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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

[redacted]

H5

DATE: MAY 23 2012 Office: PANAMA CITY, PANAMA FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(i) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v).

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director (FOD), Panama City, Panama, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the record does not establish that the applicant is inadmissible under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(B)(i)(II) and the relevant waiver application is therefore unnecessary.

The applicant is a citizen of Colombia who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) by a consular officer for seeking to procure admission to the United States through fraud or misrepresentation. The FOD also found the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II) for having been unlawfully present in the United States for a period of more than one year, and seeking admission within 10 years of the date of her last departure. The applicant's parents are legal permanent residents of the United States and her daughter is a U.S. citizen. The applicant is the beneficiary of an approved Petition for Alien Relative. She seeks a waiver of inadmissibility in order to reside in the United States with her parents.

The FOD 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 30, 2009.

On appeal, counsel asserts that section 212(a)(6)(C)(i) of the Act does not apply to the applicant because the immigration judge did not consider her misrepresentation regarding her country of origin as an adverse factor and granted her voluntary departure. Counsel further asserts that because the applicant's misrepresentation did not alter the fact that she was removable, concealment of her true nationality "did not prevent the Border Patrol from excluding her from the United States, albeit to the wrong country." Counsel also states that the period of the applicant's unlawful presence was miscalculated, because the FOD should not have counted the time during which her asylum application was pending.

The evidence of record includes, but is not limited to: counsel's brief; a statement from the applicant; statements from the applicant's father and sister; medical documentation for the applicant's mother; the applicant's school records; identification and relationship documents; Colombian police reports; and information on country conditions in Colombia. 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.

Section 212(i) of the Act provides:

> (1) The [Secretary] may, in the discretion of the [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 [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.

The record reflects that on September 30, 2001, the applicant entered the United States without inspection near Naco, Arizona and was apprehended by a U.S. border patrol agent. She told the agent that she was a Mexican citizen, and requested a voluntary return back to Mexico, which was granted. Soon after her return to Mexico, Mexican immigration officials informed the U.S. officials that the applicant was not a Mexican citizen. The U.S. officials took custody of the applicant and initiated removal proceedings on September 30, 2001.[1]

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

Here, the applicant misrepresented her nationality not to gain entry to the United States but to be sent back to Mexico rather than Colombia. At the time of her misrepresentation, it was already determined that she was not eligible to remain in the United States. Her misrepresentation did

[1] On her Form I-601, the applicant stated that she entered the United States on September 29, 2001 without inspection through the Mexican border and was deported back to Mexico the same day. The AAO notes that the record lacks details about her September 29, 2001 entry, and it contains no evidence that the applicant was deported on that day.

not provide her any immigration benefit, because though the border patrol agent believed her false statement about her nationality, the false statement did not entitle her to gain admission to or remain in the United States any more than if she had disclosed her true citizenship. She was removable either as a Mexican citizen or a Colombian citizen and ultimately she was placed in removal proceedings. The record also indicates that when the applicant was apprehended, she had a student identification card with the name [redacted] however, the record does not establish that she showed the fraudulent card to the U.S. officials or made her misrepresentation under oath. The record does not support a finding that the applicant committed fraud or misrepresented a material fact to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act. Based on the foregoing, the applicant's misrepresentation was not material within the meaning of section 212(a)(6)(C) of the Act, and she is therefore not inadmissible under section 212(a)(6)(C) of the Act.

The AAO will now address the FOD's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), of the Act.

Section 212(a)(9) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Section 212(a)(9)(B)(iii) provides an exception for asylees, which in pertinent part states:

> (II) No period of time which an alien has a bona fide application for asylum pending under section 208 [8 USCS § 1158] shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

Under the current policy, Service interpreted the phrase "bona fide asylum application" to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous. A denial of an asylum claim is not determinative of whether the claim was bona fide for purposes of section 212(a)(9)(B)(i)(II) of the Act. Similarly, the abandonment of an application for asylum does not mean that the application was not bona fide. *See* Memorandum from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Off. Of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009).

The record reflects that the applicant was placed in removal proceedings on September 30, 2001. On May 2, 2002, during her removal hearing, the applicant submitted her Form I-589, Application for Asylum and for Withholding of Removal. The immigration judge granted the applicant voluntary departure with a departure date on or before December 19, 2002. The applicant departed the United States on December 11, 2002. The applicant's asylum application was pending from May 2, 2002, until August 21, 2002, when she withdrew it. There is no evidence in the record that the applicant's asylum application was determined to be frivolous. Therefore, the applicant accrued unlawful presence from September 30, 2001, the day she entered the United States illegally, until May 1, 2002, the day before she filed her asylum application, which is 214 days. The AAO finds that the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Although the applicant accrued more than 180 days but less than one year of unlawful presence, the AAO also finds that she is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act. Section 212(a)(9)(B)(i)(I) of the Act specifically requires that the alien must have departed the United States *prior* to the commencement of removal proceedings. The applicant was placed in removal proceedings on September 30, 2001, the day she started accruing unlawful presence, and timely departed prior to the expiration of the voluntary departure order. Because she departed the United States after the commencement of removal order proceedings, her departure did not trigger the three-year bar under section 212(a)(9)(B)(i)(I) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has shown that she is not inadmissible and therefore not required to file the waiver application. Accordingly, the appeal will be dismissed as unnecessary.

ORDER: The appeal is dismissed because the applicant is not inadmissible and a waiver is unnecessary.