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



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



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DATE: **AUG 13 2012**

OFFICE: PHILADELPHIA, PA



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.

Thank you,

A handwritten signature in black ink, appearing to be "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is unnecessary.

The applicant is a native and citizen of Venezuela who is the beneficiary of an approved Form I-130, *Petition for Alien Relative*, filed on his behalf by his U.S. citizen spouse. On that basis, the applicant filed a Form I-485, *Application to Register Permanent Residence or Adjust Status*, on November 8, 2008 which was subsequently denied.

The Field Office Director found that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. *See Notice of Intent to Deny*, dated June 5, 2009. In response on June 7, 2009 the applicant, through prior counsel, filed a Form I-601, *Application for Waiver of Grounds of Inadmissibility*. The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601 accordingly. *See Decision of the Field Office Director*, dated August 25, 2010. The applicant filed the present waiver appeal on September 22, 2010.

On October 21, 2010, the applicant filed a motion to reopen the Form I-485, which has not yet been adjudicated by the Field Office. On June 17, 2011 the applicant filed a second Form I-485, which has not been adjudicated by the Field Office, presumably awaiting the AAO's decision on the waiver appeal. The applicant, through his accredited representative, contends that he is not inadmissible under section 212(a)(6)(C)(i) of the Act, and thus does not require a waiver of inadmissibility pursuant to section 212(i) of the Act. *See Accredited Representative's letter titled, "Follow-Up to Adjustment of Status Interview on 10/03/2011,"* dated October 3, 2011.

The record contains but is not limited to: Forms I-290B, supporting briefs by prior counsel, and related letters by the applicant's accredited representative; letters by the applicant addressing his procurement of a false United States entry stamp and subsequent misrepresentations of having entered the United States on said false date; numerous immigration applications and petitions; hardship letters; supporting letters from family and friends; medical, financial, employment and tax records; and country conditions documents. The entire record was reviewed and considered in rendering this decision on the appeal.

The record reflects that the applicant entered the United States on December 2, 2000 and was admitted as a B-2 visitor for an authorized period of stay not to exceed June 1, 2001. The applicant indicated both on his first Form I-485 application and during his June 4, 2009 adjustment of status interview that he complied with the terms of his visa, departed, re-entered and was admitted to the United States on September 9, 2001. The applicant submitted a copy of his Venezuela passport which purports to show, at page 10, a Venezuela exit stamp and United States entry stamp, both dated September 9, 2001. In a *Notice of Intent to Deny*, dated June 5, 2009, the Field Office Director notified the applicant that the September 9, 2001 entry stamps on his passport and Form I-94 were inspected, compared with control samples and determined to be

fraudulent based on obvious discrepancies and the fact that Service archives contain no record of his claimed 2001 entry into the United States. Former counsel did not contest inadmissibility on the applicant's Form I-601 or on the supporting briefs filed first in support of Form I-601 and then in support of the Form I-601 appeal. Instead, prior counsel asserted identically in both briefs that "the only adverse factor is his violation of 212(a)(6)(C)(i) by misrepresenting the time and manner of his entry into the United States. We are not asking the Service to condone his actions but, when favorable and adverse factors are balanced, the favorable factors clearly outweigh the adverse one." See *Prior Counsel's Brief in Support of Form I-601*, dated July 14, 2009 and *Prior Counsel's Brief in Support of Appeal*, dated October 13, 2010.

On the same date that prior counsel filed an appeal brief in which the applicant's inadmissibility was not contested, she asserted for the first and only time that the applicant "has never departed the United States," since entering on December 2, 2000, and therefore, "his prior misrepresentation was not material under *Kungys v. U.S.*, 485 U.S. 759 (1988) because knowledge of the true circumstances of applicant's entry would not have led to the denial of his adjustment application." See *page 2, part 3, Form I-290B*, motion to reopen Form I-485, dated October 13, 2010. Submitted with prior counsel's motion was an undated letter by the applicant. Therein, the applicant asserts that his friend from Venezuela, [REDACTED], "knew someone who could stamp my passport" and that way he would not have to worry about being stopped by a police officer who could arrest and deport him for overstaying his visa. The applicant states that he "agreed to my passport stamped," but wishes "I could have been wiser not to ask [REDACTED] to stamp my passport, I am very ashamed of my conduct." [sic].

As previously noted, the applicant through his accredited representative filed a new Form I-485 application on June 17, 2011. An adjustment of status interview related thereto was conducted on October 3, 2011. On the new Form I-485, the applicant's date of last arrival is listed as December 2, 2000. On the same date as the interview the applicant, through his accredited representative, filed an *Addendum to the I-485 Application to Adjust Status*, in which he writes: "I was in fact inspected and admitted to the U.S. on December 2, 2000 which is my first and only entrance to this country." The applicant further asserts that he disclosed to prior counsel from the beginning of their relationship that he entered the United States on only one occasion and subsequently acquired a fraudulent U.S. entry stamp in order to conceal his overstay. The applicant claims that prior counsel advised him repeatedly not to disclose this information to immigration authorities and that he "trusted my attorney's legal advice." He writes: "My mistake was not to follow my conscious and to believe in my attorney." The AAO notes that the record contains no indication that the applicant has filed any complaint or legal action against prior counsel concerning his allegations of misconduct. In the closing of his October 3, 2011 statement the applicant maintains: "I understand that I misrepresented that the last entrance to the U.S. was on September 9, 2001 when in fact the only lawful admission to the U.S. was on December 2, 2000 and that I submitted a fraudulent I-94. Please believe when I say that I regret that decision and I am ashamed for following bad advice. The truth is that I was inspected and lawfully admitted to the U.S. on December 2, 2000 and have not left the U.S. since then. I am presenting today the original I-94 from December 2, 2000."

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.

In *Kungys v. United States*, 485 U.S. 759 (1988), the Supreme Court found that the test of whether concealments or misrepresentations are “material” is whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service’s (now United States Citizenship and Immigration Services) decisions. Additionally, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements for a material misrepresentation are as follows:

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 well have resulted in proper determination that he or she be excluded.

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

The record reflects that the applicant misrepresented the date and manner of his most recent United States entry on two occasions, first on his signed sworn Form I-485 application filed November 8, 2008, and again while testifying under oath during his adjustment of status interview on June 4, 2009. The AAO concurs with the Field Office Director’s finding that the September 9, 2001 entry stamps on the applicant’s passport and Form I-94 are fraudulent based on obvious discrepancies with control subjects and the fact that Service archives contain no record of his claimed 2001 entry into the United States. The AAO further finds that had the applicant truthfully disclosed on those occasions that his only entry into the United States occurred on December 2, 2000, he would not have been excludable or inadmissible on those true facts. Additionally, the record does not reflect that the applicant’s misrepresentations concerning the date and manner of his most recent United States entry shut off a line of inquiry which may have properly resulted in a denial of his adjustment of status application.

Accordingly, based on the record as currently constituted, the AAO concludes that the applicant did not misrepresent or conceal a material fact and is not, therefore, inadmissible under section 212(a)(6)(C)(i) of the Act. The Field Office Director’s findings concerning misrepresentation under section 212(a)(6)(C)(i) of the Act are withdrawn. The waiver application filed pursuant to section 212(i) of the Act is, therefore, determined to be unnecessary as the applicant is not

inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant's file will be returned to the Field Office Director to continue processing consistent with this decision.

**ORDER:** The appeal is dismissed as the underlying waiver application is unnecessary. The applicant's yet unadjudicated application for adjustment of status and motion to reopen will be returned to the Field Office Director for adjudication and further action consistent with this decision.