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 Date: JAN 22 2010

IN RE: [redacted]

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:

[redacted]

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).

Michael Shumway

Perry Rhew
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 The decision of the District Director will be withdrawn, and the matter will be remanded to the District Director for further action and consideration consistent with this decision.

The applicant, , is a native and citizen of Nigeria. He was found to be inadmissible to the United States pursuant to 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 admission into the United States by use of a fraudulent document. 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 his U.S. citizen spouse.

The District Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that the applicant's spouse will suffer extreme hardship if the applicant's waiver is denied and he is forced to return to Nigeria.

In support of the application, the record contains, but is not limited to: a brief from counsel; financial documentation; country condition reports; wedding photographs; and letters from the applicant's spouse, mother-in-law and stepchildren. The entire record was reviewed and considered in rendering 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.

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.

In denying the applicant's waiver application, the district director noted that service records show that the applicant entered the United States on or about August 15, 1996 or 1997 by using a false passport the applicant had obtained from an unknown vendor. The district director determined that

the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for misrepresenting himself to an immigration officer in order to gain entry into the United States. *See Decision of the District Director, July 26, 2006.*

Before the AAO can make a decision as to whether the applicant is eligible for a waiver of inadmissibility, the grounds of inadmissibility must be established. In the present case, it is not clear from the record of proceedings that the applicant is inadmissible under section 212(a)(6)(C) of the Act. The principal elements of a misrepresentation that renders an alien inadmissible section 212(a)(6)(C)(i) of the Act are willfulness and materiality. The only evidence in the record related to the applicant's inadmissibility is the adjudication officer's I-485 Processing Worksheet notes, which state, "ask about EWI – false passport" and a handwritten note on the Form I-485, which states, "uncle's false passport." No other documentation in the record relates to the district director's finding of inadmissibility. The record does not contain a sworn statement of the applicant. Nor does it contain the adjudication officer's interview notes. The Petition for Alien Relative (Form I-130) filed on behalf of the applicant shows that he entered the United States in August 1997 "without inspection." There is nothing in the record to indicate the basis for the finding that he presented a fraudulent passport to obtain admission into the United States.

The AAO notes that counsel appears to be parroting the finding of inadmissibility for purposes of making arguments about extreme hardship. However, in light of the lack of evidence to establish inadmissibility in the first instance, we will consider that the applicant does not mean to concede the argument apparent in the other documents submitted – that he entered without inspection and not by a willful misrepresentation of a material fact.

Furthermore, the AAO notes that even had the applicant presented a Nigerian passport, false or not, at a port-of-entry in an attempt to be admitted into the United States, he would not have been admitted unless he also presented a visa. There is no specific allegation or admission that the passport allegedly used by the applicant contained a U.S. visa, false or genuine, or how he acquired such a visa. Although the applicant may have possessed a false or fraudulent Nigerian passport, he must have presented it to an official of the U.S. government to procure admission into the United States, and the presentation of the document must have been "predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material." *Kungys v. U.S.*, 485 U.S. 759, 771-72 (1988). The applicant would not have been admitted to the United States by presenting a Nigerian passport alone.

The AAO observes that the applicant clearly listed his ground of inadmissibility on his Form I-601 waiver application as "worked without permission using incorrect number as social security number," and on his Form I-485 adjustment application as "used false SS# to work." A notation stating "Fraudulent Passport" was made under the applicant's statement in handwriting and ink that differs from the remainder of the Form I-601. A similar notation, written "FPP," appears on the Form I-485. It is therefore unclear if this ground of inadmissibility was added by the adjudication officer or listed by the applicant.

The AAO notes that using a false social security number in order to gain employment from a private employer does not, in and of itself, render the applicant inadmissible under section 212(a)(6)(C)(i) of

the Act. The Board of Immigration Appeals (BIA) concurring opinion in *Matter of Cervantes-Gonzalez* noted, "The majority's language may be misinterpreted as suggesting that using the fraudulent passport to obtain employment is obtaining a benefit under the Act. Although the use or possession of such document is punishable under section 274C of the Act, 8 U.S.C. § 1324c (1994 & Supp. II 1996), working in the United States is not 'a benefit provided under this Act,' and we have specifically held that a violation of section 274C and fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act are not equivalent." 22 I&N Dec. 560, 571 (BIA 1999)(citations omitted).

In conclusion, because the record does not establish that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, the AAO will remand the matter to the district director to reconsider this issue. The director may choose to schedule an interview with the applicant to establish in the form of detailed interview notes or a sworn statement, the manner in which the applicant entered the United States. If the district director determines that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, a new decision on the applicant's Form I-601 shall be issued and certified for review to the AAO. The applicant shall be allowed 30 days in which to respond to the adverse decision as required by 8 C.F.R. § 103.4(a)(2).

ORDER: The decision of the District Director is withdrawn. The matter is remanded to the District Director for further action and consideration in accordance with this decision.