



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: MAY 15 2013 OFFICE: HOUSTON, TEXAS

File: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

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

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Field Office Director, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was expeditiously removed as an intending immigrant without proper documentation pursuant to section 235(b)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1225, on October 6, 2008, and the record reflects she has remained outside the United States to date. On June 9, 2010, U.S. Citizenship and Immigration Services (USCIS) approved the Petition for Alien Relative (Form I-130) filed on her behalf by her U.S. citizen spouse. She seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. §1182(a)(9)(A)(iii), in order to reside in the United States with her U.S. citizen spouse and lawful permanent resident father and siblings.

The Field Office Director additionally found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. §1182(a)(6)(C)(i), for willfully misrepresenting material facts to procure benefits under the Act. He concluded the applicant also must file Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), for a waiver of this inadmissibility simultaneously with Form I-212 with the American consulate having jurisdiction over the applicant's place of residence, and he denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated December 19, 2012.

On appeal, counsel asserts: the Field Office Director improperly found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act and thereby improperly concluded the applicant must simultaneously file Form I-601 and Form I-212 with the U.S. consulate in Mexico; the applicant did not give a false statement to the U.S. consulate at her non-immigrant visa interview to procure an immigration benefit; the record includes evidence of hardship to her family members establishing their need for the applicant to be in the United States; and the Field Office Director "erred in finding the [Form I-212] and supporting materials did not identify equities sufficient to outweigh the unfavorable factors to warrant [an] exercise of discretion." *Brief in Support of the Appeal*, dated February 14, 2013.

The record includes, but is not limited to: correspondence and briefs from counsel; letters of support; identity, psychological, medical, employment, financial, and academic documents; and documents on conditions in Mexico.¹ The entire record, with the exception of the Spanish-language documents, was reviewed and considered in rendering a decision on the appeal.

¹ The AAO notes the record contains some documents in the Spanish language. 8 C.F.R. § 103.2(b)(3) states:

Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

(i) 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.

...

(iii) Waiver Authorized.- For provision authorizing waiver of clause (i), see subsection (i).

The Field Office Director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, in part, for "fraudulent use of a social security number" because she provided a false social security number on an employment application. The applicant contests the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act.

Upon review of the record, the AAO finds the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act. The record shows the applicant created a social security number to obtain employment. While she presented the social security number to her private employer, she has not indicated that she presented it to any other individual or organization, and the record does not establish that she did so.

The legacy Immigration and Naturalization Service (INS) General Counsel's Office addressed in an April 30, 1991 published legal opinion the issue of whether an applicant who presents counterfeit documents in completing an Employment Eligibility Verification Form (Form I-9) is subject to inadmissibility for misrepresentation under former section 212(a)(19) (now section 212(a)(6)(C)(i)) of the Act. The legal opinion provides:

For two reasons, we conclude that an alien's false statements on Form I-9 do not render the alien subject to exclusion under Section 212(a)(19) of the Act. First, an alien who falsifies a Form I-9 does not make the false statements before a United States government official authorized to grant visas or other immigration benefits. Secondly, while the decision of the [INS] to grant an alien authority to accept employment is a benefit under the [Act], an employer's decision to hire any particular individual involves a private employment contract. Thus, false statements on Form I-9 are not for the purpose of obtaining a benefit under the INA and, therefore, cannot form the basis for exclusion of an alien pursuant to Section 212(a)(19) of the Act.

Genco Op., Paul W. Virtue, Act. Gen. Co., *Penalties for misrepresentations by an unauthorized*

As certified translations have not been provided for all of the foreign-language documents, as required by 8 C.F.R. § 103.2(b)(3), the AAO will not consider these untranslated documents in support of the appeal.

alien on an Employment Eligibility Verification Form (Form I-9), No. 91-39, 2 (April 30, 1991).

Similarly, 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).

The United States Courts of Appeals for the Tenth and Eighth Circuits have concluded that employment can be properly deemed a "purpose or benefit under the Act" in the context of applying section 212(a)(6)(C)(ii) of the Act. Specifically, when an applicant has made a false claim of U.S. citizenship for the purpose of obtaining employment with a private employer, he may properly be deemed inadmissible under section 212(a)(6)(C)(ii) of the Act. *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008)(stating that "the explicit reference to [U.S.C.] § 1324a [section 274A of the Act] in [U.S.C.] § 1182(a)(6)(C)(ii)(I) [section 212(a)(6)(C)(ii)(I) of the Act] indicates that private employment is a purpose or benefit of the Act."); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007)(finding that "[i]t appears self-evident that an alien who misrepresents citizenship to obtain private employment does so, at the very least, for the purpose of evading § 1324a(a)(1)(A)'s prohibition on a person or other entity knowingly hiring aliens who are not authorized to work in this country.").

However, these decisions are limited to an analysis of the application of section 212(a)(6)(C)(ii) of the Act, and the conclusions are based on the reference to section 274A of the Act found in section 212(a)(6)(C)(ii) of the Act. Section 274A of the Act renders it unlawful for an employer to hire an alien without authorization from USCIS, thus section 212(a)(6)(C)(ii) of the Act specifically contemplates false claims of U.S. citizenship for the purpose of employment in the United States. Section 212(a)(6)(C)(i) of the Act is more limited in scope than section 212(a)(6)(C)(ii) of the Act, as it does not reference section 274A of the Act, and it does not reach false representations made for purposes or benefits under other Federal or State laws. See section 212(a)(6)(C)(ii) of the Act. Thus, the finding of the BIA and Federal courts that employment is a "purpose or benefit under the Act" in the context of the application of section 212(a)(6)(C)(ii) of the Act does not constitute a finding that employment is also a "benefit under the Act" as contemplated by section 212(a)(6)(C)(i) of the Act.

Based on the foregoing, the AAO finds that the April 30, 1991 legal opinion of legacy INS General Counsel's Office and the concurring opinion of the BIA in *Matter of Cervantes-Gonzalez* continue to serve as current guidance for the application of section 212(a)(6)(C)(i) of the Act.

In the present matter, the applicant used a false social security number on an employment application with a private employer, not a U.S. government official authorized to grant visas or other immigration benefits. She did so to obtain employment, which has not been determined to be a "benefit provided under [the] Act" as contemplated by section 212(a)(6)(C)(i) of the Act. Therefore, the record fails to establish that the applicant is inadmissible under 212(a)(6)(C)(i) of the Act for this action. See *Matter of Y-G*, 20 I&N Dec. 794, 797-98 (BIA 1994)(finding that an individual did not commit fraud or misrepresentation as contemplated by section 212(a)(6)(C)(i) of the Act because he voluntarily revealed that he possessed fraudulent travel documents upon first encountering U.S. immigration officers); *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 571. Moreover, the applicant has not made a false claim of U.S. citizenship; thus she is not inadmissible under section 212(a)(6)(C)(ii) of the Act.

The Field Office Director also found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for having provided false information to obtain her non-immigrant visa. Specifically, the Field Office Director believes the applicant misrepresented her intentions when she stated during her visa interview that she planned to visit Disneyland with her family.

Upon review of the record, the AAO finds the record does not establish that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having willfully misrepresented material facts to obtain a non-immigrant visa. The record shows the applicant initially applied for a non-immigrant visa to come to the United States "on her vacation time" and to travel with her family to Disneyland. The record also shows the applicant and her family did not travel to Disneyland, and instead, the applicant travelled to North Carolina to meet her family. The record further shows the applicant timely departed from the United States after her initial admission with her non-immigrant visa. While the applicant did not travel to Disneyland as initially planned and worked without authorization, the record does not contain sufficient evidence indicating the applicant had any intention to come to the United States other than to visit her family members. Accordingly, the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, the Field Office Director's finding regarding inadmissibility for material misrepresentations under section 212(a)(6)(C) of the Act is withdrawn, and a Form I-601 waiver application is unnecessary.

However, the applicant remains inadmissible under section 212(a)(9)(A)(i) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

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

(A) Certain aliens previously removed.-

...

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal ... is inadmissible.

...

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission.

As discussed previously, the applicant was expeditiously removed from the United States on October 6, 2008, pursuant to section 235(b)(1) of the Act. On appeal, the applicant does not contest the finding of inadmissibility. Accordingly, the applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, and she requires an exception under section 212(a)(9)(A)(iii) of the Act. The AAO will determine, as a matter of discretion, whether an exception should be applied to the applicant's inadmissibility so that she may reside with her U.S. citizen spouse and lawful permanent resident father and siblings.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded the approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Id.* at 278. *Lee* additionally held,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The 7th Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in a discretionary determination. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper. The AAO finds these legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this case are the applicant's close family ties in the United States, her U.S. citizen spouse and lawful permanent resident father, sister, and brother; an approved I-130 Petition; no evidence of a criminal record; proof of filing income taxes; hardship to the applicant's spouse; and the likelihood the applicant will be found eligible for lawful permanent residence.

The unfavorable factors include the applicant's expedited removal in 2008 and her unauthorized employment.

Although the weight given to the hardship to the applicant's spouse is diminished as the applicant and her spouse married after her expedited removal, the AAO concludes that, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the applicant is eligible for a section 212(a)(9)(A)(iii) exception to inadmissibility.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, it is concluded the applicant has established a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.