U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

DATE: NOV 15 2011 OFFICE: TUCSON, AZ FILE: [redacted]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tucson, Arizona and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico 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 attempted to enter the United States through fraud or the willful misrepresentation of a material fact and section 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly encouraged, induced, assisted, abetted or aided another alien to enter or to try to enter the United States in violation of the Act. The record indicates that the applicant is the spouse of a U.S. citizen and the daughter of a Lawful Permanent Resident. She 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.

The Field Office Director found that no waiver was available for a violation of section 212(a)(6)(E)(i) of the Act. He further concluded that the hardship claim made on behalf of the applicant's daughter could not be considered as she was not a qualifying relative for the purposes of section 212(i) of the Act. The Field Office Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated May 15, 2009.

On appeal, counsel contends that the Field Office Director erred as a matter of law and procedure in denying the Form I-601. *Form I-290B, Notice of Appeal or Motion,* dated June 9, 2009.

The record includes, but is not limited to, counsel's brief; statements from the applicant and her spouse; medical statements and records relating to the applicant and her daughter; documentation of life, health and homeowners insurance; loan statements; mortgage statements; bank statements; tax returns and W-2 Wage and Tax Statements for the applicant and her spouse; support statements from family members, coworkers and friends; letters from a licensed social worker and the office manager of the church attended by the applicant; and circuit court decisions addressing inadmissibility under section 212(a)(6)(E)(i) of the Act. The entire record was reviewed and all relevant information considered in reaching a decision on the 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.
>
> (ii) Falsely claiming citizenship.—
>
> (I) In general.—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible

> (II) Exception—In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

The record reflects that on August 3, 1994, the applicant sought admission to the United States by claiming to be a U.S. citizen.

Individuals making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form I-601 waiver. However, provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 allow aliens making false claims to U.S. citizenship prior to September 30, 1996, to apply for a waiver.

> In considering a case where a false claim to U.S. citizenship has been made, Service [USCIS] 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 [USCIS] 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 Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3.

As the applicant sought admission to the United States based on a claim to U.S. citizenship on August 3, 1994, she is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act. The applicant does not contest this finding.

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

> (i) In general-Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.
>
> (ii) Special rule in the case of family reunification-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 or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided

only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized-For provision authorizing waiver of clause (i), see subsection (d)(11).

In his decision, the Field Office Director indicated that at the time the applicant had sought admission to the United States as a U.S. citizen she was accompanied by her 16-year-old brother for whom she had also claimed U.S. citizenship. The Field Office Director noted that the applicant had presented the immigration inspector at the port-of-entry with documents intended to establish that both she and her brother were U.S. citizens.

In a July 8, 2009 affidavit submitted on appeal, the applicant attests that on August 3, 1994, the immigration inspector at the port-of-entry asked her and her brother their nationalities and that they independently responded that they were U.S. citizens. Having answered this question, the applicant states, she and her brother were separated and questioned. She asserts that she never answered questions for her brother and did not submit any documents on his behalf.

On appeal, counsel states that while the applicant does not dispute that she made a false claim to U.S. citizenship on August 3, 1994, she is not subject to section 212(a)(6)(E)(i) of the Act. He asserts that the applicant did not claim U.S. citizenship for her brother or submit documentation to that effect, and that her knowledge that her brother was not a U.S. citizen at the time of their attempted entry is not sufficient to bar her admission for alien smuggling. In support of his claim, counsel points to *Altamirano v. Gonzales*, an opinion issued by the Ninth Circuit Court of Appeals, the jurisdiction within which this case arises. 427 F.3d 586 (9th Cir. 2005). In *Altamirano,* the Ninth Circuit held that having knowledge of another's inadmissibility does not equate to alien smuggling under the Act. *Id.* The court found that for section 212(a)(6)(E)(i) of the Act to apply, an "affirmative act of help, assistance or encouragement" must be provided to the individual who is attempting to enter the United States illegally. *Id.*, at 592. Counsel asserts that as the applicant did not claim U.S. citizenship for her brother or submit documents on his behalf, she did not perform the affirmative act required to trigger section 212(6)(E)(i) of the Act.

The AAO finds the record to provide support for the applicant's assertion that she presented no documentation to establish her brother's claim to U.S. citizenship and that he initially made an independent claim of citizenship to the immigration inspector. However, the record, also indicates that the applicant, while being questioned during the primary phase of her inspection, actively sought to convince the inspector of her brother's U.S. citizenship.

The record contains a Form I-213, Record of Deportable Alien, dated August 3, 1994, which reports that before being referred to secondary inspection, the applicant in responding to the primary inspector's questions was "very adamant that her brother, the passenger, was also born in the U.S." Based on this evidence, the AAO finds the record to establish that the applicant on August 3, 1994, was not a passive observer of her brother's attempt to enter the United States unlawfully, but an active participant. We conclude that her statements to the primary immigration inspector claiming citizenship on behalf of her brother constitute the affirmative act that the Ninth Circuit requires for a finding of alien smuggling under section 212(a)(6)(E)(i) of the Act. Accordingly, the applicant is inadmissible to the United States pursuant to section 212(a)(6)(E)(i) of the Act based on the assistance she provided her brother in his attempt to enter the United States as a U.S. citizen.

Section 212(d)(11) of the Act provides, in pertinent part, that:

> (11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of . . . an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

As just noted, a waiver of a section 212(a)(6)(E)(i) inadmissibility is available to individuals whose smuggling violations involved encouraging, inducing, assisting, abetting or aiding a spouse, parent, or son or daughter to enter the United States unlawfully. In the present case, the family member whom the applicant assisted was her brother. In that siblings are not among the categories of relatives listed in section 212(d)(11) of the Act, the applicant is statutorily ineligible to apply for a waiver of her 212(a)(6)(E)(i) inadmissibility and is permanently barred from entering the United States.

The applicant is inadmissible to the United States pursuant to section 212(a)(6)(E)(i) of the Act and no waiver is available. Having found the applicant to be statutorily ineligible for relief, the AAO finds no purpose would be served in considering her eligibility for a waiver under section 212(i) of the Act. Therefore, the appeal will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility is entirely on the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.