

(b)(6)



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: JUL 29 2014

OFFICE: LOS ANGELES

File: [Redacted]

IN RE:

[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:

[Redacted]

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, Los Angeles, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects the applicant is a native and citizen of Mexico 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 willfully misrepresenting material facts to procure admission into the United States. The applicant is the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140). The applicant, through counsel, contests the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, and in the alternative, seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his spouse, child, and U.S. citizen son.

The Field Office Director denied the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601), as the approval of Form I-601 would not make him admissible, and the applicant needed to establish extreme hardship to a qualifying relative, which does not include his U.S. citizen son. *See Decision of the Field Office Director*, dated September 15, 2010.

On appeal, filed on October 15, 2010 and received by the AAO on February 20, 2014, counsel asserts a Form I-601 is unnecessary as U.S. Citizenship and Immigration Services (USCIS) failed to establish the applicant committed fraud or misrepresentation, and in the alternative, the applicant timely retracted any misrepresentations. Counsel also asserts the decisions in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) are inconsistent with the clear language of the Act; the issue of the applicant's inadmissibility was not fully reviewed; and current law on his status remains in conflict. Counsel further asserts the failure to adjudicate the waiver application was a violation of the applicant's "right to due trial process" under international law as determined by the Inter-American Commission on Human Rights (IACHR). Recommendations by the IACHR concerning due process rights are not within our appellate jurisdiction; therefore this assertion will not be addressed in the present decision. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), dated October 14, 2010; *see also Supporting Memorandum*.

The record includes, but is not limited to: briefs; correspondence; letters of support; identity and financial documents; and the applicant's child's drawings. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(C) Misrepresentation.-

(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).

Section 212(i) of the Act provides, in relevant part:

- (1) The Attorney General [now 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.

Section 212(a)(9) of the Act provides, in relevant part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

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 (9<sup>th</sup> 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 applicant was expeditiously removed pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225, as an intending immigrant without proper documentation, and for having misrepresented his identity upon apprehension by U.S. immigration officials on October 27, 1998, after presenting a border crossing card that did not belong to him. Accordingly, the Field Office Director determined the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act.

On appeal, counsel states the applicant requested assistance to cross the U.S. border, and an individual provided to him a document without further explanation. Counsel also states that when the applicant presented himself at the U.S. border with the document, he presented it to an immigration official without any "affirmative false statement." Rather, the applicant immediately admitted the document was not his upon inquiry by the immigration official. Counsel further states the immigration official asked the applicant to sign a document in the English language without a translator, and the applicant did so under "extreme duress," as the immigration official told the applicant that "he would be detained for a long time if he did not sign" the document. In support of counsel's contentions, the applicant submits a statement concerning the circumstances of his attempted entry into the United States on October 27, 1998.

The record also includes the applicant's Form I-867A&B, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act and Jurat, obtained on October 27, 1998, during secondary inspection. The record reflects the secondary inspection interview was conducted in the Spanish language and the applicant was advised that he would remain in the custody of the Immigration and Naturalization Service until a decision is reached in his case. He was informed of

his rights and the purpose and consequences of the interview. The record indicates the applicant provided the following responses during the interview:

Q. Do you understand what I've said to you?

A. Yes.

....

Q. Do you swear or affirm that all the statements you are about to make are true and complete?

A. Yes.

Q. What is your true and correct name?

A. [REDACTED]

Q. What is your date of birth?

A. 3<sup>rd</sup> of July '67.

....

Q. What date did you enter attempt to enter the United States?

A. Today (10-27-98).

Q. How did you attempt to enter the United States?

A. I was walking and I showed a border crossing card that was not mine.

Q. Do you know it is illegal to present a document of another?

A. Yes.

Q. The document that you presented, did it belong to you?

A. No.

Q. Where did you obtain the document that you presented?

A. I bought it in Tijuana from a man for seventy dollars.

The evidence in the record is sufficient to establish the applicant acknowledged he knew he needed proper documentation to be admitted into the United States, he did not obtain the required documentation through proper channels, and he presented the false document to a U.S. government official to try to enter the United States. The record also is sufficient to establish the applicant misrepresented his identity to attempt to procure a benefit under the Act for which he was not eligible on October 27, 1998. Accordingly, the applicant made a willful misrepresentation in order to gain admission to the United States. The applicant's misrepresentation is material as he would have been excludable on the true facts. He was not the individual indicated on the border crossing card and lacked proper travel documents under his true identity.

Counsel also asserts on appeal that the applicant timely retracted the misrepresentations made in connection with his attempted entry into the United States on October 27, 1998. A timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) eligibility. 9 FAM 40.63 N4.6. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.*

The record demonstrates the applicant had no intention of revealing his true identity or surrendering the border crossing card when he presented it to U.S. immigration officials on October 27, 1998. Instead, he admitted that the document was false only during secondary inspection. Therefore, the applicant cannot be said to have been acting timely to retract the misrepresentation of his identity. We agree with the Field Office Director's determination that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

The record also reflects that when U.S. immigration officials at the [REDACTED] port of entry later apprehended him on October 30, 1998, the applicant provided the same false name and date of birth that he had provided three days earlier, and he was expeditiously removed a second time as an intending immigrant without proper documentation pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225. The record reflects the applicant subsequently entered the United States in 1998 without inspection by U.S. immigration officials and has remained to date. The applicant's actions further render him inadmissible under section 212(a)(6)(C)(i) as well as 212(a)(9)(C)(i) of the Act. The applicant is statutorily ineligible to apply for permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act.<sup>1</sup>

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia, supra; Matter of Briones, supra; and Matter of Diaz and Lopez, 25 I&N Dec. 188 (BIA 2010).* Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States and CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on October 31, 1998. He subsequently entered the United States without inspection in 1998 and has remained to date. He has not remained outside the United States for more than 10 years since his last departure. He is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating the applicant's waiver under section 212(i) of the Act.

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<sup>1</sup> An appeal of the applicant's denied Form I-212, Application for Permission to Reapply for Admission after Deportation or Removal, has been dismissed in a separate decision.

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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 appeal is dismissed.