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U.S. Citizenship
and Immigration
Services

H2

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: **NOV 26 2008**

IN RE:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting 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 as the applicant is not 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), and the relevant waiver application is, thus, moot. The matter will be returned to the Director for continued processing.

The applicant is a native and citizen of Ghana who 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 entry into the United States by fraud or willful misrepresentation. The applicant is the spouse of a naturalized U.S. citizen and 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 his spouse.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Director*, dated July 31, 2006.

On appeal, counsel for the applicant contends that Citizenship and Immigration Services (CIS) erred in finding the applicant to be inadmissible. Counsel also asserts that, in the alternative, CIS erred in finding that the applicant had failed to meet the burden of establishing extreme hardship to his qualifying relative necessary for a waiver under 212(i) of the Act. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, a statement from the applicant; country conditions publications; Form W-2s for the applicant and his spouse; tax statements for the applicant and his spouse; earnings statements for the applicant and his spouse; bills; an apartment lease; bank statements; life and car insurance policies; a letter of support from a friend; and employment letters for the applicant and his spouse. The entire record was reviewed and considered in rendering this decision.

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.

Section 212(i) of the Act provides that:

- (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 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 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.

The record reflects that on June 13, 1985 the applicant was admitted to the United States on a B-2 visa. *Form I-94, Departure Record*. On July 25, 2003 the applicant married a naturalized United States citizen. *Marriage certificate*. On July 20, 2006, a Form I-130, Petition for Alien Relative, was approved on behalf of the applicant. The applicant's Form I-485, Application to Register Permanent Resident or Adjust Status, was denied on July 31, 2006 as the applicant was determined to be inadmissible under section 212(a)(6)(C)(i) of the Act for having provided a false date of birth on his Form I-94, Arrival/Departure Card. The applicant's Form I-601, Application for Waiver of Ground of Excludability, filed June 21, 2005, was also denied.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility. Counsel asserts that when the applicant applied for a Ghanaian passport in approximately 1981, the Ghanaian officials mistakenly listed the applicant's date of birth to be June 2, 1959 rather than his correct date of birth of May 16, 1960. *Attorney's brief*. When the applicant notified the Ghanaian officials of this error, they informed him that in order to correct it, he would need to re-apply for a passport and pay additional fees. *Id.* At the time, the applicant could not afford to apply for a new passport. *Id.* Additionally, the applicant believed that had he applied for a new passport, he might not have received it due to the political turmoil occurring in Ghana at the time. *Id.* Counsel asserts that the applicant did not commit a willful misrepresentation of a material fact as the applicant would not have been excludable based on his true date of birth. *Id.*

The AAO notes that the Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were "material" was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now CIS) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

- a. the alien is excludable on the true facts, or
- b. 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 (AG 1961).

Although the applicant presented a passport with an incorrect date of birth and also misrepresented his date of birth on the Form I-94, Arrival/Departure Card, the AAO acknowledges counsel's assertion that had the true facts that he was born on May 16, 1960 been known, he still would have been eligible to be admitted to the United States. It finds that the applicant's alteration of his date of birth on the Form I-94 is not a misrepresentation that shut off a line of inquiry that might have resulted in his exclusion from the United States. Accordingly, his misrepresentation is not a material misrepresentation. The AAO also observes that the applicant has submitted other forms to the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) and has always used his May 16, 1990 date of birth. See *Form I-485, Application to Register Permanent Resident or*

Adjust Status; Form G-325A, Biographic Information sheet; Form I-864, Affidavit of Support Under Section 213A of the Act; Form I-130, Petition for Alien Relative; Form I-601, Application for Waiver of Ground of Excludability; an Employment Authorization Document; Form I-687, Application for Status as a Temporary Resident; Form I-690, Application for Waiver of Grounds of Excludability. As the applicant did not willfully misrepresent a material fact, he is not inadmissible under section 212(a)(6)(C)(i) of the Act. The waiver filed pursuant to sections 212(i) of the Act is therefore moot.

An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. The applicant has met his burden of proof.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The Director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.