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



**U.S. Citizenship
and Immigration
Services**



tlg

DATE: **MAY 16 2011** OFFICE: ST. ALBANS, VT FILE:

IN RE:

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:

SELF-REPRESENTED

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 waiver application was denied by the Field Office Director, St. Albans, Vermont and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is moot.

The record reflects that the applicant is a native and citizen of Haiti 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 having attempted to enter the United States through fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is the mother of a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States.

The Field Office Director found that the applicant had failed to establish that she had a qualifying relative on which to base a waiver application and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated November 17, 2008.

On appeal, the applicant states that her brother filed a Form I-130, Petition for Alien Relative, for their mother in 1998 and that she will soon be coming to the United States. She also asserts that she has a U.S. citizen child who has extensive medical problems and that she is a registered nurse who is helping ease the nursing shortage in the United States. *Form I-290B, Notice of Appeal or Motion*, dated December 2, 2008.

The record includes, but is not limited to, a statement from the applicant; medical records for the applicant and her child; school records and training certificates for the applicant; an employment letter for the applicant; W-2 forms and earnings statements for the applicant; tax returns for the applicant and her spouse; and documentation relating to the applicant's property and mortgages. The entire record was reviewed and all relevant information considered in reaching a decision on the appeal.

The applicant is seeking adjustment under the Haitian Refugee Immigration Fairness Act (HRIFA). In HRIFA adjustment cases, the regulation at 8 C.F.R. §245.15(e) indicates that certain grounds of inadmissibility do not apply to HRIFA applicants:

- (1) Certain grounds of inadmissibility inapplicable to HRIFA applicants.

Paragraphs (4), (5), (6)(A), (7)(A) and (9)(B) of section 212(a) of the Act are inapplicable to HRIFA principal applicants and their dependents. Accordingly, an applicant for adjustment of status under section 902 of HRIFA need not establish admissibility under those provisions in order to be able to adjust his or her status to that of permanent resident.

The applicant, however, has been found to be inadmissible pursuant to section 212(a)(6)(C) of the Act, which does apply to HRIFA and which 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.

The record establishes that, on June 14, 1994, the then 17-year-old applicant attempted to enter the United States as a returning resident, using a photo-substituted Haitian passport issued to a [REDACTED] that contained a Form I-94, Arrival-Departure Record, with an ADIT stamp identifying the passport holder as having been granted lawful permanent resident status. Based on the record before us, the AAO finds the applicant to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for having sought admission to the United States through fraud or the willful misrepresentation of a material fact.

In reaching this decision, the AAO has considered that the applicant was not yet 18 years old at the time of her attempted entry. We observe that an exception is provided under section 212(a)(2)(A)(ii)(I) of the Act for individuals who, prior to turning 18, committed a single crime involving moral turpitude more than five years prior to applying for admission. Also, individuals who are under 18 do not accrue unlawful presence pursuant to section 212(a)(9)(B)(iii)(I) of the Act. However, section 212(a)(6)(C)(i) of the Act does not include such an age-based exception and the AAO cannot assume such an exception was intended. See *In re Jung Tae Suh*, 23 I&N Dec. 626 (BIA 2003) (citing *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) and noting that where a provision is included in one section of law but not in another, it is presumed that the Congress acted intentionally and purposefully). Accordingly, the applicant is subject to section 212(a)(6)(C)(i) of the Act despite the fact that she was a minor at the time of her attempted entry. The AAO now turns to a consideration of whether her presentation of a photo-substituted passport and fraudulent ADIT stamp to gain entry to the United States constitutes fraud or willful misrepresentation under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C)(i) of the Act may be violated by committing fraud or willfully misrepresenting a material fact. See *Mwongera v. INS*, 187 F.3d 323, 330 (3rd Cir. 1999); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). Fraud consists of “false representations of a material fact made with knowledge of its falsity and with intent to deceive.” See *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). In the immigration context, a finding of fraud requires that an individual “know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception.” *In re Tijam*, 22 I&N Dec. 408, 424-25 (BIA 1998). Willful misrepresentation does not require an intent to deceive, only the knowledge that the representation is false. See *Parlak v. Holder*, 57 F.3d 457 (6th Cir. 2009) (citing to *Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir. 1997); see also *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *In re Tijam*, *supra*. “The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary.” See *Mwongera*, *supra*.

The applicant was unaccompanied when she presented herself as a returning resident to an immigration officer at the Miami, Florida port-of-entry June 14, 1994. In a sworn statement taken that same day, she indicated that she was aware that the passport in her possession had not been lawfully issued to her and that, by using it, she was seeking to enter the United States as a returning resident, a status she did not hold. Although the applicant was only 17 at the time she claimed to be a returning resident, she also acted on her own, and the AAO finds that she was old enough to understand what she was doing was wrong and is alone responsible for her representations. In *Malik v. Mukasey*, 546 F.3d 890-92 (7th Cir. 2008), the 7th Circuit Court of Appeals found that two 17-year-old brothers were accountable for having misrepresented their nationality in asylum proceedings, noting the finding by the Board of Immigration Appeals that

“the brothers were young when their fraud occurred but . . . that they were old enough to know better and to be held accountable for their actions.” In that the applicant’s sworn statement establishes that she knew she was presenting fraudulent documentation to enter the United States and that her presentation of this documentation was both voluntary and deliberate, we find that she willfully misrepresented a material fact and is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

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.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission would result extreme hardship for a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996).

The AAO will not, however, consider the applicant’s eligibility for a 212(i) waiver as the record fails to demonstrate that she has the necessary qualifying relative on which to base a waiver application. While we note that the applicant was married to a lawful permanent resident at the time she initially filed for a waiver of inadmissibility in 2003, she divorced her first husband in 2004. The record establishes that the applicant has remarried. However, she indicates in a November 10, 2008 statement that her spouse is not a lawful permanent resident and no evidence has been presented to demonstrate that he has acquired such status since that date. The record also fails to reflect that the applicant’s mother has immigrated to the United States based on the Form I-130 the applicant states that her brother filed in 1998. Although the record does establish that the applicant has a U.S. citizen son, children are not qualifying relatives for the purposes of a section 212(i) waiver proceeding. In that the record does not demonstrate that the applicant has a U.S. citizen or lawful permanent resident parent or spouse on which to base her waiver application, she is not eligible to file for a waiver of her section 212(6)(C)(i) inadmissibility.

The record fails to demonstrate that the applicant has a qualifying relative on which to base a section 212(i) waiver application. Accordingly, the appeal will be dismissed as the underlying waiver application is moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility is entirely on the applicant. Section 291 of the Act,

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8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed as the underlying waiver application is moot.