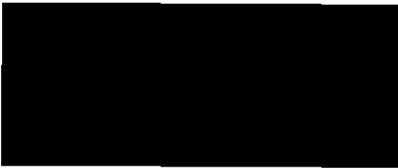


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
20 Massachusetts Avenue NW  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



hts

DATE: **JUN 19 2012** Office: VIENNA, AUSTRIA



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:



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 Field Office Director, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further processing consistent with this decision.

The applicant is a citizen of Kosovo 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 seeking to procure admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative. 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 her U.S. citizen spouse.

The director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the application accordingly. *See Decision of Field Office Director*, dated November 18, 2009.

On appeal, counsel asserts that section 212(a)(6)(C)(i) of the Act was erroneously applied to the applicant, because she did not misrepresent her identity to a U.S. government official nor did she obtain an immigration benefit as a result of her attempt to use a refugee travel document; therefore, a waiver should not be required. Counsel additionally asserts that even if the waiver application were required, the director erred in determining that the applicant had not established extreme hardship to her U.S. citizen spouse.

The evidence of record includes, but is not limited to, counsel's brief, statements from the applicant and her spouse, a psychological evaluation of the applicant's spouse, medical documentation, letters from family and friends, financial documents, identification and relationship documents, copies of family photographs, and information on country conditions in Kosovo. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(6)(C) of the Act 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 record reflects that on December 16, 2000, the applicant attempted to board a flight at Pristina airport in Kosovo to the United States via Zurich, Switzerland using a U.S. refugee travel document issued to Teuta Demaj. The applicant presented this document to an airline official and was denied access. The applicant was detained by the United Nations Mission in Kosovo Border Police, but the charges ultimately were dismissed by the public prosecutor in

Pristina. The applicant admits she presented a fraudulent refugee document but states she tried to use it to enter the aircraft to leave Kosovo because her identity documents were destroyed in the war, and she could not obtain a visa from the consulate without them.

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 U.S. 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 *Matter of D-L- & A-M-*, the BIA held that outside of the transit without visa context, an applicant is not excludable for fraud or willful misrepresentation of a material fact if no evidence indicates that “the alien presented or intended to present fraudulent documents or documents containing material misrepresentations to an authorized official of the United States Government in an attempt to enter on those documents.”

The evidence in the record establishes that the applicant did not make a misrepresentation to a U.S. government official when she attempted to board the aircraft. However, the record is not clear about whether the applicant intended to present the fraudulent refugee document to an authorized official of the U.S. Government to gain admission into the United States upon her arrival. The AAO finds the evidence in the record inconclusive to determine her inadmissibility, and therefore, remands the case for further inquiry into the applicant’s intent on arrival to the United States.

The AAO also considered whether the applicant’s misrepresentations to the U.S. consular officers were material. The record indicates that during her immigrant-visa interview on October 30, 2003 at the U.S. Embassy in Skopje, the applicant did not reveal her attempt to use a fraudulent document in Pristina but admitted it only after the consular officer indicated that she had a record of the incident. The issue is whether her initial concealment of the incident is a material misrepresentation.

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 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* 495 U.S. 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).

A concealment of facts is material if, had the applicant disclosed them, they would have been enough to justify the refusal of a visa. *See also, United States ex rel. Iorio v. Day*, 34 F.2d 920 (C.A. 2 1929) (Iorio's suppression of his imprisonment was not a ground of inadmissibility as facts would not have justified the vice consul in refusing a visa, had Iorio disclosed them); *United States ex rel. Teper v. Miller*, 87 F.Supp. 285 (S.D.N.Y. 1949) ("a suppressed fact is material only if the fact suppressed was a ground of exclusion under the law").

Here, the suppressed fact is the applicant's attempt to board an airplane in Pristina by presenting a fraudulent refugee travel document to an airline official. As noted above, her presentation of a fraudulent refugee document in an attempt to board an airplane does not render her inadmissible under the Act. The concealment, therefore, was not material.

The second element in determining materiality under *Matter of S-and B-C* requires analyzing whether the applicant's concealment shut off a line of inquiry relevant to her eligibility. The applicant's concealment in this case did not shut off a line of inquiry, because the consular officer was aware of the incident through an independent search conducted before she interviewed and confronted the applicant.

The AAO also considered other fraud concerns indicated in the record. According to several consular memoranda, U.S. consular officers believed that the applicant was involved in a "sham relationship" with her first husband, marrying him to gain immigration benefits.

Section 204(c) of the Act states:

[N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General [now Secretary of Homeland Security, "Secretary"] to have been entered into for the purpose of evading the immigration laws, or (2) the [Secretary] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The corresponding regulation, 8 C.F.R. § 204.2(a)(1)(ii), states in pertinent part:

Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the

purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 359 (BIA 1978). USCIS may rely on any relevant evidence in the record, including evidence from prior USCIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion, and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

The AAO notes that a Form I-130, *Petition for Alien Relative*, which was filed on the applicant's behalf by her first husband on October 30, 2003, was withdrawn by the petitioning husband before it was approved; the withdrawal was acknowledged on March 24, 2004. On April 19, 2004, the applicant's first husband filed a second petition, which was approved on October 28, 2004. There is no evidence in the record that either petition filed by her first husband was revoked based on a finding of marriage fraud. Furthermore, the petition filed by the applicant's second husband, on which the applicant bases her waiver eligibility, was approved on April 1, 2008. Pursuant to 8 C.F.R. § 205.2, the approval of an I-130 petition is revocable when the necessity for the revocation comes to the attention of the Service. Therefore, the AAO remands the matter to the director to further investigate allegations that the applicant entered into her first marriage for immigration purposes.

The AAO notes that the consular memoranda also refer to the applicant's "history of misrepresentation in attempting to enter the United States through fraudulent means" and her "conviction for illegally entering the United States." No evidence in the record, however, demonstrates that the applicant ever entered the United States or that she was convicted for illegal entry. Moreover, because the record lacks details about the other alleged misrepresentations the applicant made to consular officers, the AAO cannot independently determine whether they are material.

The AAO finds that the record is inconclusive to determine inadmissibility under section 212(a)(6)(C)(i) of the Act. Therefore, the AAO remands the matter to the field office director to determine whether

1. the applicant intended to present a fraudulent refugee document to a U.S. government official upon her arrival to the United States,
2. the applicant entered into her first marriage for the purpose of evading the immigration

laws, and

3. the applicant's other misrepresentations made to consular officers were material.

Should the approval of the Form I-130 be revoked, the field office director will issue a new decision dismissing the applicant's Form I-601 accordingly. In the alternative, should it be determined that the applicant is not subject to section 204(c) of the Act and that the Form I-130 will not be revoked, and the field office director determines that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, then the field office director will issue a new decision addressing the merits of the applicant's Form I-601 waiver application. If that decision is adverse to the applicant, it will be certified for review to the AAO.

**ORDER:** The matter is remanded to the field office director for further proceedings consistent with this decision.