during the applicant's adjustment interview with an officer of United States Citizenship and Immigration Services (USCIS), he failed to accurately describe his convictions for burglary of a vehicle under California Penal Code § 460(b) and for driving under the influence of alcohol/drugs under California Vehicle Code §§ 23152(b) and 21658(a). The Field Office Director found these inaccuracies to constitute material misrepresentations and, therefore, to bar the applicant's admission to the United States under section 212(a)(6)(C)(i) of the Act.

Although the AAO notes that the applicant's testimony may not have accurately reflected the details and outcomes of his arrests, we do not find these misrepresentations to bar his admission to the United States under section 212(a)(6)(C)(i) of the Act as they do not represent material misrepresentations for immigration purposes.[1] A misrepresentation is generally material for immigration purposes only if by it the alien receives a benefit for which he or she would not otherwise be eligible. *See Kungys* v. *United States,* 485 US 759 (1988); *see also Matter of Tijam,* 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez,* 10 I&N Dec. 409(BIA 1962; AG 1964) and *Matter* of *S- and B-C-* 9 I&N Dec. 436 (BIA 1950; AG 1961).

The Supreme Court in *Kungys,* 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 United States Citizenship and Immigration Services' (USCIS)) decisions. *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).

The record establishes that the applicant was convicted of burglary of a vehicle, California Penal Code (Cal. Penal Code) § 460(b) on April 1, 1996, of driving under the influence of alcohol, California Vehicle Code (Cal. Vehicle Code) § 12352(b) on November 14, 1996 and of failing to drive within a single lane, Cal. Vehicle Code § 21658(a) on April 17, 1998. The applicant's convictions under the Cal. Vehicle Code are not crimes involving moral turpitude and his conviction for burglary of a vehicle, even if found to be a crime involving moral turpitude, would fall under the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act and would not, therefore, bar his admission to the United States under section 212(a)(2)(A)(i)(I). In that the applicant's convictions would not have prevented his adjustment to lawful permanent resident status had he fully described them at the time of his interview, the AAO finds they do not constitute material misrepresentations for the purposes of section 212(a)(6)(C)(i) of the Act. Accordingly, the applicant is not inadmissible

[1] The AAO also notes that copies of court documents detailing the applicant's convictions had already been submitted for the record at the time of his interview and, therefore, does not find his failure to accurately describe his arrests to have been willful. We further observe that handwritten notes on the Form I-485 filed on February 19, 2003 indicate that the applicant had provided testimony regarding his convictions at the time of his August 12, 2003 interview.

to the United States based on his failure to accurately describe his criminal history at his September 2005 adjustment interview.

However, a review of the record finds that the applicant was previously denied adjustment of status in connection with a 212(a)(6)(C)(i) finding of inadmissibility. The denial issued by the District Director, San Francisco, California on October 31, 2005 found no approved Form I-130, Petition for Alien Relative, to underly the applicant's Form I-485, Application to Register Permanent Resident or Adjust Status, noting that the Form I-797, Notice of Action, submitted with the Form I-485 as proof that an approved Form I-130 was not a validly issued document. Accordingly, the AAO will consider whether the applicant is barred from admission to the United States as a result of this prior finding of inadmissibility.[2]

Based on the record, the Form I-797, dated August 6, 1992, was not issued by the legacy Immigration and Naturalization Service (now USCIS). The record also indicates that no actual approved Form I-130 benefitting the applicant was found in USCIS or State Department files or noted in relevant data bases. Further, although the Form I-797 indicates that the petitioner on the Form I-130 is [redacted], the record contains a September 9, 2003 sworn statement from [redacted] denying that she ever filed a visa petition on his behalf. In this same sworn statement, [redacted] who is the applicant's aunt, attests that she did not adopt the applicant as stated on the Honduran adoption decree that was submitted in support of the Form I-485. Accordingly, the AAO finds the record to establish, by a preponderance of evidence, that the Form I-485 filed on February 19, 2003 was submitted with at least one and, perhaps two, counterfeit supporting documents.

On appeal, counsel contends that the applicant did not submit the Form I-485 filed on February 19, 2003, and was unaware of the Form I-797 or any adoption proceedings involving him prior to his August 12, 2003 interview. Counsel states that the applicant had previously been told by his mother and aunt that he was eligible for adjustment based on the petition his aunt had filed for his mother, her half sister. Counsel also asserts that at the time of the applicant's adoption, which allegedly took place in 1988, he was 12-years-old and, therefore, cannot be viewed as complicit in any fraud that may have been committed. Counsel further contends that the Form I-485, Form I-485 Supplement and the Form G-325A, Biographic Information, filed with USCIS in 2003 all bear forged signatures. Counsel asserts that at the time of his interview, the applicant was told to sign off on the corrections made to his Form I-485 but was not provided an opportunity to review them. Counsel states that the applicant's Form I-485 was amended based on the statements that had been made by his sisters who had just been interviewed by the same immigration officer.

In support of these claims, counsel submits an undated declaration from forensic scientist, [redacted] who states that he reviewed the signatures that appear on the Form I-485, Form I-485

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

Supplement and Form G-325A filed on February 19, 2003 and found that they are not the applicant's signature, as established by the exemplar signatures provided in original business documents and identification cards belonging to the applicant. He concludes, however, that the same individual probably provided the signatures found in all three of the documents he reviewed. [redacted] statement is accompanied by a copy of his curriculum vitae. His resumé indicates that he has an extensive history as a forensic document examiner, with 27 years of employment at [redacted]. A newspaper article on [redacted] included in the record reports on his career as a leading expert on handwriting.

The AAO also finds the record to include a sworn statement from the applicant, taken on October 3, 2005, in which he attests that at his August 12, 2003 interview, he was never asked his parents' names and that the corrections made to the application were not read to him prior to his signing it. The applicant also states that he did not file the Form I-485 submitted on February 19, 2003 and that prior to his interview, he had never seen the Form I-797.

Having considered the evidence of record, the AAO does not find it to include sufficient evidence to establish that the Form I-485 submitted on February 19, 2003 was a willful attempt on the part of the applicant to obtain an immigration benefit through fraud or misrepresention. While there is no question that the Form I-797 submitted with the Form I-485 is a fraudulent document or that the applicant was not eligible to benefit from the Form I-485 filed on February 19, 2003, the AAO takes note of the statement provided by handwriting expert [redacted] who found that the signature on the 2003 Form I-485 is not the applicant's. Accordingly, we cannot conclude that the applicant was responsible for filing the Form I-485, was aware of the documentation that accompanied it or understood that he was ineligible to benefit from it.

The AAO also finds insufficient proof to conclude that the applicant engaged in the willful misrepresentation of a material fact by signing a Form I-485 that had been corrected to list his aunt as his mother at the time of his August 12, 2003 interview. The sworn statement in which [redacted] attests that she never adopted the applicant does not by itself establish that the Honduran adoption decree in the record is not genuine. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). There is no evidence that the decree has been deemed fraudulent by relevant authorities in Honduras or forensic documents experts within the Department of Homeland Security. Moreover, [redacted] statement raises certain questions as to its reliability in light of what appears to be her failure to clarify her relationship to the applicant at the time of his interview on August 12, 2003, when she was informed of the "adoption."

In her sworn statement, [redacted] attests that she accompanied the applicant and two of his sisters to their interviews on April 12, 2003 and learned that she had adopted them at that time. However, neither [redacted] statement nor the record indicate she immediately informed USCIS that no adoption had taken place. Instead, it appears that she did not make this disclosure until September 9, 2003, the date of her sworn statement, nearly one month later. No explanation is

provided regarding the reason that [redacted] failed to identify herself as the applicant's [redacted] rather than his adoptive [redacted], at the time of his interview. Accordingly, the AAO does not find the record to offer sufficient evidence to establish the true relationship between the applicant and his aunt, or to demonstrate that, at the time he signed the Form I-485, the applicant knew the adoption certificate in the record was not valid proof that he had been adopted by his aunt when he was 12-years-old.

As previously discussed, the record does not establish that the applicant's descriptions of his convictions during his September 2005 adjustment interview are material misrepresentations under section 212(a)(6)(C)(i) of the Act. Neither does it demonstrate that the applicant is barred from admission based on the Form I-485 and fraudulent supporting Form I-797 filed in his name on February 19, 2003. Based on the record, the AAO does not find the applicant to be inadmissible to the United States.

As the applicant is not inadmissible to the United States, he is not required to file a waiver. Accordingly, the appeal will be dismissed as the underlying waiver applicant is moot.

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