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



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

H5

Date: **JUN 11 2012**

Office: BALTIMORE

FILE: [REDACTED]

IN RE: [REDACTED]

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:
[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 District Director, Baltimore, Maryland. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the District Director will be withdrawn and the matter remanded to the District Office for further proceedings consistent with this decision.

The applicant is a native and citizen of Greece who was found to be inadmissible to the United States 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 willfully misrepresenting a material fact to procure an immigration benefit. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to live in the United States with his U.S. citizen son and grandchildren.

The District Director concluded that the applicant failed to establish that a bar to his admission to the United States would result in extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of the District Director*, dated July 19, 2010.

The District Director indicated in his decision that the applicant was admitted into the United States as a Legal Permanent Resident (LPR) on November 11, 1978, and that he failed to maintain and abandoned such status by remaining outside the United States “for more than the allotted time period.” *See Decision of the District Director*, dated July 19, 2010. The applicant was then admitted to the United States on June 1, 2008 with a nonimmigrant visa and granted an authorized stay until August 30, 2008. Thereafter he filed a Form I-539, Application to Extend/Exchange Nonimmigrant Status, which was denied on February 24, 2009. The applicant also filed a Form I-90, Application to Replace Permanent Resident Card, on November 13, 2008.¹ The applicant was found inadmissible for fraudulently filing Form I-90, after his LPR status had been deemed abandoned.

It is unclear how the District Director defines “allotted time period” and whether that is the only factor that was considered in finding that the applicant had abandoned his status. While a lawful permanent resident can lose his status once his trip abroad ceases to be temporary, “what constitutes a temporary visit cannot be defined in terms of elapsed time alone [and] the intention of the visitor, when it can be determined, will control.” *Ahmed v. Ashcroft*, 286 F.3d 611, 613 (2d Cir. 2002) (quoting *United States ex rel. Polymeris v. Trudell*, 49 F.2d 730, 732 (2d Cir.1931)). In order to determine an alien’s intent, the court has looked at factors such as the alien’s family and financial ties to the United States, payment of taxes in the United States, and whether “the end of the period of absence can be fixed by some early event.” *See Matter of Huang*, 19 I. & N. Dec. 749, 756 (BIA 1988).

Further, the record fails to clearly demonstrate that the applicant’s LPR status was abandoned, and therefore had ended. Where an applicant for admission to the United States has a “colorable claim to returning resident status,” the burden is on the government to show by “clear, unequivocal, and convincing evidence” that the applicant should be deprived of his or her lawful permanent resident status. *Matter of Huang*, 19 I. & N. Dec. at 754; *see also Matadin v. Mukasey*, 546 F.3d 85, 91 (2d Cir. 2008) (the government bears the burden of proving by clear, unequivocal and convincing evidence that the alien had abandoned her lawful permanent resident status). The only evidence

¹ The record does not contain the applicant’s Form I-90; an agency database, however, confirms that it was filed.

regarding the applicant's abandonment of his LPR status is that he had been out of the country for a year and that he obtained a non-immigrant visa. The record does not contain a Form I-407, Abandonment of Lawful Permanent Resident Status. Furthermore, the record also fails to indicate whether the government took any action to remove the applicant's LPR status. Department of Homeland Security regulations state that lawful permanent status "terminates upon entry of a final administrative order." 8 C.F.R. § 1.1 (p). The Seventh Circuit Court of Appeals concurs with these regulations, finding that an alien's lawful permanent resident status "terminates upon the entry of an administratively final order." *Perez-Rodriguez v. I.N.S.*, 3 F.3d 1074, 1079 (7th Cir. 1993). *But see U.S. v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005) (LPR status "can change" outside formal removal proceedings and filing of an abandonment form).

Even if the applicant was judged to have abandoned his LPR status, the evidence in the record fails to demonstrate that the applicant's misrepresentation was willful. The applicant must make a willful misrepresentation of a material fact in order to obtain an immigration benefit to be found inadmissible. The term "willful" should be interpreted as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). In the present case, the record indicates that the applicant stated he was out of the country for medical reasons for over a year. The Form I-601 specifies only that the applicant "allowed [his] Permanent Resident Card to Expire," and does not indicate an inadmissibility. However, it is unclear from the record whether the applicant had knowledge that he was no longer a LPR, in order for his misrepresentation to be construed as willful.

The AAO is unable to find that the applicant is inadmissible for making a willful misrepresentation of a material fact without "clear, unequivocal, and convincing evidence." *See Kungys v. United States*, 485 U.S. 759, 771-72 (1988). The evidence in the record fails to clearly indicate that the applicant filed the Form I-90 with the knowledge that his LPR status had been abandoned. On the basis of the record as it currently stands, we cannot determine that the applicant willfully misrepresented material facts to receive a benefit for which he thought he was not otherwise eligible.

In the present case, the record fails to contain sufficient documentation to establish that the applicant has abandoned his LPR status. Therefore, the AAO remands the matter to the District Director to consider whether the applicant's LPR status was abandoned. If the District Director finds that the applicant's LPR status was not abandoned, and he still retains such status, an adjustment of status application and the related I-601 waiver are unnecessary.

Should the District Director find that the applicant's LPR status was abandoned and that he is not inadmissible, the applicant is eligible to adjust his status. If the District Director finds that the applicant's LPR status was abandoned and that he is inadmissible, he shall reissue a new decision finding the applicant ineligible to receive a waiver of inadmissibility because he failed to establish that he had a qualifying relative under 212(i) of the Act.

ORDER: The matter is remanded to the District Director for further proceedings consistent with this decision.