



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **JAN 14 2013**

Office: LONDON, ENGLAND

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, London, England. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO will reopen the matter *sua sponte*. The July 6, 2012 decision of the AAO will be withdrawn and the appeal sustained.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured entry into the United States by fraud or willful misrepresentation. The record indicates that the applicant is married to a United States citizen. The applicant seeks a waiver of inadmissibility to reside in the United States with his wife.

In a decision, dated October 14, 2009, the district director found that the applicant was eligible for a 212(h)(1)(A) waiver of his criminal inadmissibility, but that the applicant would require a 212(i) waiver of inadmissibility as well, because he was also inadmissible for gaining admission to the United States under the visa waiver program by misrepresenting his criminal record on his Nonimmigrant Visa Waiver/Departure Form (Form I-94W). The district director then found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, as required for a waiver under section 212(i) of the Act, and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. The district director also found that the applicant did not warrant the favorable exercise of discretion because of his recent misrepresentations when entering the United States. The applicant filed a timely appeal.

The AAO concluded that the applicant was eligible for a waiver of inadmissibility under the less stringent standard of section 212(h)(1)(A), as the criminal activities that rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act occurred more than fifteen years earlier. *See Decision of Chief*, dated July 6, 2012. However, the AAO further found that the applicant was still required to demonstrate extreme hardship to a qualifying relative for purposes of a waiver under section 212(i) of the Act to overcome his inadmissibility under section 212(a)(6)(C)(i) of the Act. The AAO found that the applicant had failed demonstrate extreme hardship, as required, and dismissed the appeal accordingly. The AAO now reopens its prior decision *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5).

The record indicates that on September 26, 1996, the applicant was convicted of three counts of attempting to obtain property by deception in Stafford Crown Court, Stafford, United Kingdom. The events that led to his conviction occurred on September 18, 1993, June 2, 1994, and October 2, 1995. The applicant was sentenced to 100 hours community service on each count to run concurrently.

The applicant has not contested, and the AAO previously found, that his convictions are crimes involving moral turpitude that render him inadmissible under section 212(a)(2)(A)(i)(I) of the

Act. As the record does not show that finding of inadmissibility to be in error, the AAO will not disturb our prior determination.

The record also indicates that on March 10, 2007, July 15, 2007, and March 16, 2008 the applicant entered the United States under the Visa Waiver Program, and on the required Form I-94W, answered "no" to the question, "have you ever been arrested or convicted for an offense or crime involving moral turpitude or a violation related to a controlled substance; or been arrested or convicted for two or more offenses for which the aggregate sentence to confinement was five years." In an undated statement, the applicant asserts that he did not believe that the question on the Form I-94 would apply to his conviction. He states that he looked over the categories mentioned on the form (i.e.: drug traffickers, people engaged in espionage, prostitutes, terrorists, murders and spent convictions) and did not believe that any of the questions applied to him.

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 AAO previously found that the applicant's failure to disclose his criminal convictions on his Form I-94W was a willful misrepresentation under 212(a)(6)(C)(i) of the Act. *See Decision of AAO*, dated July 6, 2012. We now reopen the applicant's appeal to reconsider this determination.

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). U.S. Citizenship and Immigration Services (USCIS) interprets the term "willfully"

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as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. To be willful, a misrepresentation must be made with knowledge of its falsity. *Matter of G-G-*, 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we “closely scrutinize the factual basis” of a finding of inadmissibility for fraud or misrepresentation because such a finding “perpetually bars an alien from admission.” *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994) (citing *Matter of Shirdel*, 19 I&N Dec. 33, 34-35 (BIA 1984)); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979). We acknowledge that the term “moral turpitude” is not in common usage. Nevertheless, as the burden is on the applicant to establish that he or she is not inadmissible, the applicant has the burden of showing that any misrepresentation was, in fact, not willful. *See* section 291 of the Act, 8 U.S.C. § 1361.

After careful review of the record, we find that it demonstrates that the applicant did not have intent to deceive and that the misrepresentation on the Form I-94W was not willful. As the applicant correctly points out, item #B on the back of the Form I-94W asks whether an applicant has ever been arrested or convicted of specified offenses, including crimes involving moral turpitude. The form does not have a separate question that generally asks about arrests and convictions. The AAO finds that applicant’s explanations for responding in the negative to the question on the Form I-94W to be reasonable, given the specificity of the offenses set forth therein.

Additionally, we note that the record contains the applicant’s immigrant visa application, signed before the consular officer on January 13, 2009, which has, in item #30b, a question near identical to that on the Form I-94W, inquiring about arrests and convictions for various offenses, including crimes involving moral turpitude. There, too, the applicant responded in the negative. However, on the following page of the immigrant visa application, the applicant answered in the affirmative in response to item #31, asking whether the applicant had ever been charged, arrested or convicted of *any* offense or crime. This question is far less ambiguous, and as noted, is not found in the Form I-94W. We observe that the applicant affirmatively answered this question and disclosed the nature of his arrest on the application, prior to his consular interview and prior to issuance of the notice by USCIS, dated August 31, 2009, advising that his Form I-601 would need to include waiver of inadmissibility based on misrepresentation. Thus, based on the record before us, we conclude that the applicant has demonstrated that he did not have an intent to deceive and that the misrepresentation on his Form I-94W was not willful.

Accordingly, the AAO finds that the applicant is not inadmissible pursuant to section 212(a)(6)(C) of the Act, for having procured entry into the United States by fraud or willful misrepresentation. He, therefore, does not require a waiver under section 212(i) of the Act and need not demonstrate extreme hardship to his qualifying relative to overcome that ground of inadmissibility.

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The applicant, however, remains inadmissible under section 212(a)(2)(A) of the Act as a result of his three convictions. As stated above, the record indicates that on September 26, 1996, the applicant was convicted of three counts of attempting to obtain property by deception. The indictment in the applicant's case indicates that he attempted to deceive two educational authorities and a city council by falsely representing that he had not been in receipt of an educational award. The events that led to his convictions occurred on September 18, 1993, June 2, 1994, and October 2, 1995.

Section 212(a)(2)(A) of the Act states, in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Pursuant to section 212(h)(1)(A) of the Act, the ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act may be waived in the exercise of discretion, if the applicant demonstrates that the activities for which he is inadmissible occurred more than 15 years before the date of his application for a visa, admission, or adjustment of status. In addition, the applicant must demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated in order to qualify for a waiver under this provision.

The record demonstrates that the applicant's criminal conduct leading to his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act occurred more than 15 years ago. An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). We consider whether the applicant's admission to the United States would be contrary to the national welfare, safety, or security of the United States, and if he has been rehabilitated. The applicant has submitted documentation to demonstrate that he satisfies these requirements.

The record includes a statement from the applicant, a statement from the applicant's spouse, a statement from the applicant's mother-in-law, financial documents, medical documents, and four letters of recommendation.

The record indicates that the applicant's 1996 convictions are isolated. It does not disclose any arrests for the applicant before or since. In his hardship statement, the applicant expresses remorse and regret for his actions in attempting to obtain financial grants for his education through deception. He explains that his conduct has caused his family and himself pain and emotional suffering, and that he has since rehabilitated. The evidence of record also demonstrates that the applicant has significant family ties in the United States, including his citizen wife and her children. The applicant's wife indicates in her letters that the applicant is a loving and kind man of integrity who promotes truth and honesty in their family and community. She states in her September 5, 2009 letter that separation from her husband has caused insurmountable, emotional strain on their lives and fears that further separation will cause permanent damage. In a subsequent hardship letter, the applicant's wife also maintains that relocation would cause great psychological and financial hardship, as she would lose her close family ties, including her estranged daughter and her elderly, sick mother, for whom she is the primary care provider. A statement submitted by the applicant's mother-in-law supports the claims made regarding the applicant's spouse caring for her mother's daily needs after quadruple bypass surgery.

The AAO finds that the record indicates that the applicant's admission to the United States is not

contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated, as required by section 212(h)(1)(A) of the Act. The applicant is the husband of a U.S. citizen. The supporting statement from the applicant's wife in the record attests to the applicant's rehabilitation and good moral character. The applicant has not been convicted of a violent or dangerous crime. His 1996 convictions are remote in time and involved deception to obtain funds to pay for his higher education. Prior to the conviction, he had no criminal history. Since then, the applicant has obtained his college degree, and he asserts he paid it entirely on his own. A reference letter, dated November 6, 2009, from [REDACTED] of Assembly of God Ministries that the applicant is an individual upon whom they rely and who assists financially and with their many charity events, including the church flea market, annual youth outing, and annual drive to help indigent families. Based on the foregoing, the applicant has established that he has been rehabilitated and that he otherwise meets the requirements of a waiver under section 212(h)(1)(A) of the Act.

Furthermore, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The negative factors are his convictions for obtaining theft by deception. The favorable factors include the applicant's rehabilitation; the applicant's family ties in the United States, including his U.S. citizen wife; the ongoing emotional and financial hardships his citizen wife faces as a result of separation from the applicant; the applicant's gainful employment; the applicant's involvement in charitable church events; the passage of 17 years since the commission of conduct for which he was convicted in 1996; and the lack of any subsequent criminal history.

While the AAO cannot condone the applicant's criminal convictions, the AAO finds that the positive factors outweigh the negative and a positive exercise of discretion is appropriate in this case.

As we have found the applicant does not require a waiver under section 212(i) of the Act to overcome inadmissibility and that he is eligible for a waiver under section 212(h)(1)(A) of the Act, we find no purpose will be served in considering his eligibility for a waiver under subsection (h)(1)(B) of the same provision.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the prior decision of the AAO is withdrawn and the appeal is sustained.

ORDER: The appeal is sustained.