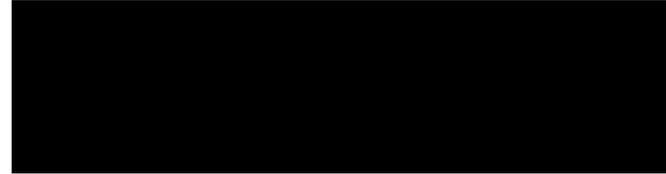




U.S. Citizenship
and Immigration
Services

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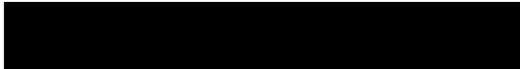
Office: KINGSTON, JAMAICA

Date:

JUN 21 2010

IN RE:

Applicant:



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:



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 \$585. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Kingston, Jamaica, and is now before the Administrative Appeals Office (AAO) on appeal. The OIC's decision will be withdrawn and the appeal will be dismissed as the underlying application is moot.

The record reflects that the applicant is a native and citizen of Jamaica who was found 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 attempting to procure entry into the United States by willful misrepresentation of a material fact, to wit; the applicant presented a passport which contains a backdated Jamaican immigration entry stamp to conceal his prior unlawful presence in the United States. The record indicates that the applicant is married to a United States citizen and is the father of a United States citizen son. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 United States citizen wife, and United States citizen son.

The OIC found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relative, his wife, and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated May 17, 2007.

On appeal, counsel asserts that the applicant's wife has suffered and continues to suffer extreme emotional and financial hardship as a result of the applicant's inadmissibility. *Form I-290B*, filed June 28, 2007. Counsel further asserts that the OIC did not take all the documentation submitted by the applicant and his wife into consideration in deciding to deny the applicant's waiver application. *Id.* Counsel does not address the applicant's inadmissibility on appeal.

The record includes, but is not limited to, an affidavit from the applicant's wife, a copy of a psychological evaluation of the applicant's wife by Dr. David Bricker, dated June 10, 2007; a letter from [REDACTED] the applicant's wife's gynecologist, dated June 20, 2007, a letter from the applicant's child's teacher and letters from friends and family in support of the appeal. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (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).

Section 212 of the Act provides, in pertinent part, that:

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

In the present case, the record reflects that the applicant had made three prior entries into the United States and was admitted as a B-2 visitor. The record reflects that the applicant timely departed the United States before the expiration of his authorized stay and that he did not remain in the United States beyond the authorized period on any of his visits. On November 24, 1999, the applicant applied for admission into the United States as a B-2 visitor and was denied admission because the Immigration Officer determined that the applicant had backdated his entry into Jamaica following his last visit in February 1999 to conceal a prior overstay. The applicant was placed in Expedited Removal Proceedings pursuant to section 235(b)(1) of the Act. The record reflects that the applicant was removed from the United States on November 25, 1999, and was prohibited from returning to the United States for a period of 5 years. On December 19, 2002, the applicant's United States citizen wife (USC) filed a Form I-130 on the applicant's behalf. On September 10, 2003, the Form I-130 was approved. On December 7, 2004, the applicant filed an application for an immigrant visa at the United States Embassy in Kingston, Jamaica. On December 7, 2004, the Vice Consul found the applicant inadmissible under section 212(a)(6)(C)(i) and section 212(a)(9)(A)(i) and advised the applicant to file a waiver of inadmissibility. On April 11, 2005, the applicant filed a Form I-601, and an Application for Permission to Reapply for Admission into the United States (Form I-212). The AAO notes that since it has been more than 5 years since the applicant was removed from the United States in November 1999, the Form I-212 is no longer necessary. On May 17, 2007, the OIC denied the Form I-601, finding the applicant had attempted to enter the United States by willful misrepresentation of a material fact and had failed to demonstrate extreme hardship to his qualifying relative.

The record reflects that the applicant was issued a multiple entry B-1/B-2 non-immigrant visa by the United States Embassy in Kingston, Jamaica, on July 30, 1997, valid until July 28, 2007. The record reflects that the applicant last entered the United States on February 8, 1999, as a B-2 visitor and was authorized to remain in the United States until August 7, 1999. The record reflects that the applicant departed the United States on August 6, 1999.¹ The record further reflects that the applicant applied for admission into the United States on November 24, 1999, and was denied admission on the ground that he had presented a passport containing a backdated Jamaican immigration entry stamp dated April 6, 1999, in order to conceal his prior unlawful presence in United States.

Prior to addressing whether the applicant qualifies for a waiver, the AAO will consider the issues related to the applicant's inadmissibility. The Department of State's Foreign Affairs Manual [FAM] provides, in pertinent part:

¹ See a copy of United States Immigration and Naturalization Service Non-Immigrant Information System (NIIS), dated November 24, 1999.

Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa....

"A misrepresentation made in connection with an application for a visa or other documents, or with 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 have resulted in a proper determination that he be excluded." (Matter of S- and B-C, 9 I&N 436, at 447.)

DOS Foreign Affairs Manual, § 40.63 N. 6.1. Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive.

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 (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. *Kungys* at 771-72. The 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.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

It is well established that fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, or other documentation, 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).

In this case, the applicant was authorized to lawfully remain in the United States from February 8, 1999 to August 7, 1999. Documentation available to the United States Citizenship and Immigration Services (USCIS) shows that the applicant departed the United States on August 6, 1999, one day before the

expiration of the authorized stay.² The record does not contain evidence that the applicant overstayed the visit which commenced on February 8, 1999. The AAO notes that even though the applicant's passport contains a Jamaican Immigration entry stamp dated April 16, 1999, such stamp is well within the applicant's authorized stay. Thus, based on the record, the AAO finds that the applicant did not defraud or make a willful misrepresentation of a material fact to a United States government official in order to procure a benefit under the Act, for which he otherwise would not have been eligible. The AAO concludes that the applicant's possession of and failure to disclose the backdated stamp in his passport is not material.

The AAO finds that the OIC erred in concluding that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. As such, the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(i) is moot and will thus not be addressed.

ORDER: The OIC's decision is withdrawn as it has not been established that the applicant is inadmissible. The appeal is dismissed as the underlying application is moot.

² See NIIS, id.