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



U.S. Citizenship
and Immigration
Services

DATE: JUN 18 2013 OFFICE: HOUSTON, TX

FILE: [REDACTED]

IN RE:

APPLICANT: [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:

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 in accordance with the instructions on 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Pakistan who has resided in the United States since July 2, 2006, when he was admitted pursuant to a nonimmigrant visa with two individuals he claimed were his wife and child. He 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 having procured a visa to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. citizen and is 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 remain in the United States with his U.S. citizen spouse and child.

The Field Office Director concluded that the applicant was additionally inadmissible for alien smuggling under section 212(a)(6)(E) of the Act, was ineligible for a waiver of that inadmissibility, and denied the application accordingly. *See Decision of Field Office Director* dated April 17, 2012.

On appeal, counsel for the applicant submits a brief, statements from the applicant and his spouse, letters from family and friends, copies of travel documents, medical and financial records, and documentation on country conditions in Pakistan. In the brief, counsel contends that the applicant is not inadmissible for alien smuggling because he did not knowingly smuggle his purported wife and child, he received nothing for such activities, the other two individuals were not smuggled in because they had valid visas, and he never faced criminal charges for those activities.

The record includes, but is not limited to, the documents listed above, other applications and petitions, evidence of birth, marriage, residence, and citizenship, statements from the applicant and his spouse, financial and medical records, and documentation on country conditions in Pakistan. The entire record was reviewed and considered in rendering 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.

In the present case, the record reflects that, in an application for a nonimmigrant visa, the applicant falsely indicated, both in the application forms and in an interview, that he was married and had a child. Inadmissibility due to section 212(i) of the Act is not contested on appeal. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having procured a visa to the United States through fraud or misrepresentation.¹ The applicant's qualifying relative for a waiver of this inadmissibility is his U.S. citizen spouse.

In June 2006, the applicant submitted a nonimmigrant visa application indicating he was married to [REDACTED] and had a child, [REDACTED] who needed to travel to the United States for medical treatment. The applicant attended a nonimmigrant visa interview, where he affirmed that the two individuals were his wife and child. They were all granted nonimmigrant visas on June 12, 2006. In a sworn statement, the applicant admits he was not married to [REDACTED] nor was [REDACTED] his child when he applied for his nonimmigrant visa in 2006. The applicant, [REDACTED] and [REDACTED] were admitted to the United States on July 2, 2006.

Section 212(a)(6)(E) of the Act provides, in pertinent part:

- (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.

....

- (iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

Section 212(d)(11) of the Act provides:

The [Secretary] may, in [her] 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) 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 211(b) and in the case of an alien seeking admission or

¹ The record shows that in 2010 the applicant was convicted of sale of alcohol to minors. The Field Office Director did not address whether or not this conviction is a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Nevertheless, because the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act and demonstrating eligibility for a waiver under section 212(i) also satisfies the requirements for a waiver of criminal grounds of inadmissibility under section 212(h), the AAO will not determine whether the applicant is inadmissible under section 212(a)(2)(A)(i)(I).

adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The Field Office Director further found the applicant was inadmissible under section 212(a)(6)(E) of the Act, and was ineligible for a waiver under section 212(d)(11) of the Act because the individuals he smuggled were not family members.

Counsel contends that the applicant did not know he could be charged with alien smuggling under the INA and that he was just following orders of the travel agent, and therefore he lacked the requisite knowing or willful intent. Section 212(a)(6)(E) of the Act requires that the alien "knowingly" encourage, induce, or assist an illegal alien to enter the United States. In his sworn statement, the applicant admitted that he was never married to [REDACTED] and that he was not the father of [REDACTED] both individuals who he had claimed were family members at his consular interview. He also stated that he lied to the consular officer about these relationships because his father was blind, his mother was old, and he wanted to come to the United States. Additionally, in his affidavit, the applicant states that the travel agency told him it would be easier to get a visa if he claimed that these individuals were related to him. These facts demonstrate that a reasonable person in the applicant's circumstances would conclude that his representations with respect to [REDACTED] and [REDACTED] could result in a fraudulent visa, and therefore, illegal entry, into the United States. The fact that he didn't know that he would be charged with alien smuggling is irrelevant.

Counsel additionally asserts that, because the applicant did not receive a benefit or gain financially, he did not engage in alien smuggling. Prior to 1990, the statute included "[a]ny alien who at any time shall have, knowingly *and for gain*, encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of the law." (Emphasis added). However, with the passage of Immigration Act of 1990, Pub.L. No. 101-649, 104 Stat. 4978, Congress eliminated the "for gain" requirement. There is now no profit requirement in the current alien smuggling statute, under which the applicant is inadmissible: "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." See Section 212(a)(6)(E)(i) of the Act. The "for gain" requirement was likely eliminated because it "was often the most difficult part of a case to establish under the former provisions, with the result that many suspected 'smugglers' could not be found inadmissible. Elimination of the 'for gain' element obviates the necessity to establish the exception or receipt of profit as an element of a finding of inadmissibility under INA 212(a)(6)(E)." 9 FAM § 40.65 n.7 (1995).² Thus, counsel's argument that the applicant is not inadmissible because he did not receive a benefit is without merit.

² Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive.

Counsel also claims the applicant did not smuggle the two individuals into the United States because they had valid visas. A visa is invalid if it is obtained by misrepresentation of a material fact, one that “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.” See *Kungys v. United States*, 485 U.S. 759, 771-772 (1988). See also *Ablett v. Brownell*, 240 F.2d 625, 629 (D.C. Cir. 1957)(“ The rule is now well settled that a visa obtained by misrepresentation of a material fact, that is, a fact which under the law is relevant to the alien's admission, is not a valid visa and hence is no visa.”) The visas [REDACTED] and [REDACTED] obtained were through misrepresentation of a material fact, as stated above, and hence, were invalid visas. As they were traveling on invalid visas, they entered the United States in violation of law with the applicant’s assistance.

Counsel lastly asserts that, because the applicant was not criminally charged with an offense related to smuggling, he is not inadmissible. However, the statute does not require a conviction for the alien to be inadmissible. *Popoca v. Holder*, 320 Fed. Appx. 252, 258 (5th Cir. 2009) (Section 212(a)(6)(E) of the Act does not explicitly require a conviction); see also *Matter of Martinez-Serrano*, 25 I&N Dec. 151, 153 (BIA 2009) (a conviction is not required for an alien to be deportable under section 237(a)(1)(E) of the Act). It only requires that the alien “encouraged, assisted, abetted, or aided” another alien to enter the United States in violation of the law. Therefore, the applicant is inadmissible because he admitted in a sworn statement that he was not related to these individuals and that he lied to the consular officer about their alleged relationship in order for them to obtain visas.

The AAO therefore finds that the applicant is inadmissible pursuant to section 212(a)(6)(E) of the Act. Moreover, the record does not establish that the individual that the applicant aided to enter the U.S. illegally was an immediate family member. Accordingly, the applicant is statutorily ineligible for a waiver under section 212(d)(11) of the Act and no other waiver is available for this ground of inadmissibility. As such, no purpose would be served in adjudicating his waiver under section 212(i) of the Act as the applicant is permanently inadmissible under another ground.

In proceedings for a waiver of grounds of inadmissibility under sections 212(i) and 212(d)(11) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.