

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., NW, MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



PUBLIC COPY



H4

DATE: JAN 11 2012 OFFICE: VERMONT SERVICE CENTER

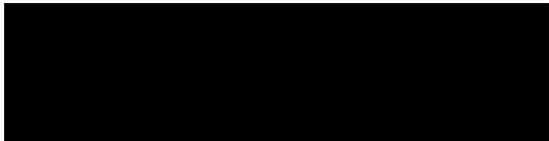


IN RE:



APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission (Form I-212) was denied by the Director, Vermont Service Center on October 27, 2009. The matter was appealed to the Administrative Appeals Office (AAO) on November 27, 2009. The AAO dismissed the appeal on December 27, 2010. The matter is now before the AAO on a Motion to Reopen and Reconsider. The motion will be granted, but the previous AAO decision and order, dated December 27, 2010 will be affirmed.

The record reflects that on September 3, 1998, the applicant was admitted into the U.S. with a B2 visitor visa valid through March 3, 1999. The applicant did not depart the U.S., and on March 5, 1999 he filed an application for Asylum and Withholding of Removal (Form I-589). The applicant's asylum claim was denied by the immigration service and referred to an immigration judge. The immigration judge denied the applicant's asylum claim and ordered him removed on October 24, 2001. The applicant filed subsequent appeals and motions to the Board of Immigration Appeals (BIA). A final motion to reopen was denied by the BIA on November 12, 2003. The record reflects the applicant departed the U.S. to Canada on December 8, 2003.

Citizenship and Immigration Service (CIS) approved a Form I-130, Petition for Alien Relative (Form I-130) based on the applicant's marriage. The record reflects the applicant applied for an immigrant visa at the U.S. Consulate in Montreal, Canada on November 10, 2005. An immigrant visa was issued to the applicant on July 27, 2006, and the applicant attempted to enter the U.S. with the immigrant visa on August 9, 2006. The applicant was denied admission into the U.S. after U.S. immigration officials checked his immigration history and noted his immigrant visa paperwork did not contain a Form I-212 approval or Form I-601, Application for Waiver of Grounds of Inadmissibility, approval. Subsequent contact with the U.S. Consulate in Montreal revealed the applicant's immigrant visa had been issued in error. The applicant was allowed to withdraw his application for admission into the United States, and he returned to Canada on August 9, 2006.

The applicant filed a Form I-601 and a Form I-212 with the USCIS Vermont Service Center in November 2006. In a decision dated July 2, 2007, the director denied the Form I-212 on the basis that the applicant's Form I-601 waiver application had been denied, and that no purpose would be served in approving the Form I-212 application. Through counsel, the applicant filed a Motion to Reopen and Reconsider the denial of his Form I-212 application. Counsel asserted, on motion, that the asylum exception of section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B) exempted the applicant's unlawful presence in the U.S. for inadmissibility purposes. Counsel asserted further that the applicant had not been unlawfully employed while he pursued his asylum claim. Counsel concluded the applicant was thus not inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and that a Form I-601 waiver was not necessary in the applicant's case. Counsel requested adjudication of the applicant's Form I-212.

The record reflects that the director approved the applicant's motion, and that the applicant's Form I-212 was adjudicated and approved on January 14, 2008. In a decision dated October 27, 2009, however, the director sent a letter to the applicant stating the Form I-212 had been approved in error and that evidence established the applicant had been unlawfully present in the U.S. for over a year prior to his departure from the U.S. The applicant was thus inadmissible and required an approved Form I-601 waiver. The director noted the applicant's Form I-601 was denied on July 2, 2007, and

the director determined that on this basis, no purpose would be served in approving the Form I-212 application. The Form I-212 was denied again on October 27, 2009.

Through counsel, the applicant appealed the denial of his Form I-212 to the AAO on November 27, 2009. Counsel asserted that the applicant's asylum claim status exempted him from unlawful presence inadmissibility provisions contained in section 212(a)(9)(B) of the Act, and he asserted that the basis of the applicant's Form I-212 denial was erroneous and contrary to the law.

The AAO dismissed the applicant's appeal on December 27, 2010. The AAO agreed that under section 212(a)(9)(B)(iii)(II) of the Act, presence in the U.S. during periods in which a bona fide asylum application is pending is not counted for unlawful presence inadmissibility purposes unless an applicant has engaged in unauthorized employment during the pendency of the asylum application. The AAO found the record demonstrated the applicant had engaged in unauthorized employment during the pendency of his asylum. The AAO found further that the record demonstrated the applicant willfully misrepresented a material fact by concealing his prior removal order when he applied for an immigrant visa at the U.S. Consulate in Montreal, Canada. On this basis, the AAO found the applicant was also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i). The AAO noted the applicant did not have an approved Form I-601 waiver for his grounds of inadmissibility. The applicant thus failed to overcome the basis of the director's denial of his Form I-212. The appeal was dismissed accordingly.

Through counsel, the applicant now files a Motion to Reopen and Reconsider the AAO's December 27, 2010 decision. Counsel reasserts that the applicant qualifies for the asylum exception to unlawful presence and that he is not inadmissible under the Act. Counsel indicates on motion that the director did not find the applicant had worked in the U.S. without authorization. The AAO finding that the applicant worked without employment authorization during the pendency of his asylum proceedings was thus brought up for the first time by the AAO on appeal, without allowing the applicant an opportunity to rebut the finding. Counsel asserts that the AAO finding was stated summarily and was not corroborated with documentation or evidence in the record. Counsel asserts further that the AAO violated the applicant's due process rights in finding a new basis for inadmissibility under section 212(a)(9)(B) of the Act.¹ Counsel additionally asserts that the director did not address or find that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act, and that the AAO violated the applicant's due process rights in finding this new ground of inadmissibility on appeal and not allowing the applicant an opportunity to rebut the finding. Counsel indicates further that the applicant's Form I-130, Petition for Alien Relative responses refer to his immigration and removal history. Counsel concludes the AAO finding that the applicant committed visa fraud or a material misrepresentation is thus unsupported by the record and erroneous.

The Regulations state in pertinent part at 8 C.F.R. § 103.5(a):

(a) Motions to reopen or reconsider

....

¹ Counsel sites to the U.S. Supreme Court decision, *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) to support his due process violation assertions.

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

Counsel has failed to present or state new facts to be proved in a reopened proceeding, and he has submitted no affidavits or other documentary evidence to demonstrate new facts to be proved in a reopened proceeding. Counsel has thus failed to meet the requirements for a motion to reopen. Counsel has, however, provided the reasons underlying his assertions that the AAO misapplied the law in its December 27, 2010 decision, supported by legal provisions and decisions. The applicant has therefore met the requirements for review as a motion to reconsider. The AAO has reviewed and considered all of the evidence in arriving at a decision on the motion to reconsider.

Counsel asserts on motion that the AAO denied the applicant's due process rights by changing the basis of the unlawful presence finding against the applicant and finding a new ground of inadmissibility without allowing the applicant an opportunity to rebut the facts or premise of either finding, in violation of *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976). Like the Board of Immigration Appeals, the AAO does not have appellate jurisdiction over constitutional issues. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Regardless, the applicant has, by means of the present motion, had the opportunity to address and rebut the AAO's prior decision.

We find that the applicant failed to establish that the AAO erred in finding inadmissibility in the applicant's case, pursuant to sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act.

Section 212(a)(9)(B) of the Act provides in pertinent part:

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(iii) Exceptions

....

(II) Asylees. No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

As discussed in the December 27, 2010, AAO decision, the record reflects the applicant filed a bona fide asylum application on March 8, 1999, three days after his visitor visa authorization expired. The BIA issued a final denial of the applicant's asylum application on November 12, 2003, and evidence in the record reflects the applicant departed the United States 25 days later, on December 8, 2003. The previous AAO decision noted that:

[W]hile an application for asylum halts the accrual of unlawful presence during the period of time that it is pending and on appeal, in the applicant's case, since he engaged in unauthorized employment before and during the pendency of the application for asylum, the asylum application does not stop the accrual of unlawful presence.

The AAO decision noted further that in the present matter the record reflected the applicant engaged in periods of unauthorized employment between April 3, 2001 and December 2003.

Although the applicant indicates, through counsel, that he worked with employment authorization during the entire pendency of his asylum application, no evidence is submitted to establish this. Moreover, the record reflects that this is not the case. The applicant's alien file and USCIS computer records reflect that the applicant was issued Employment Authorization Documents (EADs) valid from April 3, 2000 to April 3, 2001, and from December 13, 2001 to November 29, 2003. The applicant did not have authorization to work in the U.S. from April 4, 2001 through December 12, 2001. The applicant also had no authority to work in the U.S. after November 29, 2003. The applicant states in his Form G-325, Biographic Information, signed October 25, 2006, that he worked as an accountant for [REDACTED] between June 2000 and May 2001. He states further that he worked as an accountant for [REDACTED] from May 2001 to December 2003. 2001 Federal and Georgia State tax return evidence and W2, wage and income information contained in the record reflect further that the applicant worked in the U.S. during the entire year of 2001. Based on the evidence in the record, the applicant has failed to overcome the finding that during the pendency of his asylum application he worked without authorization for eight months between April 4, 2001 and December 12, 2001. The statement on the applicant's Form G-325 that

he worked with [REDACTED] through December 2003 also indicates that the applicant worked without authorization after the expiration of his EAD on November 29, 2003.

The record reflects the applicant was admitted into the U.S. on September 3, 1998 with a B2 visitor visa valid through March 3, 1999. The applicant did not depart the U.S., and he remained in the U.S. until December 8, 2003. The applicant has not established the asylee exemption to unlawful presence at section 212(a)(9)(B)(iii)(II) of the Act. The applicant was therefore unlawfully present in the U.S. for more than one year prior to his departure on December 8, 2003, and he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The previous December 27, 2010, AAO decision additionally found that evidence in the record established the applicant willfully misrepresented a material fact by not revealing his prior removal history when he applied for an immigrant visa at the U.S. Consulate in Montreal, Canada. The applicant has failed to overcome the basis of the AAO's finding of inadmissibility under section 212(a)(6)(C)(i) of the Act.

Counsel asserts on motion that the AAO finding was factually erroneous, and he refers to the applicant's response on his Form I-130 that he was in removal proceedings in Atlanta in October 2001. While it is true that the applicant revealed his removal history to USCIS on his Form I-130, a review of the applicant's Department of State, Form DS-230, Immigrant Visa application reflects, at question #30(h), that he answered "no" to the question about whether he was:

An alien who was previously ordered removed within the last 5 years or ordered removed a second time within the last 20 years; who was previously unlawfully present and ordered removed within the last 10 years or ordered removed a second time within the last 20 years; who was convicted of an aggravated felony and ordered removed; who was previously unlawfully present in the United States for more than 180 days but less than one year who voluntarily departed within the last 3 years; or who was unlawfully present for more than one year or an aggregate of one year within the last 10 years.

The applicant's immigrant visa application was approved by the Department of State Consulate in Montreal, Canada based on the applicant's failure to reveal his prior removal and immigration history on the Form DS-230. It is this failure to reveal his prior removal order history that is referred to in the previous AAO decision.²

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

² It is noted the record also contains a "Warning to Alien Ordered Removed or Deported" form signed by the applicant on August 9, 2006, reflecting that he was prohibited from entering, attempting to enter, or being in the U.S. for a period of 10 years from the date of his departure from the United States, and reflecting that he must request and obtain permission from the Attorney General to reapply for admission to the U.S. during the period indicated.

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

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759; 108 S. Ct. 1537 (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. *See Kungys* 485 U.S. at 771-72. The Board of Immigration Appeals (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.

See Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961). The fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, other documentation, or admission must be made to an authorized official of the United States Government in order for inadmissibility under section 212(a)(6)(C)(i) of the Act to be found. *See Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994); *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984); *Matter of L-L-*, 9 I & N Dec. 324 (BIA 1961).

The applicant's failure to reveal his removal and immigration history on his Form DS-230 cut off a line of inquiry that was relevant to the alien's eligibility and which would have resulted in a determination that he be denied an immigrant visa and excluded. The Form I-130 was not filed by the applicant, nor considered by the same government department that adjudicated his Form DS-230. As such, the applicant willfully misrepresented a material fact when he sought, and procured a U.S. immigrant visa, and he is inadmissible under section 212(a)(6)(C)(i) of the Act, as determined in the previous AAO decision. The applicant has failed to establish that the previous AAO decision was incorrect based on the evidence of record. The December 27, 2010 AAO decision and order are therefore affirmed.

ORDER: The prior AAO decision, dated December 27, 2010, is affirmed.