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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 18 2014 OFFICE: NEBRASKA SERVICE CENTER File: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v), 212(i), and 212(d)(11) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i), and 1182(d)(11)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within 10 years of her last departure from the United States. The record also reflects the applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having sought to procure a benefit under the Act through willful misrepresentation. The record further reflects the applicant was found to be inadmissible pursuant to section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly aided another alien to enter the United States in violation of the law. At the time she filed her waiver application, the applicant was the daughter-in-law of a lawful permanent resident and the parent of a U.S. citizen child. The applicant contests the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act and seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(d)(11) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(d)(11), to reside with her family in the United States.

The Director concluded the applicant failed to establish that her husband or parent is a qualifying relative, as required under section 212(a)(9)(B)(v) of the Act, and therefore denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Director*, dated September 23, 2013.

On appeal, the applicant asserts that her family would suffer emotional and economic stress because her family members were approved for residency in the United States, whereas she has been left behind in Mexico. *See Form I-290B, Notice of Appeal or Motion*, dated October 18, 2013.

The record includes, but is not limited to: affidavits by the applicant, her spouse, their son and daughter, her mother-in-law, and brother-in-law; letters of support; documents establishing identity and relationships; and academic, financial, medical, residential, and voter registration documents. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides, in relevant part:

> (B) Aliens unlawfully present.-
>
> (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

. . .

(iii) Exceptions.-

. . .

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

. . .

(v) Waiver.-The Attorney General [now Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the [Secretary] regarding a waiver under this clause.

The record reflects that U.S. immigration officials admitted the applicant to the United States multiple times as a temporary visitor as a national of Mexico and last admitted her to the United States as a B-2 visitor around June 12, 1993, with authorization to remain until June 20, 1993. However, the applicant remained until November 24, 2005, departing the United States pursuant to an immigration judge's order of removal under section 240 of the Act. The record further reflects the applicant has remained outside the United States since her last departure.

The record also reflects the applicant filed a Request for Asylum in the United States (Form I-589) on April 7, 1994, and an Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100 (NACARA)) (Form I-881) on October 20, 2004. Individuals with bona fide asylum applications do not accrue unlawful presence while their applications are pending, in accordance with section 212(a)(9)(B)(iii)(II) of the Act. However, because the applicant filed Form I-589 as a Guatemalan national and not with her true identity, the applicant's asylum application cannot be considered bona fide. *See also Memorandum from Donald Neufeld, Act. Assoc. Dir., Domestic Operations, Lori Scialabba, Assoc. Dir., Refugee, Asylum and International Operations, Pearl Chang, Acting Chief, Office of Policy and Strategy, U.S. Citizenship and Immigration Service, to Field Leadership, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," p. 29,* dated May 6, 2009 (bona fide asylum applications must have a "reasonably arguable basis in fact or law").

The applicant therefore accrued unlawful presence from April 1, 1997, the effective date of the unlawful-presence provisions in the Act, until November 24, 2005, a period in excess of one year. She requires a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. The applicant does not contest this finding of inadmissibility.

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

> (C) Misrepresentation.-
>
> (i) In general.- 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 relevant part:

> (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.

The Board of Immigration Appeals (BIA) has held that for immigration purposes, the term *fraud* "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.*

The intent to deceive, however, 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 relevant standard for a willful misrepresentation is knowledge of falsity. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995).

A misrepresentation is generally material only if 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*, 485 U.S. 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).

As discussed previously, the record reflects the applicant submitted Form I-589 on April 7, 1994, and Form I-881 on October 20, 2004. The record also reflects that on her Forms I-589 and I-881, the applicant indicated a name and date of birth that did not belong to her and indicated that she was a national and citizen of Guatemala. The record further reflects the applicant received employment authorization documents during the pendency of the Form I-589 adjudication, indicating a name and date of birth that did not belong to her and that she was a Guatemalan national.

In support of the waiver application, the applicant and her spouse submitted a joint statement, stating that a third party completed their Forms I-589 and I-881 without their direct participation and that they were unaware that their applications identified them as Guatemalan until their asylum interview. The applicant and her spouse also state they attempted to correct the application at the asylum interview but were unable to do so, as they did not have an interpreter. They further state that during the asylum interview, they only confirmed the information on their applications as instructed by the third party who completed their applications and the asylum officer.

The evidence demonstrates the applicant signed Forms I-589 and I-881, and multiple Forms I-765, Application for Employment Authorization, as demonstrated by the issuance of employment authorization documents for about 10 years, and in so doing, certified under penalty of perjury that the applications and the evidence submitted with them are true and correct. The applicant also signed a declaration before her asylum interview on January 26, 2005, certifying she is competent in English, waiving her right to an interpreter, and choosing to proceed with the interview alone. Therefore, the applicant is responsible for willfully misrepresenting her nationality in connection with her request for asylum, benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA), and work authorization.

Foreign nationals must establish admissibility "clearly and beyond doubt." *See* sections 235(b)(2)(A) and 240(c)(2)(A) of the Act. The same is true for admissibility in the context of an application for adjustment of status. See *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008). *See Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008); *see also Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). Based on the foregoing, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, and she requires a waiver under section 212(i) of the Act.

Section 212(a)(6)(E) of the Act also provides, in relevant part:

> (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.

. . .

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

Section 212(d)(11) of the Act provides:

> The [Secretary] 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 any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and 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 such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The record reflects the applicant included her children on her Form I-589 filed on April 7, 1994 and on her Form I-881 filed on October 20, 2004. Based on the foregoing, a U.S. consular officer found the applicant to be inadmissible for alien smuggling pursuant to section 212(a)(6)(E)(i) of the Act.

The plain language of the Act specifies that an individual is inadmissible if she "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." *See* section 212(a)(6)(E)(i) of the Act (emphasis added). In this case, the record indicates the applicant's children had been admitted to the United States as B-2 visitors and had overstayed their authorized period of stay when the applicant included them on her Forms I-589 and I-881. There is no evidence the applicant assisted them to enter or attempt to enter the United States "in violation of law." Accordingly, we find the applicant is not inadmissible under section 212(a)(6)(E)(i) of the Act, and she does not require a waiver under section 212(d)(11) of the Act.

Waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act are dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant, her adult sons and daughter, other children, or relatives listed on the applicant's Form I-601, is not relevant under the statute and is considered only insofar as it results in hardship to a qualifying relative.

The record demonstrates the applicant filed the present Form I-601 on December 27, 2012, indicating her lawful permanent resident mother-in-law and U.S. citizen child would experience hardship if her waiver were not approved. However, the applicant's mother-in-law and U.S. citizen child are not qualifying relatives under the waiver provisions of 212(a)(9)(B)(v) and 212(i) of the Act. The applicant's spouse, a lawful permanent resident since October 26, 2013, could be her

qualifying relative; however the record reflects the applicant's spouse became a lawful permanent resident approximately 10 months after the applicant filed her Form I-601.

An applicant must establish eligibility for the benefit sought at the time of filing an application. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). An application cannot be approved at a future date after the applicant becomes eligible under a new set of facts. *Id.* Thus, as the applicant did not have a qualifying relative at the time she filed her Form I-601, hardship to her husband may not be considered as a basis for approval of the present waiver application.[1]

When the applicant filed her Form I-601, she was not the spouse, son, or daughter of a U.S. citizen or lawful permanent resident. As the applicant did not demonstrate that a qualifying relative existed when she filed her Form I-601, she is ineligible for a waiver of her inadmissibilities under sections 212(a)(9)(B)(v) and 212(i) of the Act. Consequently, the appeal must be dismissed.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

[1] This decision does not prevent the applicant from filing a new Form I-601, in which her circumstances as of the date of filing would serve as a basis for her eligibility under sections 212(a)(9)(B)(v) and 212(i) of the Act.