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U.S. Citizenship
and Immigration
Services

DATE: **JAN 29 2013** OFFICE: HARTFORD, CT

FILE: [REDACTED]

IN RE: [REDACTED]

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 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,

Michael Shumway
for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hartford, Connecticut, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal 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 The applicant is married to a U.S. citizen. Waivers of his inadmissibilities are available under sections 212(a)(9)(B)(v) and 212(i) of the Act; 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i).

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. *Decision of the Field Office Director*, dated January 26, 2012.

On appeal, the counsel contends that United States Citizenship and Immigration (USCIS) erred in finding the applicant to have accrued more than a year of unlawful presence in the United States and to have been involved in alien smuggling, as stated by the Field Office Director. *Form I-290B, Notice of Appeal or Motion*, dated February 23, 2012.

¹ The AAO notes that the record establishes that the applicant was convicted of Assault in the third degree, Connecticut General Statutes §53a-61, in 2000. The AAO does not, however, find it necessary to determine whether the offense committed by the applicant constitutes a crime involving moral turpitude (CIMT). Even if the applicant's assault conviction were found to be a conviction for a CIMT, it would be subject to the petty offense exception found in section 212(a)(2)(A)(ii)(II) of the Act and would not bar the applicant's admission to the United States.

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 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 has timely responded to the AAO's decision, asserting that section 212(a)(6)(E)(i) of the Act does not apply to the applicant and 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 [REDACTED].

Prior to addressing the issue of the applicant's section 212(a)(6)(E)(i) inadmissibility, we will briefly review our findings regarding the grounds of inadmissibility that the Field Office Director found to bar the applicant's admission to the United States. A full explanation of our reasoning is found in the Notice of Intent to Dismiss, dated August 1, 2012.

Section 212(a)(9)(B) states 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 . . . 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.

The record reflects that the applicant entered the United States without inspection in 1992, remaining until he departed for Canada in December 2001. Based on his immigration history while in the United States, the AAO has found that the applicant accrued unlawful presence only from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until May 12, 1997, the date he first filed for adjustment of status. As his unlawful presence in the United States prior to his December 2001 departure totals less than 180 days, the applicant is not subject to section 212(a)(9)(B)(i) of the Act.

Section 212(a)(6)(C) states in pertinent part:

- (i) In general. 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 chapter is inadmissible.

The Field Office Director based her determination that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act on the decision of the immigration judge who ordered the applicant's removal on January 12, 2004. She noted that while the immigration judge's finding that the applicant had previously filed a frivolous asylum application had been vacated by the BIA on January 13, 2009, his determination that the applicant had given false testimony had been upheld.

For a misrepresentation to bar admission to the United States under section 212(a)(6)(C)(i) of the Act, it must be material. The AAO notes that a misrepresentation is generally material for immigration purposes only if by it the alien receives a benefit for which he or she would not otherwise be eligible. *See Kungys v. United States*, 485 US 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) and *Matter of S- and B-C-9* I&N Dec. 436 (BIA 1950; AG 1961).

In its January 13, 2009 decision, the BIA found that the applicant's false testimony before the immigration judge, in which he had denied that he had attempted to help his brother-in-law unlawfully enter the United States from Canada, was not a material element of his asylum claim and, therefore, could not be used to support a finding that he had filed a frivolous asylum application. We find this same reasoning to apply in the present case. While the applicant was found not to have testified truthfully regarding his involvement in his brother-in-law's unlawful entry, his misrepresentation was unrelated to his persecution claim and, therefore, not material to the immigration benefit he was seeking. Accordingly, he is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Instead, we find the record to establish that, as indicated in the Notice of Intent to Deny, his admission to the United States is barred under section 212(a)(6)(E)(i) of the Act,² 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.

The record contains the transcript of the oral decision of the immigration judge who ordered the applicant's removal from the United States on January 12, 2004. In his decision, the immigration judge found that the applicant had attempted to smuggle his brother-in-law into the United States on July 5, 1998. He based this conclusion on a July 6, 1998 Form I-213, Record of Deportable Alien, in which he found the applicant to have admitted his involvement. The Form I-213, the immigration judge indicated, established that the applicant had sent his cousin to Montreal for the purpose of

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the all of the grounds for denial are not identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

smuggling his brother-in-law into the United States because he knew that his brother-in-law would not be allowed to enter the United States legally. The judge also noted that the Form I-213 established that the applicant knew that his brother-in-law was going to walk around the port-of-entry and enter the United States surreptitiously.

In response to the AAO's Notice of Intent to Dismiss, counsel contends that even if the information provided on the Form I-213 is true, it does not demonstrate the applicant's inadmissibility under section 212(a)(6)(E)(i) of the Act as the information it provides is "too vague" to establish that the applicant assisted anyone in entering the United States unlawfully. He further asserts that the immigration judge's statements regarding the applicant's involvement in alien smuggling are *dicta* and are not binding on the AAO as they do not relate to the removal charge brought against the applicant, nor the forms of relief he sought at the time of his 2004 hearing.

In support of his assertions regarding the vague nature of the information provided by the Form I-213, counsel notes that, while it does state that the applicant asked his cousin to go to Montreal and pick up his brother-in-law, it does not indicate what he asked his cousin to do, i.e., that he asked him to drive across the U.S. border or that he asked him to do anything to aid an unlawful entry. Counsel further contends that the Form I-213 fails to demonstrate that the applicant informed his cousin that his brother-in-law had to be smuggled into the United States and that there is no indication when his cousin learned this fact. He also maintains that the applicant's request to his cousin to pick up his brother-in-law, even if he knew his brother-in-law could not enter the United States, is not sufficient to demonstrate that he assisted his brother-in-law's entry without inspection. Counsel concludes that, "at best," all the Form I-213 does is establish that the applicant asked another person to pick up his brother-in-law in Montreal and that at the time he made this request, he knew his brother-in-law could only enter illegally. Counsel asserts that the circumstances in the present case are similar to those in *In Re: [REDACTED]* (BIA 2008), a case in which the BIA found a Form I-213's recording of a vague statement relating to alien smuggling to be too imprecise to establish inadmissibility under section 212(a)(6)(E)(i) of the Act.

Counsel also maintains that the evidence the applicant has submitted in response to the AAO's Notice of Intent to Dismiss proves that he did not "knowingly" assist his brother-in-law in entering the United States. He contends 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. Counsel states that the submitted evidence is more persuasive than the Form I-213 because it is more detailed and is supported by objective evidence. He notes that the submitted statement from the applicant, which is dated August 28, 2012, is supported by affidavits from his brother-in-law and cousin, as well as a copy of his brother-in-law's Turkish passport reflecting his prior U.S. visa and entries to the United States, documentation of his brother-in-law's part ownership in a pizza restaurant, and transcripts from the immigration hearing for [REDACTED] the individual who accompanied the applicant's cousin to Montreal, which establish that the immigration judge found insufficient evidence to establish his involvement in alien smuggling.

In considering counsel's claims, we turn first to his assertion that the Form I-213 in the record, also noted as Exhibit 11 in the immigration's judge's oral decision, should be discounted as the information it provides is too vague to establish the nature of the applicant's involvement in his brother-in-law's 1998 unlawful entry to the United States.

The Form I-213 relied upon by the immigration judge indicates that the applicant provided several statements regarding his involvement in his brother-in-law's July 5, 1998 arrival in the United States, initially indicating to the legacy Immigration and Naturalization Service Border Patrol Agents who apprehended him that "he was in Swanton [Vermont] because a friend of his and an unknown male asked to borrow his car and took it into Canada for an unknown reason." When transported to the Swanton Border Patrol Station, the Form I-213 reports, the applicant stated "that his friend had taken his car to Montreal . . . to pick up an unknown male subject and bring him into the United States. He stated that he did not know the status of this man nor did he know if he would be brought into the U.S. legally or illegally." Subsequently, the applicant stated that "the driver of the car was a distant relative of his . . . but he did not know who the other man in the car [was] and still did not know who they were going to meet in Montreal but thought they [might] try to smuggle him into the United States." The Form I-213 lastly indicates that the applicant later admitted that the person to be picked up in Montreal was his brother-in-law and that his brother-in-law "had to be smuggled in because he [had] been denied visas on different occasions and wanted to come and visit."

The Form I-213 also references a July 5, 1998 sworn statement given by the individual driving the applicant's car, his U.S. citizen cousin [REDACTED]. The statement reflects that [REDACTED] informed the Border Patrol officer who interviewed him that before he and his passenger, [REDACTED] left the United States for Montreal, the applicant told him that his brother-in-law "could not come into the United [S]tates." [REDACTED] also stated that the applicant had instructed him to drive the applicant's brother-in-law to the border, drop him there and then return to the United States to meet the applicant. He further testified that he had driven the applicant's brother-in-law to the Canadian side of the Highgate, Vermont port-of-entry.

Although we agree that the information provided by the Form I-213 is limited, we do not find it to be too vague to establish that the applicant assisted his brother-in-law in unlawfully entering the United States. Moreover, the sworn statement referenced by the Form I-213 (and attached to it) indicates that it was the applicant who informed his cousin that his brother-in-law could not legally enter the United States and that he revealed this information to his cousin prior to his cousin's departure from the United States for Montreal. The sworn statement further indicates that the applicant instructed his cousin to drive his brother-in-law to the border and that his cousin followed these instructions, dropping off the applicant's brother-in-law on the Canadian side of the Highgate, Vermont port-of-entry. We also find no basis on which to equate the present case with *In Re*: [REDACTED] an unpublished BIA decision that would not bind the AAO even if we were to find it to reflect the similarities claimed by counsel..

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, [REDACTED], in the July 5, 1998 sworn statement incorporated into the Form I-213.

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 case 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.

In his 2004 oral decision, the immigration judge indicated that the applicant had offered no objection to the submission of the Form I-213 into the record, although he had objected to his cousin’s statement, Exhibit 11A, as his cousin was not present to be cross-examined. In appealing the immigration judge’s decision to the BIA, the applicant’s then counsel indicated that the applicant had not objected to the admission of the Form I-213³ as it was a government work product and “would have been brought in for impeachment purposes anyway.” *Brief in Support of Appeal in the Matter of [REDACTED]* at 2-3. He further stated that the applicant had testified to his “state of mind with regard to attempting to have his brother in law enter the United States and [stood] by his testimony.” *Id.* at 3. Based on this evidence, we do not find the applicant to have asserted at the time of his 2004 hearing or on appeal to the BIA that the information provided in the Form I-213 was incorrect or that it was obtained through force or coercion. Even in this proceeding, 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.

In 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 statements, we find that evidence to outweigh the statements and supporting documentation submitted by the applicant on appeal. 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 [REDACTED] 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.

Therefore, based on the record before us, we conclude, as did the immigration judge in the applicant’s 2004 hearing,⁴ that the Form I-213 and relating sworn statement offer sufficient evidence

³ Although counsel’s brief indicates that the applicant did not object to Exhibit 11A, we assume that he refers to Exhibit 11, as indicated in the immigration judge’s January 12, 2004 oral decision.

⁴ Counsel on appeal urges the AAO to ignore the immigration judge’s statements regarding the applicant’s involvement in smuggling his brother-in-law into the United States as they do not relate to the removal charge brought against him, nor any of the forms of relief he sought. Although we are not bound by the conclusions reached by the immigration judge regarding the applicant’s involvement in smuggling, we have, nevertheless, considered them as part of the evidence of record. Counsel errs in asserting that these findings are unrelated to any of the forms of relief sought by the applicant at the time of his hearing. We find the immigration’s judge’s conclusions regarding the applicant’s

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to establish that the applicant sent his cousin to Montreal for the purpose of assisting his brother-in-law to enter the United States illegally. Accordingly, the applicant is inadmissible to the United States pursuant to section 212(a)(6)(E)(i) of the Act.

Section 212(a)(6)(E)(ii) of the Act provides an exception to a section 212(a)(6)(E)(i) inadmissibility as follows:

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988 has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

A waiver of a section 212(a)(6)(E)(i) inadmissibility is also available under section 212(d)(11), which states:

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The applicant, however, is not eligible for consideration under either section 212(a)(6)(E)(ii) or section 212(d)(11) of the Act. Accordingly, he is permanently barred from admission to the United States by section 212(a)(6)(E)(i) of the Act.

The burden of proof in establishing eligibility for admission to the United States rests with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

involvement in smuggling his brother-in-law into the United States to have been directly related to his negative credibility finding in the applicant's case and, therefore, his determination that the applicant was not eligible for any relief under the Act.