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

(b)(6)

Date: APR 0 9 2013 Office: ACCRA, GHANA FILE:

IN RE: Applicant:

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:

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 in accordance with the instructions on 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Field Office Director, Accra, Ghana, and 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 Nigeria 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 attempting to seek a benefit through fraud or the willful misrepresentation of a material fact. The applicant is the mother of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 son.

The Field Office Director found that the applicant had failed to establish that she has a qualifying relative for a waiver under section 212(i) of the Act and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated July 30, 2012.

On appeal, the applicant, through counsel, contends that the Field Office Director incorrectly determined that the applicant is inadmissible for misrepresenting her date of birth when she applied for non-immigrant visitor visas in 2005 and 2006. *Form I-290B, Notice of Appeal or Motion*, dated August 29, 2012. Counsel claims that the applicant is illiterate, and her failure "to correct the misrepresentation . . . was in error and poor judgment on her part." *Id.*

The record includes, but is not limited to, counsel's appeal brief, statements from the applicant, and letters of support. The entire record was reviewed and considered in arriving at 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.
>
> . . . .
>
> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

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

> (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 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 [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 record indicates that on two separate occasions, the applicant applied for a U.S. visitor's visa using two different dates of birth: May 2, 1960, and May 22, 1960, respectively. The AAO notes that her actual date of birth is November 27, 1946.

In his appeal brief dated September 24, 2012, counsel states that the applicant did not "intend to deceive or make a deliberate and voluntary misrepresentation of her birth date" when applying for her visas. Counsel claims that the applicant was unaware of clerical mistakes in her passports, because she cannot read or write English, and she attempted to correct those mistakes by providing a correct attestation of birth from the Nigerian government during her last visa interview. He states that the misrepresentation is not material, because even with the incorrect dates of birth in her visa applications, the applicant still would have been eligible for the visas.

In order for the applicant to be inadmissible under section 212(a)(6)(C) of the Act, the applicant's misrepresentations not only must be willful, but they must be material. In regards to the willfulness of the applicant's stated misrepresentation, 9 FAM 40.63 N5, in pertinent part, states that:

> The term "willfully" as used in INA 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, and deliberately made an untrue statement.

A misrepresentation is generally material only if by making 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 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. The Board of Immigration Appeals (Board) 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).

"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* and *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975)).

Additionally, "materiality" is defined in 9 FAM 40.63 N6.1, which states, in pertinent part, that:

> Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa.

The AAO finds the applicant's claim that she is not inadmissible to the United States because she was unaware of the incorrect dates of birth in her passports and therefore she did not misrepresent facts willfully to be unpersuasive. The AAO observes that in waiver proceedings, the burden of proof is on the applicant to establish admissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. Counsel contends that United States Citizenship and Immigration Services must prove misrepresentation by clear and convincing evidence and cites *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998). However, counsel correctly notes that this burden applies to removal proceedings, and the cited authority does not concern administrative proceedings.

Following the denial of her previous nonimmigrant visa applications, the applicant attempted to obtain another immigration benefit by misrepresenting her date of birth. Although counsel claims that the different dates of birth in the applicant's passports were clerical mistakes, he does not dispute that she presented the passports to U.S. consular officers to obtain a nonimmigrant visa. The applicant, however, is responsible for knowing and understanding the information in the documents she submits to a U.S. immigration officer. Moreover, the applicant herself acknowledges that she discovered and was aware of the incorrect date of birth after her first interview in 2005, and she chose to present the purportedly incorrect passport to U.S. officials again in 2006. *See* Form I-601, filed February 17, 2012. The misrepresentation shut off a line of inquiry relevant to the applicant's eligibility. Therefore, the applicant's misrepresentations were willful and material, and based on these misrepresentations, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

Because the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, she must demonstrate eligibility for a waiver under section 212(i). A section 212(i) waiver is dependent first upon a showing that the applicant is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident of the United States. On March 10, 2010, the applicant's U.S. citizen son filed a Form I-130 on behalf of the applicant, which was approved on July 1, 2010. The applicant's U.S. citizen son, however, is not a qualifying family member under section 212(i) of the Act. The record does not establish that the applicant has a qualifying family member required for a waiver. As the applicant is ineligible for waiver consideration under section 212(i) of the Act, the appeal must be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.