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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: FEB 04 2014 Office: LIMA, PERU [redacted]

IN RE: [redacted]

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by Field Office Director, Lima, Peru. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision is affirmed.

The applicant is a native and citizen of Brazil who was found 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 one year or more and again seeking admission within ten years of her last departure from the United States. The applicant was also found inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure an immigration benefit through fraud or willful misrepresentation of a material fact. The applicant was further found inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. §1182(a)(9)(C)(i)(I), for having been unlawfully present in the United States for an aggregate period of more than one year and re-entering the United States without being admitted. The applicant seeks a waiver of inadmissibility to reside in the United States with her U.S. citizen spouse.

The Field Office Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), because the applicant is not yet eligible for a waiver under section 212(a)(9)(C) of the Act. *Decision of the Field Office Director,* dated June 6, 2012. The AAO found that, as the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether she established extreme hardship to a qualifying relative or whether she merits a waiver as a matter of discretion, and the appeal was dismissed accordingly. *Decision of the AAO*, dated May 10, 2013.

On motion, the applicant provides details related to her immigration history. *Form I-290B, Notice of Appeal or Motion (I-290B)*, filed June 12, 2013. She asserts that she did not enter the United States without inspection and is therefore not inadmissible under section 212(a)(9)(C)(i)(I) of the Act. In contesting her inadmissibility under section 212(a)(6)(C)(i) of the Act, she also asserts that a misunderstanding and her emotional state caused her to provide incorrect information to a U.S. government official about her re-entry to the United States.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Based on the applicant's updated statement, which includes new facts, the requirements of a motion to reopen have been met. The requirements of a motion to reconsider have not been met.

The record includes but is not limited to, the applicant's immigration applications and supporting evidence, her appeal, an appeal brief, and her updated statement accompanying her motion. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) 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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> . . . .
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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.
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> . . . .
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> (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 [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 record reflects that the applicant entered the United States with a B-2 visitor's visa on March 24, 2000, her period of authorized stay expired on September 23, 2000, and she remained in the United States until she traveled to Mexico in 2004. The applicant re-entered the United States in February 2004 and departed in November 2011. The applicant accrued unlawful presence from September 23, 2000, the date her authorized period of stay expired, until her departure in 2004; and from her entry in February 2004 until her departure in November 2011. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within 10 years of her November 2011 departure from the United States. The applicant does not contest this ground of inadmissibility.

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:

> 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 immigrant 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 the applicant was found inadmissible under section 212(a)(7)(A)(i)(I) of the Act for not possessing valid documents to enter the United States on February 1, 2004, when attempting to return from a brief visit to Mexico. She was allowed to withdraw her application for admission. The applicant provided inconsistent information about how she subsequently re-entered the United States during an interview with U.S. Citizenship and Immigration Services (USCIS) concerning her Form I-485, Application to Register Permanent Resident or Adjust Status (Form I-485), in 2005 and during her immigrant-visa interview with the U.S. Department of State in 2012. Based on these misrepresentations, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to procure an immigration benefit under the Act through fraud or misrepresentation. The applicant contests this ground of inadmissibility.

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).

Concerning the misrepresentation she made during her I-485 interview, the applicant states that when the USCIS interviewing officer asked her when she entered the United States, she thought he meant her initial entry in 2000, and therefore she responded incorrectly regarding the date. However, the record reflects that during her Form I-485 interview, the applicant initially stated she had re-entered the United States the same day she withdrew her application for admission, February 1, 2004, then stated it was several days later, February 7, 2004. She claims in her motion that she nonetheless was consistent about being waved into the United States from Mexico in February 2004. The record reflects that she testified to the USCIS officer that she was admitted upon presenting her California driver's license. Whether her entry was on February 1 or February 7, 2004, the record

supports concluding that she misrepresented her manner of entry, a material fact in that the applicant would be inadmissible for entering the United States without inspection.

Concerning the misrepresentation she made during her immigrant-visa interview in 2012, the applicant states that she was very anxious at her interview; she was asked about what happened when she tried to re-enter the United States; her head was pounding, everything was a blur and she was going to faint; she did not understand the U.S. consular officer's Portuguese; and as a result she made a mistake in describing past events. During her immigrant-visa interview, the applicant stated that after U.S. immigration officials at the U.S.-Mexico border allowed her to withdraw her application for admission in February 2004, they then allowed her to enter the United States to apply for adjustment of status. This statement, however, is inconsistent with documentation in the record that confirms the applicant was not allowed to enter the United States. The record reflects that after being found inadmissible in February 2004, the applicant signed a Form I-275, Withdrawal of Application for Admission, indicating she understood the reasons for her inadmissibility, and she was allowed to return to Mexico.

Concerning the relevant past events, the applicant states that she is not trying to change her story to fit her needs; her lack of language skills, nervousness and emotions were factors in her inability to get her point across; she does not remember exactly how things happened; and these events took place almost ten years ago. While the applicant's claims related to the passage of time since her re-entry to the United States and her emotional state during her interviews are reasonable, the applicant has made inconsistent statements concerning when and how she re-entered the United States after her departure in 2004, as discussed above. The applicant, therefore, has not overcome the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act.

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

> (C) Aliens unlawfully present after previous immigration violations.-
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> (i) In general.-Any alien who-
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,
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> and who enters or attempts to reenter the United States without being admitted is inadmissible.
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> (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 applicant accrued unlawful presence from September 23, 2000, the date her authorized period of stay expired, until her departure in 2004, and she re-entered the United States in February 2004. The applicant provides no evidence on motion that she was lawfully admitted into the United States after her 2004 departure and therefore has not met her burden of proof to show that her re-entry was lawful. She is inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act, for having been unlawfully present in the United States for an aggregate period of more than one year and re-entering the United States without being admitted. The applicant contests this ground of inadmissibility.

Regarding her entry into the United States after she withdrew her application for admission on February 1, 2004, the applicant states that after the U.S. immigration officer told her she could not enter the United States on February 1, 2004, she does not remember what she said, only what her spouse told her, namely that he told the officer that this was a mistake. The applicant adds that a U.S. consular officer told her that she could speak to a U.S. immigration officer at the border about humanitarian parole.

The applicant states that when she returned to the border to request humanitarian parole, something happened with the car in line behind her, and all of the U.S. immigration agents ran toward that car; because the officer was in a hurry, he returned their identification cards and waved them through. She states that in this manner she was inspected and that being waved through is not unusual.

The applicant has made several inconsistent statements related to the timing and manner of her entry into the United States after her departure in 2004, as discussed above. The record does not include sufficient evidence to establish that the applicant was inspected and admitted to the United States after she left in 2004. The applicant has not met her burden of establishing that she re-entered the United States in 2004 after having been inspected and admitted by an immigration inspector. The applicant, therefore, has not overcome the finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

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* USCIS has consented to the applicant's reapplying for admission. The record establishes that the applicant returned to Brazil. She is thus currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act. Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative or whether she merits a waiver as a matter of discretion.

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 motion is granted and the prior AAO decision is affirmed.