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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

H5

[redacted]

DATE: MAY 18 2012 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who in 1968 and 1970 attempted to procure admission to the United States using fraudulent border crossing cards. He was found to be inadmissible to the United States 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 attempted to procure admission to the United States through fraud or misrepresentation. The applicant is the parent of a U.S. Citizen and is the beneficiary of an approved Form I-130 Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his U.S. Citizen son and grandchildren.

The Service Center Director concluded that the applicant did not have a qualifying relative for a waiver of inadmissibility and denied the application accordingly. *See Decision of Service Center Director* dated March 25, 2010.

On appeal, counsel contends the applicant's attempted entries in 1968 and 1970 do not render him inadmissible for fraud or misrepresentation because they predate the statute making fraud or misrepresentation with connection to an entry a ground of inadmissibility, and in any event his subsequent lawful entry cures any inadmissibility with respect to his application for adjustment of status. Counsel additionally asserts that the applicant would be inadmissible only if he utilized fraud to procure a document from the government, not if he attempted to use a fake document at entry. Counsel lastly claims that the 1986 Immigration and Marriage Fraud amendments are not retroactive.

The record includes, but is not limited to, evidence of birth, residence, and citizenship, documentation of attempted entries and removal proceedings, other applications and petitions filed on behalf of the applicant, financial documents, statements from the applicant and his family, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (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:

> (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 [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.

In the present case, the applicant admitted in a sworn statement that on April 26, 1968 he attempted to procure admission to the United States using a fake border crossing card which he had bought from a man in Chihuahua City. *Sworn statement,* April 26, 1968. The applicant admitted in another affidavit that in 1970 he again attempted to procure admission to the United States using a fake border crossing card, purchased from the same man in Chihuahua City. *Affidavit,* February 23, 2010. Both times immigration officials refused him admission and allowed him to voluntarily return to Mexico.

Counsel contends that the applicant's 1968 and 1970 attempted entries do not make him inadmissible for fraud or misrepresentation because controlling law at the time he attempted entry only invalidates fraudulent entries, does not preclude subsequent regular entries, and does not render an applicant inadmissible. For these assertions counsel relies on section 212(a)(19) of the Act. This reliance is incorrect, as section 212(a)(19) of the Act has been replaced by section 212(a)(6)(C) of the Act which, contrary to counsel's claims, applies retroactively and requires a waiver regardless of how the applicant last entered the United States. In support of his assertions counsel cites to *Matter of Shirdel,* 19 I&N Dec. 33 (BIA 1984) and *Matter of Y-G,* 20 I&N Dec. 794 (BIA 1994). *Matter of Shirdel,* however, does not support counsel's assertions with respect to fraudulent entry because the BIA decided *Shirdel* in 1984, before enactment of the Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Amendments), and before the Immigration Act of 1990 (1990 Act), two acts which amended excludability based on fraud or misrepresentation found in section 212(a)(19) of the Act to inadmissibility as set forth in 212(a)(6)(C)(i) of the Act.[1] Moreover, the BIA held in *Matter of Y-G* that the provision on seeking entry in section 212(a)(6)(C)(i) of the Act is both prospective *and* retrospective:

> Since the fraud exclusion ground has been amended, an alien is now excludable under section 212(a)(6)(C)(i) of the Act not only if he 'seeks' to procure but also if he 'has sought to procure or has procured' an entry into the United States by fraud or the willful misrepresentation of a material fact. Accordingly, the provision relating to seeking entry, like the provision relating to the procurement of documents, **is now both prospective and retrospective**, and an alien who is found excludable for seeking to procure entry by fraud or the willful misrepresentation of a material fact is now forever barred from admission to the United States unless a waiver is obtained.

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[1] Former section 212(a)(19) of the Act excluded "(1) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, by fraud, or willful misrepresenting a material fact; (2) Any alien who seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact." The AAO notes that section 212(a)(19) of the Act has been replaced by section 212(a)(6)(C)(i) of the Act.

Matter of Y-G-, 20 I&N Dec. at 797 (emphasis added). Thus, despite counsel's assertions to the contrary, not only does inadmissibility pursuant to 212(a)(6)(C)(i) apply retrospectively to the applicant, but also once he has been found inadmissible under this ground, he is forever barred from admission unless he receives a waiver regardless of the manner of his latest entry.

Counsel also asserts that because the applicant bought a fake document from a private entity, and did not use fraud or misrepresentation to obtain a legitimate document from the U.S. government, the applicant is not barred from admission for fraud or misrepresentation. Again, counsel relies on BIA case law, *Matter of L-L,* 9 I&N Dec. 324 (BIA 1961), which predates the Marriage Fraud Amendments and the 1990 Act, and does not reflect current law on inadmissibility due to fraud or misrepresentation. As discussed above, section 212(a)(6)(C)(i) applies retrospectively, and finding an applicant inadmissible does not depend on a choice between whether an applicant used fraud or misrepresentation to procure a document from the U.S. government or whether he presented a fake document to gain admission. Instead, section 212(a)(6)(C)(i) of the Act requires an analysis of whether the applicant used fraud or made a material misrepresentation to procure a visa, other documentation, or admission to the United States. A misrepresentation is generally material only if by it the alien received a benefit for which he 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). In the present case, on two separate occasions the applicant falsely presented himself as a person who owned a border crossing card which would allow admission into the United States as a nonimmigrant. In fact at the time the applicant had not been issued a border crossing card by the U.S. government, and he had no other status with which to gain admission into the United States. The applicant was thus excludable on the true facts, and remains inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or willful misrepresentation made in connection with applications for admission to the United States.

For a waiver of inadmissibility under section 212(i) of the Act, the applicant must first show he is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence. The applicant fails to establish that he has a qualifying relative for a waiver. He indicates that he is the parent and grandparent of U.S. Citizens; however, congress did not include hardship to an alien's children or grandchildren as a factor to be considered in assessing

extreme hardship under section 212(i) of the Act. Without a qualifying relative the applicant is ineligible for a waiver of inadmissibility under section 212(i) of the Act.

In proceedings for a waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.