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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: [REDACTED] Office: ATLANTA, GA Date: JUN 17 2009

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Atlanta, Georgia. The matter 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 China. The district director found the applicant 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 having entered the United States by using a fraudulent passport. The district director found that the applicant did not have a qualifying relative and denied the waiver application accordingly. *Decision of the District Director*, dated August 17, 2006.

On appeal, counsel contends that the applicant does not need a waiver because he did not present his photo-switched passport to any U.S. government official. According to counsel, the applicant entered the United States during a stopover on a flight from Bolivia to China, and the applicant refused to reboard the aircraft after it landed in Los Angeles. Counsel contends airline personnel had taken away the applicant's passport and turned it over to U.S. immigration officials, and, therefore, the applicant "could not possibly deceive the U.S. official when he had no photo-switched passport with him." The applicant purportedly told the U.S. immigration official that the passport was not his, and thus, according to counsel, "timely retracted the fraud or misrepresentation, if any." *Petitioner's Supplemental Brief*, dated February 18, 2009.

Counsel's contention is unpersuasive. As counsel concedes, the applicant presented a fraudulent, photo-substituted passport to the airline while in transit without a visa to China. The record shows that the applicant did not intend on traveling to China, but boarded the plane with the intention of coming to the United States. *Statement of [REDACTED]*, undated. The record further shows that the applicant was paroled into the United States pending an exclusion hearing using a fraudulent name, [REDACTED] *Departure Record (Form I-94)*. In addition, on the applicant's Application to Register Permanent Resident or Adjust Status (Form I-485), the applicant stated that he "had lost [his] I-94." The record further shows that during his adjustment of status interview on June 11, 2002, the applicant recanted his statement that he had lost his Form I-94.

Section 212(a)(6)(C)(i) of the Act provides:

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.

The Transit Without Visa program ("TWOV") was designed to facilitate international travel, and permitted:

[A]liens traveling from one foreign country to another, which route entails a stopover in the United States, to proceed “in immediate and continuous transit” through this country without a passport or visa. 8 U.S.C. § 1182(d)(4)(C) (1970). An individual desiring to use the transit without visa privilege must establish, *inter alia*, that: 1) he is admissible under the immigration laws, 2) he has confirmed means of transportation to at least the next country, and 3) he will accomplish his departure within eight hours after his arrival or on the next available transport.

8 C.F.R. § 214.2(c) (1980).¹ As the First Circuit has held:

T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country’s border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.

....

[A]n alien’s assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United States before again departing. *See Reyes v. Neely*, 228 F.2d 609, 611 (5th Cir. 1956) (“A misrepresentation may be made as effectively by conduct as by words”)

U.S. v. Kavazanjian, 623 F.2d 730, 732, 739 n.15 (1st Cir. 1980); *see also Matter of Shirdel*, 19 I&N Dec. 33, 36 (BIA 1984) (“[t]he fraud was their flying to the United States posing as TRWOV aliens in order to submit applications for asylum”); *Ymeri v. Ashcroft*, 387 F.3d 12, 19 n.4 (1st Cir. 2004) (describing the TWOV program as a “benefit” under the Act).

Counsel’s reliance on *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994), and *Matter of D-L- & A-M*, 20 I&N Dec. 409 (BIA 1991), is unpersuasive as those cases explicitly do not apply in the TWOV context. *Matter of D-L- & A-M-*, 20 I&N Dec. at 412 (“[W]e hold that, *outside of the TRWOV [TWOV] context addressed in Shirdel*, an alien is not excludable . . . for seeking entry by fraud or willful misrepresentation of a material fact where there is no evidence that the alien presented or intended to present fraudulent documents or documents containing material misrepresentations to an authorized official of the United States Government in an attempt to enter on those documents.”) (emphasis added); *see also Matter of Y-G-*, 20 I&N Dec. at 797 (concurring with *Matter of D-L- & A-M-*).

In this case, the record clearly reflects that the applicant traveled to the United States posing as a TWOV alien under the TWOV program. The record reflects further that the applicant intended to remain in the United States and was paroled into the United States using a fraudulent name. Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for fraud.

¹ The TWOV program was suspended on August 2, 2003.

Section 212(i) provides:

(1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 permanent resident **spouse or parent** of such an alien. . . .

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C)(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. *See* Section 212(i)(1) of the Act, 8 U.S.C. § 1182(i)(1). Here, it is uncontested that the applicant does not have a U.S. citizen or lawful permanent resident spouse or parent. Therefore, the applicant does not have a qualifying relative under the statute and is ineligible for a section 212(i) waiver. *Id.*

Finally, the AAO notes that counsel's contention that the applicant is eligible for a waiver under section 237(a)(1)(H) of the Act is incorrect. While a violation of section 212(a)(6)(C)(i) of the Act may render an individual deportable under section 237 of the Act, in the instant case, the applicant has not been found to be deportable under section 237 of the Act, but rather, inadmissible under section 212 of the Act. *See* Section 237(a)(1) of the Act, 8 U.S.C. § 1227(a)(1) (rendering deportable any alien who was inadmissible at time of entry). In addition, section 237(a)(1)(H) applies to aliens who were "inadmissible at the time of admission." In this case, the applicant was never admitted into the United States, but rather, was paroled into the country. Furthermore, a waiver under section 237(a)(1)(H) applies only to aliens "in possession of an immigrant visa or equivalent document." It is clear the applicant was not in possession of an immigrant visa or equivalent document. Therefore, a section 237(a)(1)(H) waiver is inapplicable.

ORDER: The appeal is dismissed.