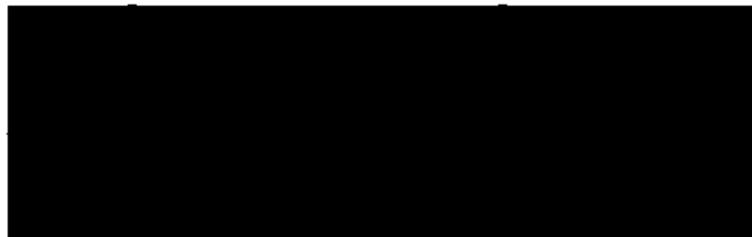


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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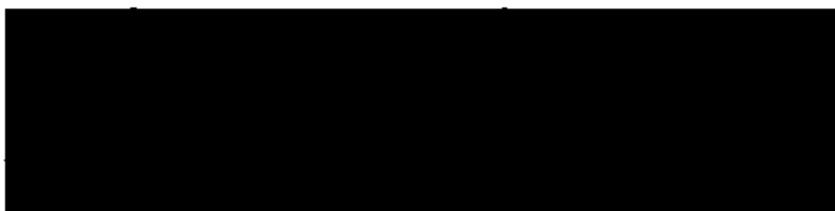
DATE: **JUL 05 2012** OFFICE: ACCRA, GHANA

FILE:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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,

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Accra, Ghana, and is now before the Administrative Appeals Office (AAO) on appeal. The Field Office Director's decision will be withdrawn and the appeal will be dismissed as no purpose would be served due to the fact that the applicant is not inadmissible under the stated provision of the Act.

The applicant is a native and citizen of Nigeria 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 a benefit under the Act through fraud or misrepresentation. 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 U.S. citizen spouse.

On May 22, 2009, the Field Office Director concluded that the hardship that the applicant's U.S. citizen spouse would suffer did not rise to the level of extreme as required by the statute.

On appeal, counsel for the applicant states that the Field Office Director erred in denying the application for a waiver of inadmissibility.

In support of the waiver application, the record includes, but is not limited to briefs by counsel for the applicant, statements from the applicant's spouse, a statement from the applicant, biographical information for the applicant, his spouse, and their children, letters of support from family and community members, documentation of the applicant's prior employment in the United States, documentation of the applicant's spouse's employment in the United States, documentation of the applicant's spouse's and children's travel to Nigeria, documentation of the applicant's spouse's financial situation, and documentation of the applicant's immigration history in the United States.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

The applicant was found to be inadmissible under section 212(a)(6)(C) of the Act, which provides, in pertinent part:

- (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 Field Office Director determined that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act as a result of fraud or misrepresentation in connection with a lease document that was submitted in support of the applicant's spouse's initial Petition for Alien Relative (Form I-130) filed on his behalf on August 18, 1999. The lease, for 2385 Park Avenue Austell, GA 30106, was determined by the U.S. Citizenship and Immigration Services Office in Atlanta, Georgia to be fraudulent, as it was prepared by the applicant's mother, was for a period of

greater than 12 months, and because investigations concluded that the applicant's spouse was residing in California for much of the time for which the lease included. The applicant was ultimately placed into removal proceedings; with one of the charges being section 212(a)(6)(C)(i) of the Act. All of the charges on the applicant's initial Notice to Appear (Form I-831) were deleted on May 7, 2004, and ultimately the applicant was removed from the United States on April 14, 2005, based on the amended charge that he violated section 212(a)(7)(A)(i)(I) of the Act.¹ The applicant's spouse filed another I-130 petition on his behalf on November 24, 2004, which was ultimately approved on February 2, 2006. The applicant and his spouse have been married since March 26, 1998.²

A misrepresentation is generally material only if by making it the alien received a benefit for which she 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, which 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).

In this case, what is material to the approval of Form I-130 are the bona fides of the qualifying marriage at the time of inception of the marriage. *See, e.g., Matter of Boromand*, 17 I&N Dec. 450 (BIA 1980) (holding that a marriage that is valid at inception is valid for immigration purposes, even if the parties are separated and the marriage is no longer viable); *see also Bark v. INS*, 511 F.2d 1200 (finding that the conduct of the parties after marriage is relevant only to the extent it bears upon their subjective state of mind at the time they were married). The central inquiry in determining the bona fides of a marital relationship is to examine the parties' intent at the time of the marriage; however, conduct of the parties following the marriage may also be relevant in determining their intent. *See Matter of McKee*, 17 I&N Dec. 332 (BIA 1980); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983). The applicant and his spouse provided substantial

¹ Section 212(a)(7)(A)(i)(I) of the Act refers to violations of passport and visa documentation requirements under the Act.

² The record contains only the birth certificate for the applicant and his spouse's daughter born on December 14, 2004; however, counsel for the applicant states that the applicant and his spouse also have a son who was born on September 25, 2007 and share in the raising of the applicant's spouse's daughter from a previous relationship.

documentary evidence to substantiate their marital relationship, such as the birth certificate for their child, documents showing joint residence, commingled financial assets and accounts. Additionally, a petition for alien relative is approvable even if the individuals in question no longer reside together, although the AAO notes that that information is relevant but not dispositive to the inquiry into the validity of the marriage. *Matter of McKee*, 17 I&N Dec. 332 at 333. Thus, had the applicant and his spouse disclosed that his spouse was residing in California for a period of time covered by the lease in question to pursue her education, as they later explained, the applicant would have remained eligible for the benefit he sought to receive under the Act, the approval of the Form I-130 filed on his behalf. Moreover, the AAO notes that the record indicates that both the applicant and/or the applicant's spouse resided at the address on the lease in question for extended periods of time up to and beyond the applicant's removal from the United States in 2004. The record does not clearly evidence the fraudulent nature of the lease or a material misrepresentation by the applicant to obtain a benefit under the Act. Because the record indicates that the applicant's visa petition was approvable on the true facts, the AAO concludes that the applicant's alleged misrepresentation was not material. Consequently, the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act for a willful misrepresentation of a material fact.

The AAO concurs with the Field Office Director's decision that the applicant is not inadmissible under section 212(a)(9)(B). The applicant accrued less than one year of unlawful presence in the United States prior to his removal and has now remained outside of the United States more than three years since his removal on November 24, 2004.

The AAO also notes that the applicant is no longer inadmissible under Section 212(a)(9)(A) of the Act, which states, in pertinent part:

Aliens previously removed.-

(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 (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

The applicant was ordered removed from the United States on July 7, 2004, as an arriving alien in removal proceedings, and was ultimately removed on April 14, 2005. Because the applicant's

removal proceedings were initiated after he was paroled into the United States to pursue a then pending application for adjustment of status, he was an arriving alien in removal proceedings. As a result, the applicant's removal order rendered him inadmissible for a period of five years from the date of his removal from the United States in accordance with section 212(a)(9)(A)(i) of the Act. As five years have passed since the date of the applicant's removal on April 14, 2005, he is no longer inadmissible under section 212(a)(9)(A)(i) of the Act. The applicant no longer requires permission to reapply for admission into the United States after removal (Form I-212) under section 212(a)(9)(A)(iii) of the Act. The Field Office Director denied the applicant's Form I-212 in a separate decision based solely on the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act. The applicant did not appeal that decision. As the AAO has now found that the applicant is not inadmissible under 212(a)(6)(C)(i) of the Act and that the applicant no longer requires permission to reapply for admission into the United States after removal, Form I-212 is no longer necessary.

The AAO finds that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act and therefore, there is no purpose served in adjudicating Form I-601. Having found that the applicant is not in need of the waiver, no purpose would be served in discussing whether he has established extreme hardship to his U.S. citizen spouse. Accordingly, the appeal will be dismissed as the applicant is not inadmissible.

ORDER: The appeal is dismissed as the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act and no longer requires permission to reapply for admission into the United States.