

(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: NOV 08 2013

Office: NEWARK, NJ

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Permanent Residence Pursuant to Section 1 of the Cuban Adjustment Act of November 2, 1966 (P.L. 89-732)

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Field Office Director, Newark, New Jersey, who certified the decision to the Administrative Appeals Office (AAO) for review. The Director's decision will be affirmed.

The applicant is a native and citizen of Cuba who filed this application for adjustment of status to that of a lawful permanent resident as the spouse of a Cuban national under section 1 of the Cuban Adjustment Act (CAA) of November 2, 1966. The CAA provides, in part:

[T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, (now the Secretary of Homeland Security, (Secretary)), in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

The Field Office Director denied the application on September 16, 2013, because the applicant was inadmissible 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 procured an immigrant visa by misrepresenting a material fact. The director also noted that the applicant does not have either a qualifying spouse or parent in the United States, and as she cannot establish extreme hardship to a qualifying relative, no purpose would be served in submitting an Application for Waiver of Grounds of Inadmissibility (Form I-601).

On appeal, the applicant submits a statement of the circumstances surrounding her procurement of her immigrant visa and contends that she did not commit fraud in procuring the visa. The applicant does not submit additional evidence.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The first issue in this proceeding is whether the applicant is eligible to adjust her status pursuant to section 1 of the CAA.

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,

---

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record indicates that on September 27, 2010, the applicant submitted an Application for Immigrant Visa and Alien Registration, Form DS-230, to the United States Department of State, in Havana, Cuba, for the purpose of securing an immigrant visa to immigrate to the United States. On the visa application, the applicant indicated that she was married to [REDACTED]. On March 3, 2011, the applicant was interviewed by a consular officer and indicated on Part II of the Form DS-230 that she was still married to her husband. On May 25, 2011, the applicant was issued an immigrant visa (CP3) in Havana, Cuba. The record reflects, however, that on March 19, 2009, the applicant divorced her husband.

The director determined that the applicant misrepresented a material fact as she had been divorced and was no longer married at the time she filed the Form DS-230 and at the time of her consular interview. As a result of the material misrepresentation, the director deemed the applicant inadmissible. The director also determined that the applicant was ineligible for a waiver of this ground of inadmissibility as the applicant does not have a qualifying relative in the United States.

On appeal, the applicant contends that she did not commit fraud in procuring the nonimmigrant visa. The applicant states that she applied for a duplicate of a visa for which she had been approved because her documents, including her visa, had been stolen. She states that after she explained the circumstances the consular office instructed her to bring the same documents that she earlier presented.

A misrepresentation is generally material only if by 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 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).

The BIA has held that the term "fraud" in the Act "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.* However, intent to deceive 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 AAO finds the record to establish that the applicant misrepresented a material fact to obtain an immigration benefit. The applicant sought and procured a CP3 immigrant visa by submitting a Form DS-230 and attended an interview before a Consular Officer, wherein she indicated that she was married when, in fact, she had been divorced prior to the filing of the visa application. Had the applicant disclosed that she was divorced she would not have been issued the CP3 visa. It is clear from the record of evidence that the misrepresentation had the effect of shutting off a material line of inquiry.

The AAO thus affirms the director's denial in concluding that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. The applicant procured entry into the United States by willful misrepresentation. The applicant is, therefore, inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact.

The next issue in this proceeding is whether the applicant can establish that she is statutorily eligible for a waiver of inadmissibility in order to reside in the United States.

Section 212(i) of the Act, 8 U.S.C. § 1182(i), provides, in pertinent part:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (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 Attorney General (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....

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her children can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

The applicant does not have a qualifying relative who is either a U.S. citizen or lawfully resident spouse or parent. Even if the applicant were to seek a waiver of her inadmissibility, she cannot avail herself of waiver of inadmissibility under section 212(i) of the Act. Accordingly, no purpose would be served in the applicant seeking 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. Therefore, the

waiver application is unnecessary,<sup>2</sup> and the issue of whether the applicant can establish extreme hardship to a qualifying relative pursuant to section 212(i) of the Act is moot and will not be addressed.

The applicant is ineligible for adjustment of status to permanent residence, pursuant to section 1 of the CAA of November 2, 1966. The decision of the Field Office Director to deny the application will be affirmed. Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. The applicant has not met that burden.

**ORDER:** The director's decision is affirmed. The application is denied.

---

<sup>2</sup> The record does not reflect that the applicant sought a waiver for her inadmissibility resulting from a violation of section 212(a)(6)(C)(i) of the Act.