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

U.S. Citizenship and Immigration Services

[redacted]

H5

DATE: AUG 0 6 2012 OFFICE: SANTA ANA 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

to support the assertions made on appeal. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F. 2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO finds the applicant failed to establish that she was granted U.S. lawful permanent resident status or that rescission proceedings are required.

The regulations provide in pertinent part at 8 C.F.R. § 103.2(a)(17) that:

> The status of an applicant or petitioner who claims that he or she is a permanent resident of the United States or was formerly a permanent resident of the United States will be verified from official Department records. These records include alien and other files, arrival manifests, arrival records, Department index cards, Immigrant Identification Cards, Certificates of Registry, Declarations of Intention issued after July 1, 1929, Permanent Resident Cards, or other registration receipt forms (provided that such forms were issued or endorsed to show admission for permanent residence), passports, and reentry permits. . . . Other cards, certificates, declarations, permits, and passports must have been issued or endorsed to show admission for permanent residence.

Under Service policy, adjustment of status involves approval of the Forms I–130, I–485, and finally, the Form I–181, Creation of Record of Lawful Permanent Residence (Form I-181). "Only after these approvals are granted should an applicant receive an I–551 stamp in his or her passport." *See Nelson v. Reno,* 204 F. Supp. 2d 1355, 1359 (S.D. Fla. 2002), *aff'd,* 61 Fed. Appx. 670 (11th Cir. 2003). *See also Bassey v. INS,* No. C01-4035 SI, 2002 WL 31298854 at 5 (N.D. Cal. Oct. 10, 2002); *Ayoub v. Chertoff,* No. 05-71484, 2005 WL 1028180 at 2 (E.D. Mich. April 20, 2005). Both the lawful permanent resident card (Form I-551) and the I-551 temporary passport stamp are deemed to be clear evidence of permanent resident status. *See Peng v. Gonzales,* No. C-06-07872 JCS, 2007 WL 2141270 at 2 (N.D. Cal. July 25, 2007).

A review of the applicant's alien file reflects that her Form I-485 application initially was approved on June 22, 2009. Agency database records reflect that a welcome notice was sent to the applicant on June 24, 2009. An approval notice was not sent to the applicant, however, and a Form I-551 lawful permanent resident card was not generated or sent to her. The record contains no evidence showing that the applicant's passport was stamped with a temporary I-551 passport stamp. Moreover, neither agency databases nor the applicant's file reflect that a Form I-181, which is the official record of approval for adjustment of status, was created for the applicant. Rather, the applicant's alien file and computerized USCIS records reflect the Form I-485 decision was reopened and reconsidered by USCIS based on a determination that she was inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant was notified of the inadmissibility finding and its basis on

February 1, 2010, and she was provided 87 days to file a Form I-601 application for a waiver of her inadmissibility. The adjustment of status application was subsequently denied on May 13, 2010, and a denial notice was ordered on October 13, 2010.[2]

The applicant has not submitted evidence of official notices or records granting her lawful admission for permanent residence, and the cumulative evidence in the record reflects that the applicant was *not* granted U.S. lawful permanent resident status. The AAO therefore finds the applicant failed to establish that she was granted U.S. lawful permanent resident status, and rescission proceedings are not required.

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.

There must be some evidentiary basis for a Service conclusion that an alien is inadmissible under the Act. Agency fact-finding shall be accepted if the evidence permits a reasonable fact-finder to make the inadmissibility finding. *See INS v. Elias-Zacarias,* 502 U.S. 478 (1992).

A misrepresentation is generally material only if by making 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 must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys,* 495 U.S. at 771-72.

"It is not necessary that an 'intent to deceive' be established by proof, or that the officer believes and acts upon the false representation," but the principal elements of the willfulness and materiality of the stated misrepresentations must be established. 9 FAM 40.63 N3 (citing *Matter of S and B-C*, 9 I&N Dec. 436, 448-449 (A.G. 1961) and *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975)).

In regards to the willfulness of the applicant's stated misrepresentations, 9 FAM 40.63 N5, in pertinent part, states that "[t]he term "willfully" as used in [section] 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise." In order to find the element of willfulness, it must be determined that "the alien was fully aware of the nature of the information sought, and knowingly, intentionally,

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[2] *Under 8 C.F.R. § 103.5(a)(5)(ii), when the Service reopens or reconsiders a decision and the new decision may be* unfavorable to the affected party, the applicant must be provided 30 days to submit a brief. The record does not reflect that the applicant was advised that she may submit a brief. The error is harmless in the present matter, however, as counsel has had an opportunity to address the inadmissibility finding on appeal before the AAO.

and deliberately misrepresented material facts." *See Memorandum from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, "Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators,"* dated March 3, 2009; *see also, Matter of G-G-,* 7 I&N Dec. 161 (BIA 1956).

In the present case, the record reflects the applicant obtained her visitor visa in July 2002, based on an application stating the purpose of her trip was to attend a high-school reunion in Washington D.C. and to visit her siblings. The visa application reflects further that the applicant intended to stay in the United States for one month and that she did not intend to work. The applicant entered the United States on August 16, 2002. She did not attend the high-school reunion, after traveling with her siblings she began working, and she has not departed the United States.

The applicant states in an affidavit that she intended to attend her high-school reunion when she applied for her visitor visa and when she entered the United States, and that she intended to return to the Philippines on December 15, 2002. After she arrived in the United States, her siblings decided not to attend the reunion and to instead travel around the country. The applicant feared traveling to the reunion in Washington, D.C. alone and therefore did not attend the event. The applicant states that she intended to return to the Philippines prior to the expiration of her tourist visa, but in November 2002, her son-in-law's aunt told her she planned to open a care facility and needed employees; she said she would file an employment petition on the applicant's behalf. After consulting with an attorney, the applicant decided to remain in the United States to work. The applicant states that an employment petition was filed on her behalf, and that she received notice that her labor certification was received. However, her son-in-law's aunt subsequently sold the business, and the applicant was unable to get her petition approved.

In addition to the applicant's affidavit, the record contains affidavits from the applicant's sister and friend stating they intended to attend the Baguio City High School international alumni association reunion together in Washington D.C., but that the applicant did not go after her siblings changed their plans.

The Department of State (DOS) Foreign Affairs Manual states that, "in determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application. . . . Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants . . . [a]pply for adjustment of status to permanent resident." *See DOS Foreign Affairs Manual,* Vol. 9 § 40.63 N4.7(a)(1). The Department of State developed the 30/60-day rule, which applies when an alien states on his or her nonimmigrant visa application, or to an immigration officer at the port of entry, "that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status" by actively seeking and obtaining employment or engaging in an activity that requires an adjustment of status. *Id.* at § 40.63 N4.7-1. Under this rule, if violative conduct occurs within 30 days of entry, it is presumed "that the applicant misrepresented his or her intention in seeking a visa or entry." *Id.* at § 40.63 N4.7-3. "When violative conduct occurs more than 60 days after entry into the United States, the Department does not consider such conduct to constitute a basis for [a section] 212(a)(6)(C)(i) of the Act inadmissibility." *Id.* at § 40.63 N4.7-4.

Although not bound by the Foreign Affairs Manual, the AAO finds its analysis in these situations to be persuasive. In the case at hand, the record reflects that the applicant was admitted into the United States as a visitor in August 2002. The record reflects she began working in the United States sometime after November 2002, more than 60 days after her admission. Furthermore, although the applicant did not attend her high-school reunion, the record contains letters explaining why she did not attend, and the record reflects that the applicant visited with her family members as she stated she would. Upon reviewing the totality of the evidence, the AAO finds that the record contains insufficient evidence to demonstrate that the applicant intended to work and immigrate permanently to United States when she obtained her nonimmigrant visa and when she was admitted into the United States. Accordingly, the AAO finds that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, for procuring a visa by willfully misrepresenting a material fact. The Form I-601 is therefore unnecessary, and the appeal will be dismissed.

ORDER: The appeal is dismissed, the decision of the Field Office Director is withdrawn, and the application for a waiver of inadmissibility is declared unnecessary.