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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H5

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2011

IN RE: Applicant: [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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the field office director for continued processing.

The applicant is a native and citizen of Mexico. The record indicates that December 17, 1993, the applicant sought to enter the United States through the pedestrian lane at San Luis port of entry claiming that she was a naturalized U.S. citizen. After questioning, the applicant admitted that she was a Resident Alien. In 1987 the applicant had applied for Amnesty and was granted temporary residence, but in 1988 she lost her Resident Alien Card and she returned to Mexico. Prosecution was declined because the applicant was found to be admissible as a lawful temporary resident. The director found the applicant to be 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), for having sought to procure a visa by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her United States lawful permanent resident mother.

The director concluded that extreme hardship to a qualifying relative had not been established and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The director noted that the applicant did not claim hardship to a qualifying relative. *Decision of the Director,* dated March 25, 2008.

On appeal, counsel states, generally, that the applicant has submitted sufficient evidence to establish extreme hardship to her qualifying relative. Counsel submits a brief and additional evidence. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant is the beneficiary of a Form I-130, Petition for Alien Relative, filed on June 7, 2008, on behalf of the applicant by her United States citizen father (now deceased). On June 7, 2008, simultaneously with the Form I-130, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On October 4, 2007, the applicant filed a Form I-601. On October 25, 2007, the director simultaneously approved the Form I-130 petition, and denied both the Form I-485 application, and the Form I-601 application.

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....

The AAO notes that aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act. Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 afford aliens in the applicant's position, those making false claims to U.S. citizenship prior to September 30, 1996, eligibility to apply for a waiver.

> In considering a case where a false claim to U.S. citizenship has been made, Service [CIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30, 1996. If the false claim was made before the enactment of IIRIRA, Service [CIS] officers should then determine whether (1) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act.

Memorandum by [redacted]

A misrepresentation is generally material only if by it the alien received a benefit for which she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 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). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. 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 (BIA 1960; AG 1961).

The BIA has held that the term "fraud" in the Act "is used in the commonly accepted legal sense, that is, as consisting of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). The "representations must be believed and acted upon by the party deceived to" the advantage of the deceiver. *Id.* However, intent to deceive is not a required element for a willful misrepresentation of a material fact. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).

The record reflects that the applicant filed her Application for Temporary Resident Status (Form I-687) on July 26, 1987, and the applicant was granted temporary resident status on December 31, 1987. The applicant filed the Application for Adjustment of Status from Temporary to Permanent Resident (Form I-698) on March 14, 1994. The Form I-698 was denied on January 4, 1996. The record further reveals that the applicant's temporary resident status was not terminated until February 16, 1996. Therefore, on December 17, 1993, the date the applicant sought to enter the United States, she had valid temporary resident status.

As discussed above the applicant was found to be admissible as a lawful temporary resident. Under the facts of this case, the misrepresentation is not material because by it the applicant would not have received a benefit for which she would not otherwise have been eligible. The applicant is, therefore, not inadmissible under section 212(a)(6)(C)(i) of the Act for having sought to procure a visa by fraud or willful misrepresentation.

In the present case, a review of the record reflects no indication that the applicant sought to procure entry into the United States by fraud or willful misrepresentation. In addition, the applicant has not been convicted for false statements in any other application. The AAO thus finds that the acting district director erred in concluding that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act is moot and will not be addressed.

ORDER: The appeal is sustained, the district director's decision is withdrawn and the waiver application declared moot. The director shall reopen and continue to process the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) accordingly.