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

U.S. Citizenship and Immigration Services

DATE: AUG 1 3 2013 OFFICE: BOSTON, MA FILE:

IN RE: APPLICANT:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B), and under Section 212(i) of the 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Boston, Massachusetts, and the Administrative Appeals Office (AAO) remanded the matter to the Field Office Director on a subsequent appeal. The matter is now again before the AAO. The appeal will be dismissed as unnecessary.

The applicant is a native and citizen of El Salvador. Upon adjudication of an application for adjustment of status, the Field Office Director found the applicant to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure. He was also 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 having procured a benefit under the Act through fraud or misrepresentation. The applicant filed an application for a waiver of inadmissibility in conjunction with his application for adjustment of status in order to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant failed to demonstrate his qualifying relative would experience extreme hardship given his inadmissibility and denied the application accordingly. *See Decision of Field Office Director* dated July 20, 2011. The AAO remanded the matter on appeal for further findings on the applicant's departure in 2006 and his subsequent re-entry, noting the applicant may also be inadmissible under section 212(a)(9)(C)(i)(II) of the Act. *See AAO Remand,* March 1, 2013.

On remand, the applicant and the Field Office Director submit new evidence for consideration, specifically, evidence of the applicant's advance parole and reentry in December 2008, and a statement from the applicant that he never departed the United States in 2006.

The record includes, but is not limited to, statements from the applicant, his spouse, and his family, medical and financial documents, documentation of entry, admission, and deportation proceedings, other applications and petitions, and evidence of birth, marriage, divorce, residence and citizenship. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (B) ALIENS UNLAWFULLY PRESENT.-
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> > (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > . . . .
> >
> > (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.

> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.
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> . . . .
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> (v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant entered the United States without inspection on March 8, 1993. He was apprehended and placed into deportation proceedings the same day. The applicant gave his real name, however, documents from those proceedings indicate he was born on while he later indicated his date of birth is On August 31, 1993, an immigration judge ordered him deported *in absentia*. The applicant was initially granted temporary protected status (TPS) on March 22, 2002.

On appeal, the AAO found the applicant may have departed the United States in 2006. A thorough search of USCIS records now reveals no evidence that the applicant departed the United States in 2006. The AAO withdraws its concern regarding that matter and finds that his first departure after his 1993 entry without inspection occurred on November 6, 2008, when he returned to El Salvador. The record further reflects on December 2, 2008 the applicant was lawfully inspected and paroled into the United States pursuant to a grant of advance parole.

The applicant accrued unlawful status from April 1, 1997, the effective date of the unlawful presence provisions, until he was first granted TPS. However, based on the present record, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an applicant for adjustment of status who left the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act did not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States. In accordance with the BIA's decision in *Matter of Arrabally,* the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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.

Section 212(i) of the Act provides:

> (1) 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.

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 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 Field Office Director found the applicant was inadmissible pursuant to section 212(a)(6)(C) of the Act because on multiple TPS applications he did not disclose he had been ordered deported, his date of initial entry into the United States changed from March 1993 to May 1994, and his date of birth, listed as on his deportation paperwork, was changed to . However, these misrepresentations are not material, because they do not have an impact on whether the applicant is eligible for TPS. The fact that the applicant has a deportation would not render him ineligible for TPS. *See section 244 of the Act.* Furthermore, the applicant would be eligible for TPS whether he entered without inspection in March 1993 or in May 1994, because in either event he would fulfill the continuous residence and physical presence requirements as stated in the TPS designation for El Salvador. *See Temporary Protected Status Designated Country: El*

Salvador, USCIS, May 30, 2013. As such, the date of the applicant's entry is immaterial. Similarly, despite the discrepancy in his date of birth, he still would be eligible for TPS status under section 244 of the Act.

Based on the record, the AAO finds that the applicant's representations on his TPS applications do not constitute fraud or misrepresentation of a material fact for immigration purposes. As such, the applicant is not inadmissible under section 212(a)(6)(C) of the Act, nor is the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence. The waiver application filed pursuant to sections 212(i) and 212(a)(9)(B)(v) of the Act is therefore unnecessary.

The AAO notes although the applicant's August 31, 1993 deportation order does not affect his eligibility for TPS, it does render him inadmissible under section 212(a)(9)(A) of the Act for purposes of adjustment of status to that of a permanent resident. Consequently, in order to be granted lawful permanent resident status the applicant will have to obtain permission to reapply for admission by filing a Form I-212 Application to Reapply for Admission After Removal.

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 been met, as the I-601 waiver application is unnecessary.

ORDER: The appeal is dismissed as the waiver application is unnecessary.