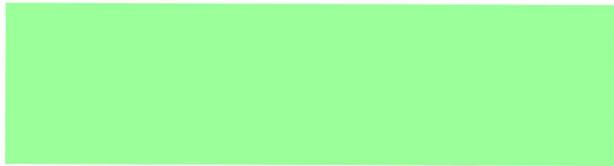


(b)(6)

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



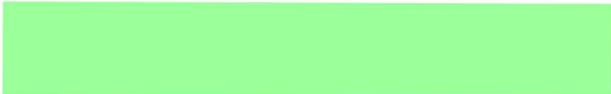
U.S. Citizenship  
and Immigration  
Services



Date: **MAY 30 2014**

Office: PHOENIX

FILE: 

IN RE: Applicant: 

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:

SELF-REPRESENTED

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, Phoenix, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as unnecessary.

The record reflects that the applicant, a native and citizen of Mexico, 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 seeking to procure admission to the United States or another benefit under the Act through fraud or misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Decision of the Field Office Director*, dated November 29, 2011.

On appeal, filed on December 27, 2011, and received by the AAO on December 1, 2013, the applicant<sup>1</sup> contests the finding that he is inadmissible for misrepresentation and submits additional statements regarding his claims about having lost his passport and hardship to his spouse if the waiver application is not approved.

The record includes, but is not limited to, the following documentation: a brief filed by the applicant and his spouse in support of the Form I-290B, Notice of Appeal or Motion; statements by the applicant's spouse, mother, and sister; financial documentation; and letters of reference. 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.

The Field Office Director determined that the applicant is inadmissible under section 212(a)(6)(C)(i), because the applicant's statements during his interview at the U.S. Citizenship and Immigration Services (USCIS) Phoenix Field Office on August 26, 2011, contradicted statements he made during his interview at the U.S. Consulate in Hermosillo, Mexico, on February 21, 2008. The Field Office Director also noted that the applicant's passport shows no stamp to corroborate the applicant's claim that he legally entered the United States on February 23, 2008, using a previously issued and then-still valid border crossing card (BCC).

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<sup>1</sup> The record indicates that the applicant's Deferred Action for Childhood Arrivals (DACA) application was approved on May 15, 2013 and that he had retained counsel for his DACA application. However, the Form I-290B, Notice of Appeal or Waiver accompanying the instant appeal does not show that the applicant was represented by counsel in 2011, when he filed his appeal. Therefore, the applicant will be considered self-represented for the purposes of this application.

The applicant asserts on appeal that at the time of his interview at the U.S. Consulate on February 21, 2008, he believed that his passport was lost and so informed the consular officer. The applicant states that he subsequently located his passport. The applicant submits statements from his mother and sister, who were with him in Mexico and involved in holding and searching for his passport, to corroborate his assertion that his previous passport was lost at the time of his consular interview and was subsequently found.

A misrepresentation is generally material only if by making it 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 must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* 495 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).

"It is not necessary that an 'intent to deceive' be established by proof, or that the officer believes and acts upon the false representation," but the principal elements of the willfulness and materiality of the stated misrepresentations must be established. 9 FAM 40.63 N3 (citing *Matter of S and B-C*, 9 I&N Dec. 436, 448-449 (A.G. 1961) and *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975)).

In regards to the willfulness of the applicant's stated misrepresentations, 9 FAM 40.63 N5, in pertinent part, states that:

The term "willfully" as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. 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 made an untrue statement.

In order for the applicant to be inadmissible under section 212(a)(6) of the Act, the applicant's misrepresentations not only must be willful, but they must be material. As stated above, according to the U.S. Supreme Court, a misrepresentation must have been "predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material."

*Kungys v. U.S.*, 485 U.S. at 771-72. Additionally, “materiality” is defined in 9 FAM 40.63 N6.1, which states, in pertinent part, that:

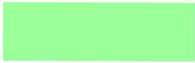
Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa.

In this particular case, the Field Office Director’s decision does not address, and the record does not reflect, how the applicant would have been excludable on the true facts. Similarly, the decision and record do not show that the applicant’s statements cut off a line of inquiry that would have resulted in a proper determination that he be excluded. The record reflects that the applicant’s visa application on February 21, 2008 was denied under section 212(b) of the Act, because the consular officer still was able to elicit testimony relevant to his eligibility for a visa, even without his lost passport, sufficient to conclude that he was not qualified. The Field Office Director’s decision indicates that the applicant made a statement at the U.S. Consulate that contradicted his statement before a USCIS officer in seeking to procure an immigration benefit through the filing of his Form I-485, Application to Register Permanent Residence or Adjust Status. However, the denial decision does not specify the applicant’s contradictory testimony, nor does it reflect how his contradictory statements were material and made to obtain admission or another immigration benefit under the Act. The record therefore fails to establish that the applicant sought to procure or received a benefit for which he would not otherwise have been eligible based on a material misrepresentation made either to a consular officer or a USCIS officer.

Regarding the Field Office Director’s concern about the applicant’s lawful admission and his conclusion that the applicant misrepresented his manner of entry into the United States, the applicant explained, and continues to assert on appeal, that he walked through the pedestrian lane at the U.S.-Mexico border at Nogales, Arizona, presented his visa to U.S. immigration authorities, and was waved in without having his passport stamped. The applicant provides affidavits from his sister and mother, in addition to his own statement, describing his entry. The record does not include evidence to show that the applicant’s explanation is inconsistent with other testimony, implausible or otherwise a misrepresentation. Entries made in this manner have been held to be procedurally regular, meaning the alien has been inspected and admitted. *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010); *see also Matter of Areguillin*, 17 I&N Dec. 308 (1980); and *Matter of G-*, 3 I&N Dec. 136 (BIA 1948). The applicant thus appears to have satisfied his burden of proof concerning his manner of entry.

The record establishes that the applicant's misrepresentations regarding losing and finding his passport were not material, and the record does not establish that he misrepresented his manner of entry into the United States. The applicant therefore is not inadmissible under section 212(a)(6)(C)(i) of the Act, and the 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 a waiver application. Because the waiver application is unnecessary, the appeal is dismissed.

**ORDER:** The appeal is dismissed as the underlying application is unnecessary.