



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: DEC 01 2014

Office: NEWARK

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. 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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The applicant was sent a Notice of Intent to Dismiss (NOID) on October 1, 2014. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Peru 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 procuring a visa to the United States through fraud or the willful misrepresentation of a material fact. The applicant's spouse, child and two stepchildren are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside in the United States with his family.

The Field Office Director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated March 12, 2013.

On appeal, counsel asserts that the Field Office Director erred in finding that the applicant's spouse would not experience extreme hardship if the applicant were removed. Counsel also submits new evidence to show the hardship that the applicant's spouse would experience if the waiver application is not approved. *Form I-290B, Notice of Appeal or Motion*, dated April 5, 2013, and supporting brief.

Upon reviewing the applicant's appeal, we found in the record evidence that the applicant had assisted an individual trying to enter the United States in violation of law. We therefore concluded he also is inadmissible under section 212(a)(6)(E) of the Act. We sent the applicant a NOID, dated October 1, 2014, to provide him an opportunity to address this inadmissibility.

Counsel, in response to our NOID, states that we did not discuss the factual basis of our decision, we did not properly weigh the documents submitted, and we did not consider the positive and negative discretionary factors in the applicant's case. *Counsel's Response*, dated October 15, 2014.

The record includes, but is not limited to, counsel's brief and letter, the applicant's statements, an undated psychiatric evaluation of the applicant's family, financial records, the applicant's spouse's statement, and documents reflecting country conditions in Peru.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that:

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 that:

The Attorney General [now the Secretary of Homeland Security (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 the applicant applied for a visitor's visa at the U.S. embassy in Lima, Peru, on April 16, 2003, and indicated on the non-immigrant visa application form that he was married. The applicant asserts that he was not married when he applied for his visa; he only stated he was married on the application because, if one lives with someone in Peru for more than two years, one considers that person a spouse. His current spouse, also a native of Peru, makes the same claim.

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 a 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).

We find that the applicant's misrepresentation about his marital status tended to cut off a line of inquiry, which would have been relevant to his eligibility and which might well have resulted in a proper determination that he was inadmissible. Specifically, had the applicant truthfully answered that he was not married, the consular officer may have inquired about the applicant's other ties to Peru and his intention to return to Peru. If the consular officer had known that the applicant was single, the consular officer may have found him inadmissible for lack of ties to Peru and presumed immigrant intent.

We will now address whether the applicant's misrepresentation was willful. The term "willful" should be interpreted as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *Matter of G-G-*, 7 I&N Dec. 161(BIA 1956). We are unable to find that an applicant is inadmissible for making a willful misrepresentation of a material fact without "clear, unequivocal, and convincing evidence." See *Kungys v. United States*, 485 U.S. 759, 771-72 (1988).

Though the applicant states he did not intend to misrepresent his marital status to receive an immigration benefit, the record does not include sufficient documentary evidence to support his claim. The record includes no evidence showing the applicant was incapable of exercising his judgment during the visa-application process or was unaware of his actions. As such, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for procuring a visa by willful misrepresentation of a material fact.

In our NOID we informed the applicant that the record includes evidence of an additional ground of inadmissibility. Section 212(a)(6)(E) of the Act provides, in pertinent part, that:

(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).

The record reflects that the applicant gave or sent his passport to [REDACTED] who applied for a visitor's visa at the U.S. embassy in Lima, Peru, and claimed to be his spouse. The passport includes a fraudulent stamp showing that the applicant entered Peru on May 10, 2003, though the record shows that he left Peru for the United States on or about May 3, 2003, and has not returned to Peru since. The passport was used to try and fraudulently obtain a visa for [REDACTED]. Specifically, she presented the applicant's passport to corroborate her misrepresentation that they were married, in order to obtain a visa to travel to the United States. Without the applicant's passport, the consular officer may have inquired about her other ties to Peru and her intention to return from the United States. The record therefore reflects that the applicant assisted [REDACTED] in trying to enter the United States in violation of law and is therefore inadmissible under section 212(a)(6)(E) of the Act. Neither counsel nor the applicant contests this ground of inadmissibility.

Section 212(d)(11) of the Act provides, in pertinent part, that:

(11) The [Secretary] 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) in the case of . . . an alien seeking admission or 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.

Section 212(d)(11) of the Act does not apply to the applicant, as the person he assisted to try to enter the United States in violation of law was not his spouse, parent, son, or daughter. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver under section 212(d)(11) of the Act as a matter of discretion.

Furthermore, as the applicant is inadmissible pursuant to section 212(a)(6)(E) of the Act and he is not eligible for a waiver under section 212(d)(11) of the Act, we find that no purpose would be served in addressing a section 212(i) waiver based on his inadmissibility under section 212(a)(6)(C)(i) of the Act. We will not weigh the evidentiary value of the documents he submits regarding extreme hardship and positive discretionary factors, as the applicant is ineligible for a waiver and doing so would serve no purpose.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.