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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 30 2013 OFFICE: HARTFORD, CT

IN RE:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hartford, Connecticut, and an appeal to the Administrative Appeals Office (AAO) was dismissed. The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of Turkey who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking adjustment within ten years of his last departure, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having sought a benefit under the Act through fraud or willful misrepresentation of a material fact.[1] In our prior decision we held that the applicant was not in fact inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act, but that he was inadmissible under section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), for alien smuggling.

On January 26, 2012, the Field Office Director determined that the applicant had failed to establish that his inadmissibility would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability, accordingly. The applicant appealed that decision. On August 1, 2012, the AAO issued a Notice of Intent to Dismiss the applicant's appeal. The notice informed the applicant that although we had found that he was not inadmissible under either of the grounds identified by the Field Office Director, his admission to the United States was, nevertheless, barred pursuant to section 212(a)(6)(E)(i) of the Act, based on his July 5, 1998 attempt to smuggle his brother-in-law into the United States. Counsel for the applicant responded to the Notice of Intent to Dismiss submitting additional evidence in the form of a brief, sworn statements with supporting documentation, an unpublished decision from the Board of Immigration Appeals (BIA), and transcripts from immigration proceedings related to Altan Erol. The AAO dismissed the applicant's appeal on January 29, 2013, finding that the applicant was inadmissible under section 212(a)(6)(E)(i) of the Act, a ground for which he was not eligible for a waiver of inadmissibility.

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[1] In our prior decision we noted that the record contains evidence to demonstrate that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act for entering the United States without admission after having been ordered removed. The record includes evidence that establishes the applicant's departure from the United States in December 2001 did not occur within the 30-day grant of voluntary departure issued by the Board of Immigration Appeals (the Board) on November 9, 2001. A Form I-146, Nonimmigrant Checkout Letter, returned to USCIS by the U.S. Consulate in Montreal, reflects that the applicant departed the United States on December 13, 2001. Therefore, his 2001 exit from the United States would not have been a voluntary departure but a self-deportation and his March 28, 2002 entry without inspection would have triggered the provisions of section 212(a)(9)(C)(i)(II). The AAO will not, however, address whether the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act in this proceeding, as we note that at the January 12, 2004 hearing, the Immigration and Customs Enforcement (ICE) trial attorney stipulated to the applicant's testimony that he departed the United States on December 7, 2001, prior to the end of the 30-day voluntary departure period. This stipulation was confirmed by the Board's August 28, 2009 decision to grant the applicant's motion to reopen to apply for adjustment of status. We note that stipulations of fact in immigration proceedings are binding on all parties, though a court may set a stipulation aside on numerous grounds, including fraud, undue influence, collusion, mistake, false statement innocently made, inadvertence or improvidence. *Matter of A-----*, 4 I&N Dec. 378, 383-84 (BIA 1951). Although such an exception may apply here, as a component of the Department of Homeland Security, which was a party in the removal proceedings, we will not replace the Board's legal judgment with our own. *See* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1).

On motion, counsel for the applicant submits three affidavits and a legal brief in support of the motion to reopen and reconsider the AAO's prior decision, stating that the AAO "erroneously mischaracterizes the nature of [the applicant's] arguments on appeal (ie. stating that he never challenged the contents of the Form I-213 prepared by CBP in July of 1998) and failed to take into account the entire record."

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). As set forth below, the applicant has not stated new facts on motion nor has he established that the AAO's prior decision was based on an incorrect application of law or policy.

The applicant's admission to the United States is barred under section 212(a)(6)(E)(i) of the Act which states:

> (i) In general – Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

In regards to the applicant's motion to reopen, counsel for the applicant submits a new affidavit from the applicant, a new affidavit from , and a new letter from the applicant's brother-in-law. All of these individuals have submitted statements previously in response to the AAO's notice of intent to dismiss. The AAO does not find that the submitted documents contain new facts unavailable in the record.

In regards the applicant's motion to reconsider, counsel states that the AAO "erroneously mischaracterizes the nature of [the applicant's] arguments on appeal…and failed to take into account the entire record." First, counsel states that the AAO failed to consider that the applicant has not previously been charged with alien smuggling in prior proceedings, either in his removal proceedings or in criminal proceedings. As counsel correctly notes, the fact that the applicant was not charged with alien smuggling in removal proceedings or in criminal proceedings does not preclude the finding by the AAO that the applicant is inadmissible under section 212(a)(6)(E)(i) of the Act.

Second, counsel contends that the AAO did not take into account that the applicant has consistently challenged accusations against him that he engaged in smuggling his brother-in-law into the United States. In our previous decision, the AAO acknowledged and dismissed counsel's argument that the evidence of record established that the applicant did not "knowingly" assist his brother-in-law in entering the United States. We noted that counsel stated that the applicant reasonably believed that his brother-in-law had a valid visa and learned of his brother-in-law's visa refusals only after his apprehension by Border Patrol officers.

As stated in our previous decision:

> We further cannot agree with counsel that the submitted statements and documentation submitted in response to the Notice of Intent to Dismiss are more persuasive than the Form I-213. While we note that the statements -- an August 28, 2012 statement from the applicant; an August 28, 2012 statement from his cousin; and a previously submitted statement from the applicant's brother-in-law, dated September 25, 1998 -- all attest to the applicant's lack of knowledge regarding his brother-in-law's inadmissibility to the United States, we observe that they contradict the testimony of the applicant as reflected in the July 6, 1998 Form I-213, as well as that of the applicant's cousin, , in the July 5, 1998 sworn statement incorporated into the Form I-213.

We further addressed whether there was evidence of record to illustrate that the I-213 used as evidence in this case should be discounted. Counsel's argument on motion that the applicant's affidavits and other evidence submitted by the applicant – including documentation that an Immigration Judge found that the government could not sustain its burden of proof in the case of the individual who accompanied the applicant's cousin to Montreal to pick-up his brother-in-law – are more persuasive than the I-213 is not new. This argument was previously considered. As noted in our previous decision:

> In *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976), the BIA found that absent proof that a Form I-213 contained information that was incorrect or obtained through force or coercion, it was "inherently trustworthy and would be admissible even in court as an exception to hearsay rules as a public record and report under Rule 803(8) of Federal Rules of Evidence. We further note that in *Felzcerek v. INS*, 75 F.3d 112 (2nd Circuit 1996), the U.S. Court of Appeals for the Second Circuit (Second Circuit), the jurisdiction within which this cases arises, found the Form I-213 to contain a guarantee of "reliability and trustworthiness" that was "substantially equivalent to those required of documents admissible under Rule 803(8)" of the Federal Rules of Evidence. *Id.* at 116. It also found the Form I-213 to be "presumptively reliable" and that it could be admitted in deportation proceedings without giving an alien the opportunity to cross-examine its author. *Id.* at 117.
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> [I]n that the record does not offer a basis on which to question the evidence provided by the Form I-213 and the February 5, 1998 sworn statement, we find that evidence to outweigh the statements and supporting documentation submitted by the applicant on appeal.
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> While we do not question the reliability of the submitted copy of the applicant's brother-in-law's Turkish passport showing his prior admissions to the United States or the proof of his part ownership of a pizza restaurant, this documentation does not demonstrate what the applicant knew about his brother-in-law's admissibility as of July 5, 1998. We also acknowledge the transcripts from the immigration hearing for the passenger who drove with the applicant's cousin to Montreal, but find

it to establish only his unknowing involvement in the events of July 5, 1998, not that of the applicant.

We do not see any basis set forth on motion that shows that our previous decision was based on an incorrect application of law or policy. The AAO notes that in our previous decision, we stated that "the applicant does not assert that the information provided by the Form I-213 is incorrect, but only that it is too vague to establish his section 212(a)(6)(E)(i) inadmissibility." The AAO acknowledges that the record makes clear that the applicant has consistently denied trying to smuggle his brother-in-law into the United States. The AAO notes, however, that the applicant has not identified what specific information on the I-213 in his case, dated July 6, 1998, was incorrect, nor has he provided persuasive evidence showing that the statements in the document were obtained through force or coercion, or that there were other errors on the form that would call into question whether it is "inherently trustworthy." On motion, counsel states that the applicant presented "significant evidence to challenge the truthfulness of the I-213 – namely his own affidavit, affidavits of two other individuals involved in the incident, evidence to corroborate his claim that he honestly believed that his brother-in-law had a valid US visa and had a valid reason to enter the country, and evidence that an Immigration Judge found insufficient evidence of alien smuggling in the case of one of the other individuals involved in the incident." The analysis in our prior decision makes clear that the applicant's statements and evidence were considered previously, but not found to overcome the reliability of the Form I-213.

On motion, counsel states that the applicant's case is more similar to the situations in *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009), *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995) and *Cunanan v. INS*, 856 F.2d 1373 (9th Cir. 1998), where courts found significant problems with the Form I-213. The AAO notes that these cases are distinguishable as the burden of proof resided with the government in each. In contrast, the burden of proof in these proceedings is with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Moreover, that the facts of the cases cited by counsel are all distinguishable from the facts of the applicant's case. Counsel states that the applicant and his cousin were "held in handcuffs for seven to eight hours by CBP" and "they were not read their rights before being questioned," which makes the facts in the present case "more egregious" than in *Singh*. We do not agree. In *Singh*, the court found that the Form I-213 merited suppression, under due process requirements, where "the officers' conduct undermined" its reliability. 75 F.3d at 215 (finding that the conditions of the interrogation undermine the petitioner's statement, where the interrogation took place in the "wee hours of the morning" and the petitioner had not slept for "approximately twenty-four hours by the time he was released," among other factors including violation of 8 C.F.R. § 287.3(a)). In *Murphy*, the court found that the government did not meet its burden of proof to establish the alienage of the petitioner where an unauthenticated I-213 was shown to "carry numerous indicia of untrustworthiness." 54 F.3d at 611 (citing that the applicant disputed significant information on the unauthenticated I-213, such as place of birth, name of parents etc., that the source of the information on the I-213 may have had an ulterior motive and was not available for cross-examination, and the form contained unexplained cross-outs and handwritten additions). In *Cunanan v. INS*, the court found that Board's use of hearsay documents was fundamentally unfair where the petitioner was not given a reasonable opportunity to cross-examine the government's witness. 856 F.2d at 1375. The AAO does not find that our prior decision that the I-213 in the applicant's case was inherently reliable was based on an incorrect application of law or policy. Accordingly, the applicant remains inadmissible to the United States pursuant to section

212(a)(6)(E)(i) of the Act, and as noted in our previous decision is not eligible for a section 212(d)(11) exception to a section 212(a)(6)(E)(i) of the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is dismissed.