



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 29 2015** Office: NEBRASKA SERVICE CENTER

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:



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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I). The applicant also was found to have accrued over one year of unlawful presence in the United States. The applicant is the beneficiary of an approved Immigrant Petition for Alien Relative (Form I-130). He now seeks a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his family.

The Director found that the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act, because the applicant had accrued over one year of unlawful presence in the United States and subsequently re-entered without inspection. The Director denied the applicant's waiver as a matter of discretion, having concluded that the applicant was ineligible to request consent to reapply because 10 years had not elapsed since the date of his last departure.

On appeal, the applicant, through counsel, asserts that the three and ten-year unlawful presence bars are inapplicable to him, because he was a minor for most of the time that he resided in the United States unlawfully.

The record includes, but is not limited to: statements from the applicant, family members and friends; identity and relationship documents; a psychological assessment of the applicant's spouse; and photographs. The entire record was reviewed and considered in rendering this decision.

We conduct appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3^d Cir. 2004).

The record reflects that the applicant is a native and citizen of Mexico who entered the United States on or about November 1, 1996, without inspection, and departed the country on or about June 2, 2008, when he was 14 years old. He then attempted to procure entry to the United States on March 19, 2009, by presenting a border crossing card belonging to [REDACTED]. A U.S. Customs and Border Patrol officer referred the applicant for further questioning and while the first officer escorted him to speak with another officer, the applicant stated that he was not the owner of the visa and that his name was [REDACTED]. The applicant was allowed to withdraw his application for admission to the United States and he returned to Mexico. He re-entered the United States without inspection in April 2009 and returned to Mexico on August 25, 2012 for a consular interview.

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

(B) Aliens Unlawfully Present.-

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

- (iii) Exceptions.-

(I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (I).

...

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 Attorney General (Secretary) that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The applicant asserts that he is not inadmissible under either section 212(a)(9)(B) or 212(a)(9)(C) of the Act, because time spent in the United States while under the age of 18 is not counted to determine the period of unlawful presence, referring to the exception for minors under section 212(a)(9)(B)(iii) of the Act. He asserts that given his age, he accrued only five months of unlawful presence; therefore, neither section of the Act applies to him.

The applicant is correct that section 212(a)(9)(B)(i)(II) of the Act does not apply to him, given the exception for minors provided under section 212(a)(9)(B)(iii) of the Act. He accrued approximately five months of unlawful presence over the age of 18; consequently section 212(a)(9)(B)(i)(I) of the

Act, which addresses unlawful presence of over 180 days and less than a year, also does not apply to the applicant.

However, minors are not exempt from the provisions of section 212(a)(9)(C)(i)(I) of the Act. See *Memorandum from Donald Neufeld, Act. Assoc. Dir., Domestic Operations, Lori Scialabba, Assoc. Dir., Refugee, Asylum and International Operations, Pearl Chang, Acting Chief, Office of Policy and Strategy, U.S. Citizenship and Immigration Service, to Field Leadership, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,"* dated May 6, 2009 (statutory exceptions to unlawful presence provisions of the Act do not apply for purposes of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act). Therefore we affirm the Director's finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

The record reflects that the applicant is also inadmissible pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for misrepresenting material facts while seeking admission into the United States. Specifically, the applicant presented a fraudulent document and lied about his identity to U.S. immigration authorities when he sought admission into the United States in March 2009. The applicant, through counsel, asserts that section 212(a)(6)(C)(i) is inapplicable to him, because he was a minor at the time and had been coerced by an adult smuggler after being briefly detained in the Arizona desert coyote to present a false name and document at the port of entry. The record reflects that the applicant was 15 years old in March 2009.

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

- (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:

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 or, in the case of an alien granted classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

There is no statutory exception for minors to inadmissibility under section 212(a)(6)(C)(i) of the Act. Where a provision is included in one section of law but not in another, it is presumed that Congress

acted intentionally and purposefully. *See In re Jung Tae Suh*, 23 I&N Dec. 626 (BIA 2003) (citing *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999)). Unlike section 212(a)(6)(C)(i), two other grounds of inadmissibility in section 212(a) contain express exceptions for minors. An exception is provided under section 212(a)(2)(A)(ii)(I) of the Act for individuals who, prior to turning 18, committed a single crime involving moral turpitude more than five years prior to applying for admission. Also, individuals who are under 18 do not accrue unlawful presence pursuant to section 212(a)(9)(B)(iii)(I) of the Act. By comparison, section 212(a)(6)(C)(i) of the Act provides for the inadmissibility of “any alien” who commits fraud or willful misrepresentation of a material fact in an attempt to gain a benefit. The sub-clause does not include an age-based exception, and we cannot assume such an exception was intended. For this reason, the fact that the applicant was only 15 when he made the material misrepresentations is not, by itself, enough to establish that he is not inadmissible.

Nor, however, is his age completely irrelevant. As the Supreme Court has noted, “A child’s age is far ‘more than a chronological fact.’ . . . It is a fact that ‘generates commonsense conclusions about behavior and perception.’” *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2403 (2011) (internal citations omitted). Fraud consists of “false representations of a material fact made with knowledge of its falsity and with intent to deceive.” *See Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). In the immigration context, a finding of fraud requires that an individual “know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception.” *In re Tijam*, 22 I&N Dec. 408, 424-25 (BIA 1998). Willful misrepresentation does not require an intent to deceive, but instead requires only the knowledge that the representation is false. *See Parlak v. Holder*, 57 F.3d 457 (6th Cir. 2009) (citing to *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997); *see also Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *In re Tijam*, *supra*. “The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary.” *See Mwongera*, *supra*.

Therefore, when assessing a claim that an applicant lacked capacity to incur inadmissibility due to his or her minor age at the time of the misrepresentation, the adjudicator must weigh the totality of the circumstances presented in the evidence of record and determine whether the applicant possessed the maturity and judgment to comprehend both the falsity, and the potential consequences of, a false statement. Based on this understanding, we find that an evaluation of whether an applicant who made a material misrepresentation while under the age of 18 possessed, at the time, the capacity to make a willful misrepresentation of a material fact must be the result of an individualized inquiry into that particular applicant’s maturity level and ability to understand the nature and consequences of his false statement. The applicant bears the burden of demonstrating that he is not inadmissible under section 212(a)(6)(C)(i) of the Act. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, he has the burden to prove that, when he made the material misrepresentations, he lacked capacity to willfully misrepresent a material fact.

In *Singh v. Gonzales*, the Sixth Circuit Court of Appeals found that the immigration fraud committed by the parents of a five-year-old child could not be imputed to her because fraudulent conduct “necessarily includes both knowledge of falsity and an intent to deceive” and requires proof of such. 451 F.3d 400, 407 (6th Cir. 2006). The Sixth Circuit found that imputing fraud to a five-year-old child was “even further beyond the pale” than imputing a parent’s negligence to that child. *Id.* at 407. However, in *Malik v. Mukasey*, the Seventh Circuit Court of Appeals found that two 17-year-

old brothers whose father had misrepresented their identities, nationality, and religious affiliation when he listed them as derivatives on his asylum application, could be held accountable for that fraud. 546 F.3d 890, 892-893 (7th Cir. 2008). While the brothers contended that the immigration judge had erred by imputing their father's fraud to them, the court concluded that the brothers, "given their ages at the time" as well as the fact that they had actively participated in perpetuating the false information, were accountable for the misrepresentations. The court also noted that the Board had previously acknowledged that while the brothers were young at the time their father filed for asylum, "they were old enough to know better and to be held accountable for their actions." 546 F.3d 890, 892 (7th Cir. 2008).

The age of the applicant in the present case falls much closer to that of the 17-year-old brothers in *Malik* than to that of the five-year-old child in *Singh*. At 15 years of age, the applicant certainly would have been considerably more cognizant of his misrepresentations than a five-year-old child whose parents had misrepresented her immigration status on her behalf.

The applicant asserts that he was coerced to misrepresent his identity to gain entry into the United States. However, he does not explain how he was coerced. He merely states that a coyote told him to give a false name. The burden of proof is on the applicant to establish that he or she is not inadmissible. Although his statement is accorded some weight and has been considered, he has not met that burden.

The applicant's false statements indicate that he decided to impersonate the true owner of a border crossing card to gain entry into the United States. When referred to secondary inspection, he admitted that the border crossing card was not his, but then provided another false identity. The record does not establish that the applicant's misrepresentations may be attributed to someone else. His actions indicate that he was sufficiently mature to understand that his statements were false and that there would be immigration-related consequences if it were revealed that the document did not belong to him. Accordingly, the applicant is subject to section 212(a)(6)(C)(i) of the Act despite the fact that he was a minor at the time of his attempted entry.

We also find that the applicant's misrepresentations were deliberate and voluntary. Section 212(a)(6)(C)(i) of the Act may be violated by committing fraud or willfully misrepresenting a material fact. See *Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). Fraud consists of "false representations of a material fact made with knowledge of its falsity and with intent to deceive." See *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). In the immigration context, a finding of fraud requires that an individual "know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception." *In re Tijam*, 22 I&N Dec. 408, 424-25 (BIA 1998). Willful misrepresentation does not require an intent to deceive, but instead requires only the knowledge that the representation is false. See *Parlak v. Holder*, 57 F.3d 457 (6th Cir. 2009) (citing to *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997); see also *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *In re Tijam*, *supra*. "The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary." See *Mwongera*, *supra*.

Although the applicant was a minor when he presented the border crossing card in an attempt to gain entry, we find that he was “old enough to know better and to be held accountable for [his] actions.” *Malik v. Mukasey*, 546 F.3d 890, 892 (7th Cir. 2008). Notwithstanding his minority, the record establishes that the applicant knew he was presenting fraudulent documentation to enter the United States and that his presentation of this documentation was both voluntary and deliberate. Accordingly, we find that he willfully misrepresented a material fact and is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

Therefore, the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission to the United States through fraud or misrepresentation.

The Director’s finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act in the instant case is based on the applicant’s entry into the United States without being admitted on or around April 2009 after having accrued unlawful presence by residing in the United States from 1996 until 2008.

Section 212(a)(9)(C) of the Act states in pertinent part:

Aliens unlawfully present after previous immigration violations.-

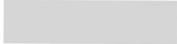
(i) In general.-Any alien who-

(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.

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*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); 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 U.S. Citizenship and Immigration Services has consented to



the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on August 25, 2012 (less than 10 years ago). The applicant currently resides in Mexico, but he has not remained outside the United States for 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 his waiver under section 212(i) of the Act.

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.