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



U.S. Citizenship
and Immigration
Services

DATE: OCT 24 2013 OFFICE: DETROIT, MICHIGAN

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 (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.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Detroit, Michigan, denied the waiver application. The applicant, through counsel, appealed the Field Office Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on motion. The motion is granted, the prior AAO decision is withdrawn, and the underlying appeal is dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant is a native and citizen of India who was found to be inadmissible to the United States pursuant to 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 admission to the United States through fraud. The Field Office Director concluded the applicant failed to establish extreme hardship would be imposed upon a qualifying relative and denied her Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The AAO dismissed the applicant's appeal and affirmed the Field Office Director's decision.

On motion, counsel asserts the applicant is not inadmissible, as she did not enter the United States through deceit or willful misrepresentations; her silence and failure to volunteer information at the U.S. – Canada border do not constitute a material misrepresentation; she experiences difficulties in understanding questions even when they are translated to her native language; and additional documentation demonstrates the applicant's spouse would suffer extreme hardship because of the applicant's inadmissibility.

A motion to reopen must state the new facts to be proved 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 Service 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). As the applicant has submitted new documentary evidence to support her claim and asserted reasons for reconsideration, the motion to reopen and reconsider will be granted.

The record includes, but is not limited to: briefs, motions, and correspondence; letters of support; identity, psychological, medical, employment, and financial documents; and photographs. 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) 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 Act is inadmissible.

...

(iii) Waiver Authorized.- For provision authorizing waiver of clause (i), see subsection (i).

The Board of Immigration Appeals (BIA) has held that for immigration purposes, the term *fraud* “is used in the commonly accepted legal sense, that is, as consisting of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party.” *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). The “representations must be believed and acted upon by the party deceived to the advantage of the deceiver.” *Id.*

The intent to deceive, however, is not a required element for a willful misrepresentation of a material fact. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The relevant standard for a willful misrepresentation is knowledge of falsity. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995).

A misrepresentation is generally material only if 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 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*, 485 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).

The record reflects the Field Office Director found the applicant presented herself to U.S. immigration officials for inspection and subsequently was admitted as the spouse of an unknown individual to whom she had paid \$500 to assist her entry into the United States. The Field Office Director concluded the applicant was inadmissible for willfully misrepresenting a material fact pursuant to section 212(a)(6)(C)(i) of the Act. The AAO affirmed the District Director’s decision, because the applicant did not present objective evidence on appeal to explain material inconsistencies in her testimony.

In support of the applicant’s motion, counsel submits an evaluation from a licensed psychologist dated July 1, 2013, diagnosing the applicant with borderline intellectual functioning. The psychologist found that the applicant’s diminished functioning appears to affect her ability to reason, her general comprehension, and her ability to reconcile information. Additionally, he determined that “she likely performs within the mild range of cognitive impairment” and questioned her ability to “truly” understand questions, even when asked in her native language. He noted that when she is nervous or under stress, her anxiety likely would influence her

responses and concluded that her inconsistent statements could reflect “the manner in which she tries to understand the world around her.”

Based on the new evidence submitted on motion and considering the record in its totality, the applicant’s inconsistent statements concerning the actions she and others took on her behalf do not demonstrate she willfully misrepresented material facts to be admitted into the United States. Additionally, the record does not establish the applicant’s awareness of the misrepresentations specifically made on her behalf at the border when she sought admission into the United States. She therefore is not inadmissible under section 212(a)(6)(C)(i) of the Act, and her waiver application is thus unnecessary.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(i) 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 is not inadmissible and therefore not required to file the application. Because the waiver application is unnecessary, the appeal is dismissed.

ORDER: The motion is granted. The prior AAO decision is withdrawn. The appeal is dismissed as the underlying waiver application is unnecessary.